IN THE COUNTY COURT AT MAYOR'S AND CITY OF LONDON COURT

Claim No: K02ED953

Courtroom No. 2

Mayor's and City of London Court
Basinghall Street
London EC2V 5AR

Date: 14 March 2025

Before:
HIS HONOUR JUDGE HELLMAN

BETWEEN:-

SPIRIT PUB COMPANY (MANAGED) LIMITED

Claimant

-and-

PRIDEWELL PROPERTIES (LONDON) LTD

Defendant

Mr Nathaniel Duckworth appeared for the Claimant
Ms Lina Mattsson appeared for the Defendant

Hearing dates: 28 – 30 January 2025

JUDGMENT

In Court

Background

1. The claim involves a dispute over the renewal of a business lease of a public house known as "The Railway Bell" at 87 George Lane, South Woodford, London E18 1JJ ("the Premises"). The governing statute is the Landlord and Tenant Act 1954 ("the

Act"). The tenant seeks the grant of a new tenancy under section 24(1) of the Act. The landlord opposes the request on ground (f) at section 30(1) of the Act, namely that on the termination of the current tenancy it intends to redevelop the Premises. This is the judgment on the trial of a preliminary issue, namely whether the landlord has established that ground. The tenant, Spirit Pub Company (Managed) Limited, is the Claimant, and the landlord, Pridewell Properties (London) Ltd, is the Defendant.

2. The underlying facts are not in dispute. The Claimant is the tenant of the Premises pursuant to a lease made between The Public House Investment Company Limited as landlord and The Chef & Brewer Group Limited as tenant, with Scottish & Newcastle Plc as surety ("the Lease"). The Lease was varied by a deed of variation made on the same date ("the Deed"). It appears from their names that the original landlord and tenant were both involved in the hospitality industry.

3. In both the Lease and the Deed, the Premises were identified as "*land and premises situate at and known as The Railway Bell*". So in both documents the Premises were identified as a public house. This identification was reflected in some of the terms of the Lease. For example, the tenant's covenants included at clause 3(17)(f)(i):

> "*for so long as the Demised Premises are used as a licensed public house or pub restaurant and/or an hotel at all times where necessary to obtain the consent of the Licensing Justices before carrying out any alterations or additions to the Demised Premises*".

4. Further, Part II of the First Schedule to the Lease lists the "*Fixtures and Fittings*" included in the Lease. Among them are "*Bar counters including fitted rails and bar back fittings*".

5. The Lease was transferred to the Claimant in or about October 2007 and the Claimant was registered as proprietor of the Lease on 18 October 2007. I draw the reasonable inference that when it took over the Premises they were already being operated as a public house. The Defendant purchased the freehold interest in the Premises on or about 31 July 2014 and was registered as the freehold proprietor on 19 November 2014. The Defendant is a single-purpose vehicle which exists solely to hold and develop the Premises. It has no other assets.

6. The Charges Register on the Official Copy of Register of Title contains an entry concerning a restrictive covenant:

> "*A conveyance dated 4 June 1870 made between (1) the British Land Company Limited and (2) Frank Elphicke contains restrictive covenants but neither the original deed nor a certified copy or examined abstract thereof was produced on first registration.*"

7. The Defendant's solicitors have made extensive enquiries but have been unable to locate a true copy of the 1870 conveyance. They have therefore been unable to ascertain the terms of the restrictive covenant.

8. Clause 2 of the Lease deals with demise and rents. It provides in material part that:

"*THE Landlord … HEREBY DEMISES unto the Tenant ALL THAT the Demised Premises … EXCEPT AND RESERVING as mentioned in the Third Schedule hereto TO HOLD the same … from the 20th day of April 1995 for a TERM of YEARS expiring on the 23rd day of June 2024 …*".

9. Clause 1(2)(c) of the Lease read in conjunction with the First Schedule defines "*the Demised Premises*" as the Premises. They comprise a basement; a public house and a beer garden on the ground floor; a number of function rooms/storage space and a manager's office on the first floor; and a three-bedroom flat on the second floor, which is currently used as manager's accommodation.

10. Clause 4 of the Lease contains the Landlord's covenants. These include:

"*(1) Quiet enjoyment That the Tenant paying the rents hereby reserved and performing and observing the covenants and agreements on the part of the Tenant shall and may peacefully hold and enjoy the Demised Premises during the term without any interruption by the Landlord or any person rightfully claiming through under or in trust for it*".

11. *Woodfall: Landlord and Tenant* explains at para 11.267 (case citations omitted):

"*The covenant in law for quiet enjoyment entitles the tenant to enjoy his lease against the lawful entry, eviction or interruption of any man … 'The basis of it is that the landlord, by letting the premises confers on the tenant the right of possession during the term and impliedly promises not to interfere with the tenant's exercise and use of the right to possession during the term.* "'

12. The Lease also contains an implied covenant by the Landlord not to derogate from the grant of the tenancy. As summarised in *Woodfall: Landlord and Tenant* at para 11.083 (case citations omitted):

"*If one man agrees to confer a particular benefit on another, he must not do anything which substantially deprives the other of the enjoyment of that benefit: because that would be to take away with one hand what is given with the other. This is the principle of non-derogation from grant. It is a principle which merely embodies in a legal maxim a rule of common honesty. It was imposed in the interest of fair dealing. … Where the principle applies, it militates against an interpretation of a lease which would result in a substantial or serious interference with the tenant's use and enjoyment of the leased property, or frustrate the purpose of the letting; but it does not require the court to give a right of entry the narrowest possible interpretation.*"

13. I shall address the case law on these covenants later in this judgment.

14. The Third Schedule ("the Third Schedule") sets out various exceptions and reservations out of the demise. These include:

"*(2) At all reasonable times so far as may be necessary with or without workmen the right on giving not less than seven days prior written notice (except in emergency) to the Tenant to enter and remain upon the Demised Premises with all necessary tools appliances and materials for the purpose of repairing altering or rebuilding any adjoining property or the Demised Premises and to cleanse empty and repair any of the Conduits belonging to the same or anything else*

which the Landlord must or may do under the terms of this Lease PROVIDED THAT the persons exercising such rights shall cause as little inconvenience loss or damage to the Tenant and any other occupiers and to the business carried on at the Demised Premises as reasonably possible and shall make good all physical damage caused to the Demised Premises as soon as reasonably possible."

15. The Premises are located in the London Borough of Redbridge, where the local authority offers a service providing advice on planning proposals prior to the submission of a formal planning application. The Defendant obtained such advice in relation to a proposal to demolish the existing public house and build a part four, six and nine storey building, with commercial ground floor use, mixed residential use on the upper floors, and 12 basement car parking spaces. A written response from the local authority dated 27 May 2022 stated that there was an objection in principle to the demolition and loss of the public house, which was in a prominent location in the town centre opposite the tube station. There was no "in principle" objection to the residential development, but the scheme required significant amendments to the overall design, scale and massing.

16. By cover of a letter dated 24 July 2023, the Claimant's solicitors served on the Defendant a request for a new business tenancy under section 24(1) of the Act.

17. By cover of a letter dated 16 August 2023, the Defendant's solicitors served a counter-notice under section 26(6) of the Act opposing the grant of a new tenancy. Section 30(1) sets out the grounds on which an application under section 24(1) may be opposed. The Defendant relied on various grounds including ground (f):

"*... that on the termination of the current tenancy the landlord intends to demolish or reconstruct the premises comprised in the building or a substantial part of those premises or to carry out substantial work of construction on the holding or part thereof and that he could not reasonably do so without obtaining possession of the holding.*"

18. The phrase "*without obtaining possession of the holding*" has been subject to judicial exegesis. In Pumperninks Ltd v Land Securities plc [2002] Ch 332, the leading judgment was given by Charles J. He stated at [26]:

"*The word 'possession' is used in sections 30(1)(f) and 31A. It has been held by the House of Lords in Heath v Drown [1973] AC 498 that for the purposes of section 30(1)(f) the phrase 'obtaining possession of the holding' means obtaining legal possession which would yield physical possession rather than simply physical possession of the holding. Lord Kilbrandon gave the speech of the majority and said, at pp 515-517:*

'... "Obtaining possession of the holding" (sc by the landlord) must, in my view, mean putting an end to such rights of possession of the holding as are vested in the tenant under the terms of his current tenancy.'"

19. Thus, as stated in Reynolds & Clark, "*Renewal of Business Tenancies*", Sixth Edition (2022) at para 7-108 (case citations omitted):

"*The word 'possession' means not physical possession, but the legal right to enter upon the premises … Clearly, a landlord cannot carry out works 'without obtaining possession' under ground (f) if the terms of the tenancy are such that he is not legally entitled to enter upon the holding in order to carry out the works. Where, however, the terms of the current tenancy contain a reservation of the right to enter to do the relevant work then it is to be assumed that a similar reservation would be carried into the new tenancy and that the landlord would accordingly not need to obtain possession in order to carry out the works, because he is entitled to do so pursuant to the reservation.*"

20. The Defendant sought pre-application advice on a further proposal, which was to demolish the existing public house and build a part five, seven and ten storey building, with commercial ground and first floor use and mixed residential use on the upper floors. A written response from the local authority dated 2 November 2023 stated, unsurprisingly in view of their previous response, that the principle of the development would not be supported. Any future application should consider the retention of the existing public house as there was scope to extend the existing building. Officers would recommend that any future iteration be discussed via the pre-application process prior to submission.

21. The parties having reached an impasse, the Claimant filed a claim form, with particulars of claim, dated 8 November 2023, which was issued by the court on 14 November 2023. The Defendant filed and served a defence dated 14 December 2023. The defence stated that the Defendant intended to carry out a residential conversion of the Premises ("the Development"). This would include works to the beer garden, the first and second floor, and potentially the bar area of the ground floor.

22. The joint report of the building surveyors whom the parties instructed as expert witnesses, Richard M Fiddes of Gerald Eve for the Claimant and Nigel McDonough of Earl Kendrick for the Defendant, dated 4 December 2024, contains an agreed summary of the works which the Defendant now says that it intends to carry out. The works comprise (i) the construction of three new mews houses within the existing garden terrace, ie the beer garden; and (ii) a substantial reconsideration and extension of the existing pub to provide a total of six self-contained flats on the upper floors, with a retained pub at ground floor level, served by the existing cellar, with a small garden terrace to the rear. The pub would lose the use of the first and second floors.

23. Rachel Jacques, a retail estate manager employed by the Claimant, who was called as a witness on its behalf, gave unchallenged evidence that the proposed construction of the mews houses would result in a reduction to the beer garden of roughly 65 per cent.

24. The building surveyors were also asked to include in the joint report an estimate of how long the necessary works would take. Mr Fiddes thought that if site surveys were undertaken, and intrusive investigations scoped, in November 2024, construction could commence in November 2025. Planning permission would be obtained, and various preparatory measures undertaken, in the interim. Mr McDonough thought that

construction could commence slightly earlier, in September 2025. As at the date of trial, the surveys had yet to be carried out and the intrusive works had not been scoped.

25. The time that the works would take would depend on whether the mews houses were built while the pub refurbishment was carried out or whether they were built beforehand. If both phases of the Development were carried out at the same time, Mr Fiddes reckoned that if design work were commenced in November 2024, the Development would be completed by January 2027. If the two phases were carried out sequentially, then he reckoned that the Development would be completed by September 2027. Mr McDonough thought that assuming work commenced in November 2024, a simultaneous Development would be completed by June 2026 and a sequential Development by July 2026. The projected completion dates would need to be revised as the works did not commence in November 2024.

26. The joint report, which is undated, of the planning and development experts whom the parties instructed as expert witnesses, Nick Brindley of Gerard Eve for the Claimant and Adam Gostling of HGH Consulting for the Defendant, contained an agreed statement that the anticipated timescale for the consideration of the planning application by the local authority once submitted by the Defendant was approximately four months. Mr Brindley qualified the statement by saying that it would take at least four months. In his report dated 17 January 2025, Mr Brindley anticipated that it would take at least a further two months to prepare, finalise and submit the planning application.

27. The building surveyors were asked to include in their joint report an estimate for the cost of the works. Mr Fiddes proposed a budget of £636,196 for the mews houses and £1,682,329 for the pub reconfiguration, for a total of £2,313,525. Mr McDonough proposed a budget of £731,723 for the mews houses and £1,431.456 for the pub reconfiguration, for a total of £2,163,179.00.

28. The Defendant has obtained a number of professional reports which will be required for an application for planning permission. These include an external daylight and sunlight study; a heritage impact assessment; a bat scoping report; and a design and access statement. An email from the Defendant's architect, TaylorHare Architects, to the Defendant sent on 25 January 2025 states that they have been in readiness for a while now to submit a planning application for the Development, and that the only outstanding matter is the requirement of an acoustic report. The Defendant requires the Claimant's permission to enter the premises to carry out the intrusive investigations necessary to prepare such a report. However, the Claimant has understandably taken the position that it is not in its interests to provide such access and has refused to do so.

Discussion

29. Lina Mattsson, counsel for the Defendant, submits that the Defendant's position is straightforward. It intends to carry out substantial work of construction on the

Premises. It has no right to undertake the work under the Lease and the work cannot reasonably be done without obtaining possession of the Premises. Therefore ground (f) is satisfied.

30. Nathaniel Duckworth, counsel for the Claimant, submits that, for the following reasons, ground (f) is not satisfied.

(1) The Defendant has failed to separate the works which could be carried out under the right of re-entry in Schedule 3 of the Lease from the works which could not. The Defendant has therefore failed to demonstrate that there are works which it could not reasonably carry out without obtaining possession of the Premises. (At the Court's invitation, the Defendant has subsequently prepared a schedule identifying the structural works which it contends could not be carried out under the right of re-entry. The Defendant's case is that none of them could.)

(2) The Defendant does not hold a firm and settled intention to carry out the Development understood as this particular scheme of works. Even if it does, its intention would be referrable to the exigencies of the litigation and is "*conditional*" in the sense used by Lord Sumption JSC in S Franses Ltd v Cavendish Hotel (London) Ltd [2019] AC 249 SC.

(3) The Defendant has failed to establish that it has a real prospect of overcoming the relevant hurdles (planning permission, the restrictive covenant and funding) and commencing the Development within a reasonably short time of the termination of the current tenancy.

31. I find the way in which Mr Duckworth has framed the issues helpful and I shall address each of his reasons in turn.

Claimant's first reason

The Defendant has failed to separate the works which could be carried out under the right of re-entry in Schedule 3 of the Lease from the works which could not. The Defendant has therefore failed to demonstrate that there are works which it could not reasonably carry out without obtaining possession of the Premises.

32. The principle underpinning the Claimant's first reason is to be found in the appellate judgment of Jay J in Franses [2018] 1 P&CR 6 (QB). An appeal against the judgment was allowed by the Supreme Court[1], but not on this point. The judge stated:

"*Ms Wicks' submissions under this ground were simple and straightforward. She said that it was incumbent on the judge to divide or partition the works into two categories: viz. those which could be effected under the right of entry, and those which could not be. The metaphor*

[1] In the case cited in the Claimant's second reason why ground (f) was not satisfied.

she adopted in oral argument was 'funnelling'. Works which could be carried out under the right of entry fell outside ground (f) because they could be performed without obtaining possession of the holdings. I would have thought that the correctness of Ms Wicks' submission on the law is clearly demonstrated by briefly examining the terms of s.30(1)(f) itself, but if supporting authority were required she relied on Cerex Jewels Ltd v Peachey Property Corporation Plc [1986] P. & C.R. 127 at 134–135 (Slade LJ's analysis is directed to s.31A(1)(a) , but the principle is the same) and Romulus Trading Co Ltd v Trustees of Henry Smith's Charity (No.1) [1990] 60 P. & C.R. 52 at 67 (directly on point)."

33. Thus, as Jay J stated at [122], adopting a further submission of Ms Wicks:

"*... the works have to be apportioned or divided up to the extent necessary to determine whether or not the Landlord needs possession of the holding.*"

34. The phrase "*to the extent necessary*" is significant. Reynolds & Clark suggest at para 7-095 that the court should proceed by excluding any works that are not covered by ground (f). However, depending on the facts, it may be quicker and simpler for the court to work the other way round. If there is obviously some part(s) of the works that satisfies ground (f) (i.e. work that the landlord is not entitled to carry out under the current tenancy and which meets the other criteria in ground (f)) then it will be unnecessary to consider any other part(s) of the works. In such a case, the court need only identify some work that satisfies ground (f); it doesn't have to identify all the work that satisfies ground (f).

35. Reynolds & Clark states further at para 7-095 that when considering what works are eligible to count as falling within ground (f):

"*... works which are 'part and parcel' of qualifying works, such as essential preliminaries or finishing works, will themselves qualify for inclusion.*"

36. Returning to the present case, in order to determine whether any of the proposed works fall within ground (f), it is necessary to construe the Defendant's right of entry, which is contained in clause (2) of the Third Schedule. I agree with Mr Duckworth that in the phrase, "*for the purpose of repairing altering or rebuilding any adjoining property or the Demised Premises*", the words "*repairing altering or rebuilding*" mean the same thing in relation to the Demised Premises as they mean in relation to any adjoining property. They are broad enough to include improvements. In relation to the Demised Premises, however, the meaning of the clause is limited by the covenant of quiet enjoyment and the covenant not to derogate from the grant of the tenancy. Both covenants fall to be construed in the context that the Premises were let as a public house.

37. In Franses, Jay J observed at [87] that in practice these covenants amount to the same thing. He stated at [91] that: "*There are limits beyond which a widely drawn right of entry cannot go without derogating from the grant*".

38. He reviewed the authorities to which he was referred. These included at [93] Southwark LBC v Mills [2001] 1 AC 1 HL. The case (which comprised two appeals) concerned allegations of noise nuisance caused by neighbours, and as Jay J observed, there was no right of entry involved. It addressed both derogation from grant and breach of the covenant of quiet enjoyment. Summarising what the House of Lords held, he stated:

"*In order to ascertain whether there is a derogation or breach, regard must be had to the grantor's obligations in terms of the subject-matter of the grant. Here, the nature, extent and purpose of the grant must be considered. Any substantial interference with the tenant's title or possession or lawful enjoyment of the demised premises will amount to a breach.*"

39. However, Jay J stated at [94], the "*substantial interference*" test does not apply in a case where there is a right of entry in wide terms. Applying the judgment of Neuberger J (as he then was) in Platt v LUL Ltd [2001] 2 EGLR 121 Ch, Jay J stated at [108] that a right of entry should be construed as to give effect to the "*irreducible minimum*" inherent in the grant. The covenants of quiet enjoyment and non-derogation from grant will be relevant when construing what that irreducible minimum involves.

40. Jay J considered two cases involving petrol stations to illustrate this point. In both cases the landlord sought to terminate the tenancy in reliance on ground (f). In Price v Esso Petroleum [1980] 2 EGLR 58 CA, the landlord proposed to demolish and reconstruct a petrol station. It was accepted that it made commercial sense for the contractor to be given sole occupation of the site for 16 weeks or perhaps even longer while the works were carried out. There was no dispute but that the works came within the words of ground (f), "*to demolish or reconstruct the premises comprised in the holding or a substantial part of those premises*". However, the Court of Appeal held that the landlord was unable to rely on ground (f) as the lease gave them a right of re-entry for the purpose of carrying out "*improvements additions and alterations*", and the proposed works were improvements.

41. The Court of Appeal noted that the interests of the landlord and the tenant were to a considerable degree inter-related as the works would likely result in increased sales of petrol. For example, there were to be four petrol pumps instead of three. Moreover, under the lease the landlord had to consult with the tenant before carrying out the works. If the tenant could show that, taking account of the tenant's interest, no reasonable landlord would carry out the works, the landlord would be in breach of contract if they went ahead and did so. Jay J stated at [96] that: "*The principle of non-derogation from grant was not mentioned, because it could not apply*".

42. The second petrol station case was Leathwoods Ltd v Total Oil (Great Britain) Ltd [1985] EGLR 237 CA. As in Price v Esso Petroleum, the landlord proposed to demolish and reconstruct the premises, which brought it within the words of ground (f), and there was a right of re-entry for the purpose of carrying out "*improvements additions and alterations*". However, this time the landlord succeeded. The tenant used the premises both as a petrol station and for the sale and repair of motor vehicles. The proposed

works would involve the demolition of the showroom and workshop which were used for these purposes but would not involve their replacement. The Court of Appeal held that this would infringe the tenant's right to quiet enjoyment to use the premises for the servicing and selling of motor vehicles. Accordingly, the landlord's right of re-entry would not permit them to carry out the proposed works, and ground (f) was therefore engaged.

43. At [98] Jay J analysed the difference between the two cases:

> "*The factual differences between these brace of petrol filling station cases is clear enough: in the first, the tenant's business could continue in substantially the same manner as before; in the second, it could not. Although it might be said both cases raised questions of fact and degree, it is clear from Leathwoods case that the ability to undertake core aspects of the tenant's business was being precluded. It followed that the landlord could not rely on the reservation clause. It also follows, in my view, that the issue of derogation from grant cannot be answered just by construing the clause: it is a question of construing the clause in the light of the grant.*"

44. Adopting a practical approach, in the present case at least it is helpful to approach the ambit of the right of re-entry in two stages. First, to ask whether, on the face of it, the proposed works fall within the wording of the Third Schedule. Second, if they do, to consider whether they would be incompatible with the irreducible minimum inherent in the grant. In my judgment, proposed works which involved permanently excluding the Claimant from part of the Premises would be incompatible in that sense. A right of entry does not extend to a right of expropriation.

45. The meaning of "*repairing altering or rebuilding*" in the Third Schedule is qualified by the requirement that the landlord, "*shall make good all physical damage caused to the Demised Premises as soon as reasonably possible*". Reynolds & Clark states at para 7-111.

> "*In such a case, the landlord will succeed in establishing that he reasonably requires possession if he shows that he does not intend and cannot realistically be called upon to make good the damage caused, as the damage is an inherent part of the demolition and reconstruction proposed. Thus, where the landlord's proposed development consisted of the partial demolition of two walls of a shop, the permanent removal of the shop front and lavatory, the removal of two pillars and three old steel joists and the replacement thereof with a new single span joist and the re-siting of the gas and electrical services, it was held that the landlord could not be said to be entitled to exercise his legal rights under the reservation: Shade v Eric Wright Commercial Ltd.*"[2]

46. In the present case, I am satisfied that the work is of a kind which is covered by ground (f) in that it would involve demolishing or reconstructing a substantial part of the Premises or carrying out substantial work of construction on part of the Premises. Both building surveyors agree in their joint report that the Development would involve carrying out structural work to the Premises. The structural work on the mews houses

[2] [2001] EWCA Civ 950. This was an application for permission to appeal. Permission was refused, so the point was taken no further.

would involve, amongst other works, the demolition of perimeter walls, excavation of foundations, and construction of new mews houses. The structural works to the public house would involve, amongst other works, demolishing the existing single storey WC block, constructing new loadbearing walls to the rear of the building, reconfiguring and removing staircases, and replacing the existing roof. These lists are not exhaustive.

47. I accept that the mews houses would be an alteration to the Premises, albeit that they would be a new feature and a very substantial one. The Premises would be altered by building mews houses on what had previously been part of the beer garden. However their construction would involve various pieces of structural work which, even without considering questions of breach of quiet enjoyment and derogation from grant, would not fall within the Third Schedule. I.e. which would not constitute "*repairing altering or rebuilding*" etc, or which would involve causing physical damage to the Premises which the Defendant would not repair. I have taken the descriptions directly from the building surveyors' joint report.

(1) "*… remove redundant public convenience …*"

These works would involve demolishing a public convenience which the Defendant does not intend to rebuild.

(2) "*… clear site generally.*

Grub up of existing foundations and reduction of levels generally to suit.

Excavate and form new foundations for mews houses….

Construct new mews houses and solid courtyard garden walls …

Construct new floor … structures …"

These works would not fall within the Third Schedule as they would involve damaging the Premises by removing the beer garden and building over it. The Defendant does not intend to repair that damage, and to do so would be inconsistent with the scheme of the Development.

48. Further, the above works, taken together, would be inconsistent with the irreducible minimum inherent in the grant in that they would exclude the Claimant from an area comprising 65 per cent of the beer garden. It is nothing to the point that the Claimant could continue to operate the pub. The Claimant would lose a substantial part of the land demised to them under the Lease. The above works would to that extent involve a breach of the covenant of quiet enjoyment and a derogation from grant.

49. Ms Jacques expressed concern in her second witness statement that the substantially smaller beer garden would result in fewer customers and would therefore damage the profitability of the pub. I accept that there is a real risk that this would happen.

However that finding is not relevant to my findings on loss of quiet enjoyment and derogation from grant as I am not considering those questions from the perspective of substantial interference with the tenant's lawful enjoyment of the demised premises.

50. In the circumstances, I am satisfied that the Defendant could not build the mews houses without obtaining possession of the Premises. There is therefore no need for me to consider whether the Defendant could also carry out the pub reconfiguration without obtaining possession of the Premises. However, as I heard full submissions on the point I shall do so anyway.

51. The structural work proposed for the pub reconfiguration includes some work which falls within the Third Schedule, but other work which, even without considering questions of breach of quiet enjoyment and derogation from grant, would not. It will suffice to provide several examples. Once again, I have taken the description of the work directly from the building surveyors' joint report.

(1) "*Carry out exploratory works to determine the feasibility of implementing the scale of works generally proposed in reconfiguration of the plan form of the building.*"

These are essential preliminary works which are "part and parcel" of the works falling within the wording of ground (f). It is common ground that the Defendant has no right under the Lease to enter the Premises in order to carry them out.

(2) "*Demolish existing single storey WC block and stairs leading to existing pub garden.*"

This work would not fall within the Third Schedule as it would involve demolishing features which the Defendant does not intend to rebuild.

(3) "*Following demolition, construct new loadbearing walls to rear of building to accommodate additional residential units.*

Demolition of existing internal walls …"

This work would not fall within the Third Schedule as it would involve demolishing features which the Defendant does not intend to rebuild. There would be new walls, but they would be built in a different place.

(4) "*Removal of redundant internal staircase between ground and first floors.*"

This work would not fall within the Third Schedule as it would involve demolishing a staircase which the Defendant does not intend to rebuild.

52. Further, the pub reconfiguration works would be inconsistent with the irreducible minimum inherent in the grant in that they would exclude the Claimant from the first and second floors of the public house. The Claimant would no longer have access to

these areas, which would deprive it of storage and office space on the first floor and accommodation for the pub manager on the second.

53. In her second witness statement, Ms Jacques gives evidence about the use made by the Claimant of the first and second floors and the consequences of their loss. In the event of such loss, the Claimant would have to provide these facilities off site, or, in the case of the storage and office accommodation, onsite but with a loss of trading space. The provision of offsite facilities would involve additional costs, eg £2,000 per month rental for equivalent accommodation for the pub manager, which would reduce the profits from the public house.

54. The following works identified in the building surveyors' joint report would exclude the Claimant from the first and second floors by preventing the Claimant from accessing them:

(1) "*Reconfiguration of staircases throughout to allow provision of separate self-contained access to upper floors whilst also maintaining basement access.*

Removal of redundant internal staircase between ground and first floors."

55. In the circumstances, I am satisfied that the Defendant could not carry out the work to reconfigure the public house without obtaining possession of the Premises.

56. There is another aspect to this question. In their joint report, the building surveyors agree that the kitchen and toilets would have to close for 26 – 35 weeks, i.e. approximately six to eight months. They state that if the pub was redeveloped before the mews houses were built, then there would be sufficient room to accommodate temporary toilets, in the form of Portaloos, and a temporary kitchen and cold store. The Third Schedule requires the Landlord to exercise the right of re-entry so as to cause as little inconvenience, loss or damage to the Tenant and its business as reasonably possible, so the Defendant would probably have to follow that sequence. The joint report observes that the provision of temporary facilities may be uneconomic. It states that for safety reasons it is unlikely that the second floor staff accommodation could be maintained during the 26 – 35 week period. As noted above, however, the staff accommodation would be removed as a result of the works irrespective of the interruption. Taking into account both the extent and the duration of the interruption which the works would cause, on balance I am not quite satisfied that the interruption would derogate from the "*irreducible minimum*" inherent in the grant.

57. In light of my findings above, I reject the Claimant's first submission as to why ground (f) is not satisfied. The Defendant has demonstrated that there are works which it could not reasonably carry out without obtaining possession of the Premises.

Claimant's second reason

The Defendant does not hold a firm and settled intention to carry out the Development understood as this particular scheme of works. Even if it does, its intention would be referrable to the exigencies of the litigation and is "conditional" in the sense of the judgment by Lord Sumption JSC in S Franses Ltd v Cavendish Hotel (London) Ltd.

58. There are two strands of case law underpinning the Claimant's second reason. The first relates to the "*firm and settled intention*" point. In Fleet Electrics Ltd v Jacey Investments Ltd [1956] 1 WLR 1027 CA, Lord Evershed MR, giving the judgment of the Court, stated at 1032 – 1033:

"*I must say at once that I am quite unable to accept that premise to the landlords' case. It is not now in doubt that the import of the word 'intend' in section 30 (1) (f) of the Act is that at the appropriate date or dates — a matter which I will mention later — there must be a firm and settled intention not likely to be changed, or in other words that the proposal for doing the work has moved 'out of the zone of contemplation into the valley of decision.'*"

59. The "*appropriate date or dates*" is the date of the hearing. See the headnote to Betty's Café Ltd v Phillips Furnishing Stores Ltd [1959] AC 20 HL at 21. Thus it is not relevant that in the present case the Defendant did not form an intention to pursue this particular scheme of works until after the section 26(6) notice had been served.

60. As Lord Evershed acknowledged, the phrase "*out of the zone of contemplation into the valley of decision*" comes from the judgment of Asquith LJ in *Cunliffe* v *Goodman* [1950] 2 KB 237 CA. It follows an illuminating discussion about the meaning of intention. The question was whether, pursuant to section 18(1) of the Landlord and Tenant Act 1927, the defendant tenant had proved that the plaintiff landlord "*intended*" to pull down the premises that were the subject of the lease. The Court concluded unanimously that the tenant had not, as the landlord had not formed a settled intention to proceed. Asquith LJ stated at 253 – 254:

"*An 'intention' to my mind connotes a state of affairs which the party 'intending' - I will call him X - does more than merely contemplate: it connotes a state of affairs which, on the contrary, he decides, so far as in him lies, to bring about, and which, in point of possibility, he has a reasonable prospect of being able to bring about, by his own act of volition.*

X cannot, with any due regard to the English language, be said to 'intend' a result which is wholly beyond the control of his will. He cannot 'intend' that it shall be a fine day tomorrow: at most he can hope or desire or pray that it will. Nor, short of this, can X be said to 'intend' a particular result if its occurrence, though it may be not wholly uninfluenced by X's will, is dependent on so many other influences, accidents and cross-currents of circumstance that, not merely is it quite likely not to be achieved at all, but, if it is achieved, X.'s volition will have been no more than a minor agency collaborating with, or not thwarted by, the factors which predominately determine its occurrence. If there is a sufficiently formidable succession of

fences to be surmounted before the result at which X aims can be achieved, it may well be unmeaning to say that X 'intended' that result. …

This leads me to the second point bearing on the existence in this case of 'intention' as opposed to mere contemplation. Not merely is the term 'intention' unsatisfied if the person professing it has too many hurdles to overcome, or too little control of events: it is equally inappropriate if at the material date that person is in effect not deciding to proceed but feeling his way and reserving his decision until he shall be in possession of financial data sufficient to enable him to determine whether the project will be commercially worthwhile.

A purpose so qualified and suspended does not in my view amount to an 'intention' or 'decision' within the principle. It is mere contemplation until the materials necessary to a decision on the commercial merits are available and have resulted in such a decision. In the present case … In the case of neither scheme did she [i.e. the landlord] form a settled intention to proceed. Neither project moved out of the zone of contemplation - out of the sphere of the tentative, the provisional and the exploratory - into the valley of decision."

61. The "*conditional*" point derives from Franses. In that case the Supreme Court held that an additional limb of the test was whether the landlord would intend to do the same works if the tenant left voluntarily. If the landlord would not, then the test was not satisfied.

62. Lord Sumption JSC, giving a judgment of a plurality, stated at [19]:

"*… the landlord's intention to demolish or reconstruct the premises must exist independently of the tenant's statutory claim to a new tenancy, so that the tenant's right of occupation under a new lease would serve to obstruct it. The landlord's intention to carry out the works cannot therefore be conditional on whether the tenant chooses to assert his claim to a new tenancy and to persist in that claim. The acid test is whether the landlord would intend to do the same works if the tenant left voluntarily.*"

63. Mr Chohan was cross-examined about the Defendant's avowed intention to pursue the Development. He accepted that there were a number of matters to be resolved before the Development could proceed. These included the grant of planning permission, the question of the restrictive covenant, and getting funding. Mr Chohan accepted that one would normally take a decision whether to proceed with a development once these matters had been resolved. In the present case, the Defendant had decided to proceed with the Development before they were resolved because of the Act issue. He accepted that it was "*now or never*". However, Mr Chohan also gave evidence that since acquisition the Defendant had intended to develop the Premises at the earliest opportunity. That would only arise when the Lease expired. The decision to proceed with this particular Development was taken in July 2024. Mr Chohan said that the decision had been minuted, although he accepted that neither the minutes nor the surrounding emails had been disclosed.

64. Mr Duckworth submitted that various factors cast doubt on the genuineness of the Defendant's intention. It hadn't offered an undertaking to carry out the Development, as landlords often do in such cases. It hadn't followed the November 2023 pre-application advice from the local authority that they seek further pre-application advice before submitting any further proposal. The counter-notice was dated 16 August 2023, and the claim form was issued on 14 November 2023. But the architectural drawings were dated April 2024 and most of the reports and surveys needed for the planning application were dated no earlier than June 2024. Mr Duckworth suggested that for reasons of its own, the Defendant wanted to delay the consideration of any planning application until after the trial.

65. Mr Chohan said the Defendant had received professional advice that further pre-application advice was unnecessary as the Development complied with the guidance in the previous pre-application advice. He didn't accept that the Defendant had been "dragging its heels" over preparing a planning application and was confident that the application would succeed. His 18 year old son had been in intensive care for three months until September 2024 and during that time his son had been the focus of his attention. (The Claimant accepts the evidence about the son and so do I.) By refusing the Defendant access to the Premises to prepare an acoustic report, the Claimant had ensured that the planning application would not be submitted until after the trial.

66. Mr Duckworth submitted that, assuming the Defendant intends to carry out the Development, any such intention is dependent on too many contingencies to count as firm and settled. It is contingent on the Development continuing to make good business sense.

67. Mr Duckworth further submitted that the Defendant's intention is tainted by Franses conditionality in that the decision to pursue the Development was driven by the need to remove the Claimant under ground (f). The Defendant had made the decision prematurely, before planning, funding and other critical issues were resolved. The decision, and hence the commencement of any works, had been brought forward in order to meet ground (f).

68. Having heard Mr Chohan, I am satisfied that the Defendant has a firm and settled intention to carry out the Development. I accept his evidence that the Premises were purchased as a development property. The Defendant has sought pre-application advice twice previously. It first received pre-application advice in May 2022, more than 12 months before the Claimant's request for a new business tenancy. The requests for pre-application advice demonstrate that the Defendant would have liked to pursue a more extensive scheme of development but has pared back its plans because of the pre-planning advice. This is not one of those cases where the developer would really like to pursue a smaller development or no development at all.

69. The Defendant's intention is firm and settled in that, through its directors, it has decided, insofar as it can, to build the Development. I accept that the Defendant's intention is contingent upon its resolving various outstanding matters. But I am satisfied that the Defendant has gone beyond feeling its way and reserving its decision until it is in possession of financial data sufficient to enable it to determine whether the Development will be commercially worthwhile. Mr Chohan was brimming with confidence that it would be. He did not exclude the possibility that events would turn out otherwise. But it was clear to me that he regarded the possibility as fanciful. The absence of an undertaking does not cause me to revise my assessment of the Defendant's subjective intent.

70. In Franses, the Supreme Court held that a landlord will not have the requisite intent if they would not intend to do the same works if the tenant left voluntarily. That is a narrow point. I am satisfied that the Defendant intends to pursue the Development irrespective of whether the Claimant stays or goes. Therefore the Defendant's intention is not "*conditional*" in the Franses sense. I accept that the Defendant's decision was accelerated by the Claimant's request for a new business tenancy and subsequent claim, but that is nothing to the point. Insofar as the Defendant has engaged in tactical maneouvres, as to which I need make no finding, that would not be relevant to the Franses point either.

71. I therefore reject the Claimant's second submission as to why ground (f) is not satisfied. The Defendant does have a firm and settled intention to carry out the Development and its intention is not "*conditional*" in the Franses sense.

Claimant's third reason

The Defendant has failed to establish that it has a real prospect of overcoming the relevant hurdles (planning permission, the restrictive covenant and funding) and commencing the Development within a reasonably short time of the termination of the current tenancy.

72. The Claimant's second reason was concerned with the Defendant's subjective intention. The Claimant's third reason is concerned with whether the Defendant has a real prospect of giving effect to that intention. This is sometimes referred to as the objective aspect of intention. In the words of Asquith LJ, quoted above, the court is concerned with whether the Defendant has too many hurdles to overcome, or too little control of events.

73. The same principles on this issue apply to both ground (f) cases and ground (g) cases, and decisions under the one ground have been relied on in cases under the other. Reynolds & Clark states at para 7-153:

"*The existence of those 'hurdles' and the reasonable likelihood of the landlord overcoming them are to be viewed objectively. In order to establish an intention within ground (f), the landlord has to satisfy the court that a reasonable landlord would believe that he had a reasonable prospect of overcoming any existing hurdle, such as obtaining the finance or the planning permission necessary for his proposed development or occupation: Gregson v Cyril Lord Ltd*[3] *and Cadogan v McCarthy & Stone Developments Ltd*[4]."

74. Both cases cited were decided under ground (g). Dogan v Semali Investments Ltd [2005] EWCA Civ 1036 was decided under ground (f). Like many "*objective intention*" cases, it was concerned with whether the landlord had a real prospect of obtaining planning permission. Sir Martin Nourse stated at [30]:

"*The judgment of Laws LJ is also of value for its demonstration of what is the planning hurdle that has to be surmounted by the landlord under section 30(1)(f) or (g). He read a well-known passage from the judgment of Upjohn LJ in Gregson v Cyril Lord Ltd [1963] 1 WLR 41, 47 and a passage from the judgment of Savile LJ in the more recent case of Cadogan v McCarthy & Stone Developments Ltd [1996] EGCS 94. Towards the end of his judgment (page 49J) Laws LJ summarised the position thus:*

> *'I emphasise that the hurdle to be surmounted by the appellant under section 30(1)(g), in the light of the authorities on the subject, is by no means a high one. He does not have to demonstrate a balance of probability that permission will be granted. He has to show that there is a real, not merely a fanciful, chance.'*"

75. The test is to be applied on the assumption that the landlord has obtained possession. Thus any impediment which arises out of the tenant's occupation will be ignored. See Reynolds & Clark at para 7-154. The authority for that proposition is the speech of Lord Bridge, with which the other members of the House of Lords agreed, in Westminster City Council v British Waterways Board [1985] AC 676 HL at 680:

"*A landlord opposing the grant of a new tenancy under section 30(1)(f) or (g) seeks to establish what he intends to do 'on the termination of the current tenancy.' If the only obstacle to his implementing an admittedly genuine intention is a suggested difficulty in obtaining a necessary planning permission, the plain language of the Act of 1954 requires that his prospect of success in overcoming that difficulty should be assessed on the footing that he is entitled to possession.*"

76. I shall consider in turn each of the three hurdles identified by the Claimant. Then I shall consider the question of timing.

[3] [1963] 1 WLR 41 CA.
[4] [2000] L&TR 249 CA.

Planning permission

77. The Defendant would need to obtain planning permission in order to build the Development. The regulatory framework is helpfully summarised in the main report of Mr Brindley, which is dated 10 October 2024.

78. The Planning and Compulsory Purchase Act 2004 states that if regard is to be had to the development plan for the purposes of any determination to be made under the Planning Acts, the determination must be in accordance with the development plan unless material considerations indicate otherwise. It is common ground that regard is to be had to the development plan and that there are no material considerations indicating that the determination should not be in accordance with it. The development plan for planning applications submitted to the local authority comprises the London Plan (2021) issued by the Mayor of London and the Redbridge Local Plan 2015 – 2030 (2018). The London Plan contains a number of policies together with guidance on those policies. Policies D13 (Agent of Change) and HC7 (Protecting Public Houses) are of particular relevance.

79. Policy D13 provides in material part:

"*A The Agent of Change principle places the responsibility for mitigating impacts from existing noise and other nuisance-generating activities or uses on the proposed new noise-sensitive development. Boroughs should ensure that Development Plans and planning decisions reflect the Agent of Change principle and take account of existing noise and other nuisance-generating uses in a sensitive manner when new development is proposed nearby.*

B Development should be designed to ensure that established noise and other nuisance-generating uses remain viable and can continue or grow without unreasonable restrictions being placed on them.

C New noise and other nuisance-generating development proposed close to residential and other noise-sensitive uses should put in place measures to mitigate and manage any noise impacts for neighbouring residents and businesses. …

E Boroughs should not normally permit development proposals that have not clearly demonstrated how noise and other nuisances will be mitigated and managed."

80. The guidance to D13 includes the following:

"*3.13.2 The **Agent of Change principle** places the responsibility for mitigating the impact of noise and other nuisances firmly on the new development. …*

*3.13.5 Noise-generating **cultural venues** such as … pubs … should be protected … Adjacent development and land uses should be brought forward and designed in ways which ensure established cultural venues remain viable and can continue in their present form without the prospect of licensing restrictions or the threat of closure due to noise complaints from neighbours.*

*3.13.7 Housing and other **noise-sensitive development** proposed near to an existing noise-generating use should include necessary acoustic design measures, for example, site layout, building orientation, uses and materials. This will ensure new development has effective measures in place to mitigate and minimise potential noise impacts or neighbour amenity issues. Mitigation measures should be explored at an early stage in the design process, with necessary and appropriate provisions secured through planning obligations.*"

81. Policy H7 provides in material part:

"*A In Development Plan Documents, town centre strategies, and planning decisions, boroughs should:*

1) protect public houses where they have a heritage, economic, social or cultural value to local communities, or where they contribute to wider policy objectives for town centres, night-time economy areas, Cultural Quarters and Creative Enterprise Zones …

C Development proposals for redevelopment of associated accommodation, facilities or development within the curtilage of the public house that would compromise the operation or viability of the public house use should be resisted."

82. The guidance to H7 includes the following:

"*7.7.8 Many pubs built on more than one floor include ancillary uses such as function rooms and staff accommodation. Potential profit from development makes the conversion of upper pub floors to residential use extremely attractive to owners. Beer gardens and other outside space are also at risk of loss to residential development. The change to residential use of these areas can limit the operational flexibility of the pub, make it less attractive to customers, and prevent ancillary spaces being used by the local community. It can also threaten the viability of a pub through increased complaints about noise and other issues from new residents. Boroughs should resist proposals for redevelopment of associated accommodation, facilities or development within the curtilage of the public house that would compromise the operation or viability of a public house. Where such proposals would not compromise the operation or viability of the public house, developers must put in place measures that would mitigate the impacts of noise for new and subsequent residents (see **Policy D13 Agent of Change**).*"

83. Redbridge Local Plan identifies housing shortage as a key challenge for the Borough. Policy LP2 (Delivering Housing Growth) provides in material part:

"*1. The Council will deliver a minimum target of 16,845 new dwellings in the period 2015 to 2030 by:*

(a) Focusing and prioritising new homes in the borough's Investment and Growth Areas of Ilford, Crossrail Corridor, Gants Hill, South Woodford and Barkingside;".

The Premises, it will be recalled, are located in South Woodford.

84. Mr Gostling notes in the joint report that the local authority scored only 39 per cent in the latest Housing Delivery Test. I take this to mean that it is not on track to meet its housing growth target under policy LP2.

85. The regulatory framework also includes the National Planning Policy Framework, which in its most recent iteration is dated February 2025. This contains a presumption in favour of sustainable development:

> "***11.*** *Plans and decisions should apply a presumption in favour of sustainable development. …*
>
> *c) approving development proposals that accord with an up-to-date development plan without delay; …*
>
> ***12.*** *The presumption in favour of sustainable development does not change the statutory status of the development plan as the starting point for decision-making. Where a planning application conflicts with an up-to-date development plan (including any neighbourhood plans that form part of the development plan), permission should not usually be granted. Local planning authorities may take decisions that depart from an up-to-date development plan, but only if material considerations in a particular case indicate that the plan should not be followed. …*
>
> ***125.*** *Planning policies and decisions should: …*
>
> *c) give substantial weight to the value of using suitable brownfield land within settlements for homes and other identified needs, proposals for which should be approved unless substantial harm would be caused, …*"

86. There is a tension between policies D13 and H7 on the one hand and the proposed planning application on the other. The construction of residential accommodation above the pub and the mews houses opposite would give rise to an obvious but hard to quantify risk of licensing restrictions (e.g. shorter opening hours, restrictions on the times when live music could be played) and further, to a risk of noise complaints from neighbours which could potentially result in closure. All this might compromise the operation or viability of the public house.

87. Acoustic design measures could mitigate that risk. Policy D13 provides that housing proposed near to an existing noise-generating use should include necessary acoustic design measures. Thus it contemplates that housing and noise-generating use can exist in close proximity. Indeed, as Ms Mattsson points out, in London pubs and housing often do. However the court does not have the benefit of an acoustic report. Mr Duckworth submits that without having seen one, the court cannot properly be satisfied that the Defendant has a real prospect of satisfying the local authority on matters of acoustic design. Ms Mattsson disagrees. She submits that the question is whether there is a real prospect of the Defendant obtaining an acoustic report that will satisfy the local authority.

88. In my judgment Ms Mattsson had identified the correct approach. As the case law makes clear, the Defendant has to demonstrate a real prospect of obtaining planning permission. When considering whether the Defendant has satisfied that test, as on an application for summary judgment or to set aside default judgment, the court can take into account the material that can reasonably be expected to before the local authority. This includes an acoustic report. The Defendant has instructed acoustic consultants, Spratt & Hamer, to prepare one. I must decide the application on the assumption that the landlord has obtained possession of the Premises and that there is therefore no longer any obstacle to its preparation. I cannot know what the report will say. However, it is not fanciful to suppose that it will come up with an adequate set of proposals. Neither Mr Brindley nor Mr Gostling thought this improbable. When cross-examined, Mr Brindley stated that it would be highly unusual that mitigation couldn't work. Mr Gostling stated that he hadn't come across a situation where noise could not be addressed as a technical issue. On the other hand, an acoustic report containing a well thought out set of acoustic measures would have put the Defendant in a stronger evidential position than that in which it now finds itself.

89. Earlier in this judgment, I accepted Ms Jacques' evidence that a 65 per cent reduction in the size of the beer garden would probably result in a loss of profitability for the pub. This is notwithstanding Mr Chohan's evidence, which I accept on this point, that the Development would make some improvements to the public house. This is another way in which the Development might compromise the viability of the public house.

90. In their joint report, Mr Gostling stated that in his expert opinion, the Defendant had a reasonable prospect of obtaining planning permission, and Mr Brindley stated that in his expert opinion it did not. They gave reasons for their respective positions. That the prospect of success is a question on which reasonable people with expertise in this area can agree to differ urges me to be cautious before finding that a planning application would have no real prospect of success.

91. However, I must also acknowledge that Mr Gostling, while an expert, is not independent. That is because he has been retained as the Defendant's planning consultant for purposes of the Development. As he accepted in cross-examination, he has an ongoing commercial relationship with the Defendant which is independent of this litigation. There was a conflict between his duty to give independent evidence to the court and his financial interest in the Development proceeding. I accept that Mr Gostling was giving the court his professional opinion and I accept that he was not consciously biased. Nonetheless, he should not have been tendered as an independent expert and should not have agreed to be appointed as one.

92. When cross-examined, Mr Brindley stated that given the long term nature of the public house, the local authority would ideally like to see something that said this would work as a commercial venture. If the Claimant were not to continue as the tenant (and the Claimant would not wish to be a tenant if ground (f) succeeds), then the question of

commercial viability would attract greater scrutiny. Mr Gostling agreed that the Claimant's opposition meant that prospects of success were lower than they were before. Although, if the Claimant were no longer a tenant, I am sceptical as to whether it would devote time and resources to opposing the planning application.

93. Whereas policies D13 and H7 tend to weight against the grant of planning permission, the Redbridge Local Plan and the National Planning Policy Framework would tend to support it. If the local authority is not on track to meet its housing delivery target, that would tend to favour granting an application to build more housing.

94. Evaluating all the circumstances, I find that a planning application would have a real prospect of success, albeit somewhat less than 50 per cent.

Restrictive covenant

95. It is not known what the restrictive covenant says, or whether any beneficiary of the covenant will attempt to enforce it. If they do, then, as Ms Mattsson submits, the Defendant could apply to the Upper Tribunal under section 84(1) of the Law of Property Act 1925 ("the 1925 Act") to discharge or modify any such restriction. Alternatively, the Defendant could make a pre-emptive application for discharge.

"*The Upper Tribunal shall (without prejudice to any concurrent jurisdiction of the court) have power from time to time, on the application of any person interested in any freehold land affected by any restriction arising under covenant or otherwise as to the user thereof or the building thereon, by order wholly or partially to discharge or modify any such restriction . . . on being satisfied–*".

96. The Upper Tribunal can make such an order if it is satisfied of one of various grounds. Ms Mattsson submits that in the present case the most relevant ground is (aa):

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

97. In the present case, the reasonable user of the land would be the provision of housing.

98. Section 84(1A) of the 1925 Act provides:

"*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 ['the limited benefit test']*; or*

(b) is contrary to the public interest ['the public interest test']*;*

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."

99. 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.*"

100. Thus the Upper Tribunal would take into account the Redbridge Local Plan and the National Planning Policy Framework, which would both tend to support the provision of housing as being a reasonable use of the land.

101. Preston and Newsom, "*Restrictive Covenants Affecting Freehold Land*", 12th Edition (2024) addresses the quantum of compensation at paras 13-044 and 13-045 (citations omitted):

"*13-044 … If the Tribunal has provisionally decided that the limited benefit test is fulfilled, then it must contemplate that a relatively small amount of money could be awarded in respect of the loss or disadvantage suffered from the modification. If so, then the question is whether that relatively small sum will be an adequate compensation to the person suffering loss or disadvantage, but if he would not suffer any loss or damage, the question does not arise because compensation of this type is not appropriate. …*

13-045 On the other hand, if the Tribunal has provisionally decided that the public benefit test is fulfilled then the loss or disadvantage suffered from the modification will not necessarily be small and could be large. The question then will be whether that amount, whatever it is, will be an adequate compensation to the person suffering loss or disadvantage."

102. Appendix II to Preston and Newsom provides a table of all known successful Upper Tribunal applications under ground (aa) since 2010, including details of any compensation awarded. The figures are not adjusted for inflation. They tend to reflect the percentage reduction in the value to the objector's property caused by the discharge or modification of the covenant. The compensation awarded ranges from several thousand pounds to £75,000. This figure reflected a five per cent diminution in value of the objector's overlooked neighbouring property. In some cases, no compensation was awarded.

103. Section 84(9) of the 1984 Act permits the landlord to apply for a stay of proceedings to enforce the covenant pending an application to the Upper Tribunal under the section.

"*Where any proceedings by action or otherwise are taken to enforce a restrictive covenant, any person against whom the proceedings are taken, may in such proceedings apply to the court for an order giving leave to apply to the Upper Tribunal under this section, and staying the proceedings in the meantime.*"

104. Ms Mattsson submits that it is difficult to see what practical benefits of substantial value could be preserved by preventing the proposed Development. She further submits that if no party is threatening to enforce a covenant, these situations are usually dealt with by way of a restrictive covenant insurance policy.

105. Mr Duckworth submits that as the court does not know what the restrictive covenant says, it is not in a position to form even a provisional view about the risk that the covenant poses to the Development. Neither, for that reason, is the court in a position to assess whether a section 84 application would be likely to succeed. There are all sorts of reasons which might defeat it. Preston and Newsom record at para 13-032 that practical benefits of substantial value have been held to include not being overlooked, space, peace, quiet, light, an outlook (albeit over a field), and protection against noise. The authors note that all these decisions were fact specific. I observe that when considering the protection of an outlook, it might prove material that the mews houses and the additional storey to the public house would add height to the Premises. As to defective title insurance, Mr Duckworth submits that this would not enable the Defendant to avoid the covenant.

106. Evaluating all the circumstances, even on the limited information before the court it is not fanciful to suppose that the Defendant would overcome any hurdles posed by the restrictive covenant. It is speculative that anyone will seek to enforce the covenant. Given the steer imposed by the Redbridge Local Plan and the National Planning Policy Framework, it is not fanciful to suppose that the Upper Tribunal would find that the Development was a reasonable user of land. Given the relatively modest scale of the Development, it is not fanciful that the Defendant will be able to satisfy the requirements of section 84(1A). Any compensation payable would likely be modest and would not derail the Development.

Funding

107. Sanjay Chohan gave evidence for the Defendant about the funding of the Development. He and his two brothers are the directors and shareholders of the Defendant. They each hold one of the three shares in the company. In his first witness statement, dated 12 July 2024, he confirmed that the Defendant would have the funds to carry out the Development. The proposed funder was Punjab National Bank (International) Limited ("the Bank"). The Defendant had existing credit lines with the Bank, who had a charge against the Premises. The Bank held personal guarantees from Mr Chohan and the other shareholders for the existing debt. It had issued an indicative term sheet dated 14 June 2024.

108. In his second witness statement, dated 10 January 2025, Mr Chohan stated that he had kept the Bank updated as to progress with the Development. I note that the Bank had provided a second term sheet dated 20 December 2024, which supersedes the first, as

the first term sheet was expressed to be valid for a period of only 30 days from the date of issue. The term sheets are substantially similar.

109. The terms in the second term sheet were as follows. The facility would be a development loan for the purpose of site redevelopment. The interest rate would be 5.50 per cent plus Bank of England Base Rate, which at the date of trial was 4.75 per cent. Thus the total interest rate would be 10.25 per cent. The loan amount was an estimated £2.2 million. Thus the amount of interest payable per annum would be £225,500. The collateral value was £4.2 million. There would be a 1.5 per cent arrangement fee and a 1.5 per cent exit fee. Loan to value ratio was up to 60 per cent. The loan was to be repaid by way of sale or refinance. The term of the loan was 24 months. The security was the Premises, which was the Defendant's only asset, and a charge on the debentures of the Defendant. A personal guarantee from the directors/shareholders was required. The pre-conditions were a market valuation from a Bank empanelled valuer; full planning approval and plans; full financials appraisal sheet; Joint Contracts Tribunal contract and collateral warranties; bank statements/proof of own funds; a report on title from a Bank appointed solicitor confirming that all the security required by the Bank was in place, the Premises had the appropriate planning consent, and that any covenants were not being contravened; and a Bank quantity surveyor was to be appointed.

110. The term sheet stated that the Bank had not assessed the Defendant's credit proposal, and that the terms and conditions were based on the initial information and estimation provided to the Bank. Further conditions might be stipulated in the final letter of approval.

111. As Mr Duckworth submitted, the term sheet merely set out the terms on which the Bank would in principle be prepared to lend to the Defendant provided that the information supplied by the Defendant on which the proposed terms were based proved to be correct. It is not legally binding on the Bank and does not represent any commitment on its part.

112. Mr Chohan stated in his first witness statement that once planning permission and the tenders had been obtained, the Defendant would approach the Bank to fund the Development. He did not anticipate there being any issues in obtaining the necessary funding as the Defendant had an ongoing relationship with the Bank and the gross development value of the Development was expected to be around £5.2 million. He observed in his second witness statement that at present the Bank was unable to give any further commitment to lending as one of their pre-conditions was the grant of full planning approval.

113. Mr Chohan was cross-examined about funding. He stated that interest would be rolled up into the loan and that it was part of the overall loan figure. However, based on the estimates from both building surveyors as to the cost of the Development, the loan

amount shown on the term sheets would not be sufficient to cover interest on top of the cost of the Development. As Mr Duckworth submitted, the Defendant would need a bigger loan. Mr Chohan stated that after 24 months the Defendant would sell or refinance the Premises. Once the Development was completed, the loan would turn into an investment loan and the margin would change because there was more surety. If the Defendant could not obtain funding from the Bank, then it would seek another lender. Mr Chohan thought it implausible the company would not find one, as he assessed the loan to value ratio at 37 per cent.

114. Mr Chohan was asked whether he had taken out loans from the Bank in relation to any other companies. He said that he had not, but that his fellow directors had. He was unwilling to disclose the amount of those loans without their consent, and declined to do so when pressed. I make the reasonable assumption that the loans were company loans not personal loans, although it is probable that the Bank would have required them to be supported by personal guarantees from the directors.

115. The Defendant did not produce a valuation of the Premises. However, in December 2024 Mr Chohan contacted several estate agents to obtain estimates of the rental and sale prices, once completed, of the three mews houses and six apartments within the Development. I need only concern myself with the sale value. By an email dated 11 December 2024, Savills estimated the aggregate sale price as £3.69 million. By an email dated 16 December 2024, RL Morris estimated the aggregate sale price as £3.885 million. However, these figures make no allowance for the sale value of the public house.

116. It is not fanciful to suppose that the Bank or some other lender would in principle be prepared to lend the Defendant sufficient money to carry out the Development. This would be on the basis that lender was satisfied that the Premises provided adequate security for the loan and that the Defendant took out a restrictive covenant insurance policy. A lender would not necessarily be satisfied with that level of security, but I am satisfied that there is a real prospect that it would be.

117. However, the Bank have indicated in the term sheets that they would require the directors/shareholders to provide personal guarantees. That would be standard practice and I have no doubt that any other lender would require likewise. However the Defendant adduced no evidence about the personal finances of any of the directors/shareholders. Unlike an acoustic report or restrictive covenant, this is evidence which the directors/shareholders should have been in a position to adduce. I would have expected them to do so, particularly as the Defendant has had the benefit of legal advice in these proceedings. The £2.2 million identified in the term sheets as the estimated amount of the loan is a substantial sum. I cannot simply assume that the directors/shareholders would have sufficient assets to support guarantees for that or some similar amount. The absence of evidence that they do is a cause of real concern.

118. Indeed, the Defendant did not adduce any evidence stating in express terms that the directors/shareholders would be willing to stand as guarantors, although this was perhaps implicit in the Defendant's reliance on the term sheets.

119. In the circumstances, the Defendant has not satisfied me that there is any real prospect that the directors/shareholders would be able to provide guarantees to the Bank, or some other lender, that the lender would find satisfactory. The Defendant has therefore not satisfied me that that there is any real prospect that it could obtain funding for the Development. That finding is sufficient to defeat the Defendant's opposition to the claim for a new tenancy.

Timing

120. Ground (f) requires that the works relied on to make out the ground must be undertaken "*on the determination of the current tenancy*". In the present case, the Claimant has made a request for a new tenancy under Part II of the Act and applied to the court under section 24(1). Section 64(1) provides that the effect of the notice shall be to terminate the tenancy at the expiration of the period of three months beginning with the date on which the Claimant's application is finally disposed of. Section 64(2) provides that the date of final disposal is the date on which the time for appealing against the judgment expires or, in the event of an appeal, the date on which the appellate proceedings conclude. It is plain from the context that references to "*appealing*" and "*appeal*" in the subsection include applications for permission to appeal.

121. In Franses, Jay J analysed the meaning of "*on the determination of the current tenancy*" in the context of the relevant case law. His judgment was not overturned on this point. In summary, the phrase means "*within a reasonable time*" of the determination of the current tenancy. What is a reasonable time will be a matter of impression for the trial judge. The question is fact sensitive. The decided cases suggest that a reasonable time will often be no more than a few months. The longer the period, and hence the more unusual, the greater the duty on the court to explain it. A period of three months would not require explanation. A period of twelve months would.

122. In the present case, in the building surveyors' joint report, Mr Fiddes has broken down the works prior to and including the commencement of construction into stages beginning with month one and concluding with month 12, and identified in what month each stage is likely to take place. (The joint report used actual months, but as the timetable has yet to commence, I have replaced them with numbers instead.) Mr McDonough agreed with the stages but differed slightly as to how soon some of the stages could take place.

(1) Month one: Site survey and scope intrusive investigations.

(2) Month two: Undertake intrusive investigations. Report back and present initial feasibility study. Initial feedback from pre-application consultation.

(3) Months three/five: Develop planning application with supporting material. Develop Stage 2 design.

(4) Months six/seven: Submit planning application. Progress Stage 3 design. Consultations with statutory undertakers. Mr McDonough thought the planning application was likely to be submitted in month four. The timescale provided by both building surveyors would accommodate the two months which, as noted earlier, Mr Brindley thought necessary to prepare, finalise and submit the planning application.

(5) Months eight/nine: Develop Stage 4 design and tender pack. Planning permission granted. Prepare and submit building regulation application for comment. As noted earlier, Mr Brindley and Mr Gostling thought that once the planning application was submitted, a decision would take four months. Applied to Mr Fiddes' time estimates for stages (1) – (4), this would place the grant of planning permission in months 10/11, and add two months to all Mr Fiddes subsequent time estimates. Mr McDonough agreed that the decision to grant planning permission would take four months. But he thought planning permission would likely be granted in month eight.

(6) Months nine/10 (or months 11/12 applying the Brindley/Gostling approach): Prepare and submit applications for discharge of Reserved Matters and pre-commencement conditions. Review tenders and appoint. Mr McDonough thought that this stage was likely to take place in month nine.

(7) Month 12 (or month 14 applying the Brindley/Gostling approach): Commence construction. Mr McDonough thought that construction was likely to commence in month 10.

123. Therefore, based on expert evidence of what needs to be done and how long each stage could reasonably be expected to take, construction would likely commence within 10 – 14 months of the determination of the current tenancy. This would an exceptionally long period to count as a reasonable time. However, what is reasonable is highly fact-specific.

124. To date the Defendant has done everything that can reasonably be expected of it to progress the Development. The reason for the delay is that the Claimant has refused the Defendant access to the Premises to carry out an acoustic survey and intrusive investigations. Mr Duckworth cited the judgment of HHJ Kelly in GT Motoring Solutions Ltd v Williams in the County Court (Leeds) at [81] to rebut the proposition that a tenant must volunteer rights which are not enjoyed under the lease to facilitate

the landlord's attempts to extinguish the tenant's statutory right to renew. The citation was permissible under para 6.2 of the Practice Direction (Citation of Authorities) [2001] 1 WLR 1001 CA to demonstrate current authority in the County Court on an issue in respect of which no decision at a higher level of authority is available. The rebuttal is self-evidently correct and needs no authority to support it.

125. In GT Motoring, the judge stated that it was irrelevant that the landlords' planning application might have been further progressed had the claimants granted the access which the landlords sought. I make no observations as to the correctness of that reasoning in the context of that case, in which seven out of 10 reports had yet to be obtained. In the present case, the reason why the acoustic report and necessary investigations have not yet been obtained or carried out is relevant when considering whether "*within a reasonable time*" should include time for them to be obtained or carried out after the determination of the current tenancy.

126. The Defendant cannot fairly be criticised for not having progressed the Development further. Were the Claimant to obtain possession of the Premises, the acoustic survey and the necessary investigations could be carried out, enabling the preparation and filing of an application for planning permission, and the other steps charted by the building surveyors in their joint report to be undertaken.

127. There is a reasonable explanation for each element of the 10 – 14 month period. There is a clear and specific path from the date of determination of the current tenancy to the commencement of construction. In my judgment, on the particular facts of this case, works commencing within that 10 – 14 month period would count as works undertaken upon the determination of the tenancy.

128. The prospect of proceedings in relation to a restrictive covenant is too speculative to factor into considering whether works would commence within a reasonable period of the determination of the tenancy.

129. In summary, the Defendant has established that it has a real prospect of overcoming the hurdles of planning permission and the restrictive covenant and commencing the Development within a reasonably short time of the termination of the current tenancy. But the Defendant has not shown that it has a real prospect of obtaining funding for the Development. For that narrow reason, I allow the Claimant's submission on this point.

Summary

130. I reject the Claimant's first submission as to why ground (f) is not satisfied. The Defendant has demonstrated that there are works which it could not reasonably carry out without obtaining possession of the Premises.

131. I reject the Claimant's second submission as to why ground (f) is not satisfied. The Defendant does have a firm and settled intention to carry out the Development and its intention is not "*conditional*" in the Franses sense.

132. I accept the Claimant's third submission as to why ground (f) is not satisfied. This is on the narrow ground that the Defendant has not shown that it has a real prospect of obtaining funding for the Development.

133. Therefore my decision on the preliminary point is that the Defendant has failed to establish ground (f).

134. I shall hear the parties as to costs and any consequential orders.