Neutral Citation Number: [2024] UKUT 33 (LC)

Case No: LC-2021-455

IN THE UPPER TRIBUNAL (LANDS CHAMBER)
AN APPLICATION UNDER SECTION 84, LAW OF PROPERTY ACT 1925

Royal Courts of Justice,
London WC2A

5 February 2024

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

RESTRICTIVE COVENANTS – PROCEDURE – jurisdiction – application to set aside order modifying leasehold covenants – order made without hearing in the absence of objection – application to set aside order – whether proceedings served on landlord – jurisdiction to modify alienation and keep open covenants – rule 54(1) Tribunal Procedure (Upper Tribunal Lands Chamber) Rules 2010 – section 84(1), Law of Property Act 1925

BETWEEN:

BLACKHORSE INVESTMENTS (BOROUGH) LIMITED

Applicant

-and-

THE MAYOR AND BURGESSES OF THE LONDON BOROUGH OF SOUTHWARK

Objector

The Black Horse Public House,
254 Tabard Street,
London SE1

Martin Rodger KC, Deputy Chamber President

26 January 2024

Jonathan Upton, instructed by Bryan O'Connor & Co, for the applicant
Philip Rainey KC, instructed by Southwark Legal Services, for the objector

The following cases are referred to in this decision:

Barclays Bank PLC's Application, Re (1990) 60 P & CR 354

Blumenthal v Church Commissioners for England [2005] 1 EGLR 78

Blyth Corporation's Application, Re (1962) 14 P & CR 56

Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd [1998] AC 1

Dart's Application, Re (2006) LP/68/2005

Golding v Martin [2019] Ch 489 (CA)

Hickman & Sons, Ltd's Application, Re (1951) 7 P & CR 33

Lee's Application [2012] UKUT 125 (LC)

Milius's Application, Re (1995) 70 P & CR 427

Nicholls v Kinsey [1994] QB 600

Oldham Metropolitan Borough Council v Tanna [2017] 1 WLR 1970

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

Stannard v Issa [1987] 1 AC 175 (PC)

Terry v BCS Corporate Acceptances Ltd & Ors [2018] EWCA Civ 2422

Tibbles v SIG [2012] 1 WLR 2591

Westminster City Council v Duke of Westminster [1991] 4 All ER 136; (1992) 24 HLR 572 (CA)

Young Camiade's Application [2023] UKUT 96 (LC)

Introduction

1. On 24 February 2022 the Tribunal made an order under section 84(1), Law of Property Act 1925 modifying covenants in the lease of The Black Horse, a public house in Southwark. The modifications were in respect of covenants prohibiting the making of alterations without consent, restricting assignment and subletting, and requiring that the premises be kept open and used as a public house.

2. Section 84(1) confers power on the Upper Tribunal "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 that various conditions are met.

3. The Tribunal's order was made without a hearing as no objection had been received to the application under section 84 from the owner of the freehold and landlord under the lease, the London Borough of Southwark.

4. On 1 November 2023, by which time The Black Horse had been converted into flats and let on new sub-leases, Southwark applied to the Tribunal to set aside the order of 24 February 2022 and for an extension of time within which to file an objection to the application to modify the covenants.

5. This is my decision on that application following a hearing on 26 January 2024 at which Southwark was represented by Philip Rainey KC and the applicant and leaseholder, Blackhorse Investments (Borough) Ltd, was represented by Jonathan Upton.

Setting aside a decision which disposes of proceedings

6. Rule 54 of the Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010 gives the Tribunal power to set aside a decision which disposes of proceedings, or part of such a decision, and to remake it if the Tribunal considers that it is in the interests of justice to do so and if one or more of the conditions in paragraph (2) of the rule is satisfied.

7. Those conditions are as follows:

> (a) that a document relating to the proceedings was not sent or delivered to or was not received at an appropriate time by, a party or a party's representative;
>
> (b) a document relating to the proceedings was not sent or delivered to the Tribunal at an appropriate time;
>
> (c) a party or a party's representative, was not present at a hearing related to the proceedings; or
>
> (d) there has been some other procedural irregularity in the proceedings.

8. The discretion conferred on the Tribunal by rule 54 is therefore exercisable only if one or more of the specified conditions is met.

9. By rule 54(3) a party applying for a decision to be set aside under the rule must send a written application to the Tribunal and all other parties so that it is received no later than one month after the date on which the Tribunal sent notice of the decision to the party.

10. The power to set aside a decision under rule 54 is in addition to the Tribunal's power to review its decisions (and, if appropriate, set aside and remake them) which is conferred by section 10, Tribunals, Courts and Enforcement Act 2007. Although section 10 confers a wide power to review decisions the circumstances in which that power may be exercised are closely controlled by rules 56 and 57. Thus, the Tribunal may only undertake a review of a decision on receiving an application for permission to appeal (rule 57(1)). It may then only review the decision if one of the two conditions in rule 56(1) are satisfied. These are that the Tribunal overlooked a legislative provision or binding authority which could have had a material effect on the decision, or that a binding decision has been made by a higher court since the Tribunal's decision which could have had a material effect on the decision.

11. The Tribunal has power under rule 58 to treat an application under rule 54 to set aside a decision which finally disposes of proceedings as if it was an application for permission to appeal to the Court of Appeal, or for a review of the decision under rule 57.

12. Finally, in the Rules "party" is a defined expression which includes an "objector", and an "objector" is someone who has given the Tribunal a notice of objection to an application under section 84 (rule 1(3)). Therefore, in an application under section 84 a person who has not given the Tribunal a notice of objection is not an objector, nor are they a party. It has not been suggested that Southwark is not entitled to make an application to set aside the order of 24 February 2022 under rule 54(1) and Mr Upton did not object to it being joined as a party to enable it to do so. The Tribunal has power under rule 9(1) to add a party to any proceedings and it will exercise that power whenever it is necessary to enable it to deal with cases fairly and justly. I indicated at the hearing that I would make an order joining Southwark as a party to the application.

The facts

13. The Black Horse was a purpose-built public house dating from the 1960s. It is on two storeys and, as originally laid out, had licenced premises on the ground floor and residential accommodation on the upper floor.

14. The freehold interest in the site and the larger parcel of land on which it is situated belonged originally to the Greater London Council. On March 1966 it granted a lease of the Black Horse to the brewer Courage, Barclay & Simonds for a term of 99 years. When the GLC ceased to exist the reversion to the lease and ownership of the adjoining land became vested in Southwark.

15. Clause 3 of the lease comprised covenants by the Lessee, including a covenant against alienation at clause 3(i) by which it covenanted in terms which absolutely prohibited assignment or subletting in parts, as follows:

> "Not to assign any part or parts (as opposed to the whole) of the demised premises and not without the previous written consent of the Lessor to assign the whole or to underlet (other than by way of mortgage) or part with possession of the demised premises or any part thereof PROVIDED that the consent of the Lessor shall not be required to the underletting of the demised premises for a term not extending three years".

16. Clause 3(k) was a covenant against cutting or maiming timbers or other structural parts of the demised premises or making external alterations or alterations to the internal arrangement of counters and serving hatches.

17. By clause 3(n) the Lessee covenanted to keep the premises open and in use as a pub, as follows:

> "So long as the requisite licences could be obtained to use the demised premises or cause or permit the same to be used as a licensed victualling house only and keep the same open as such during all lawful hours and conduct or cause to be conducted the business thereof in a lawful and orderly manner and so as to preserve or cause to be preserved the character of the said premises with the licensing authorities and the public".

18. By clause 3(o) the Lessee covenanted at all times to use its best endeavours to obtain a renewal or transfer of all licences authorising the sale and consumption of alcohol on or off the demised premises, and if the licence was refused, to appeal against the refusal.

19. Finally, by clause 3(p) the Lessee covenanted that for as long as the premises were licensed for the sale of alcohol it would use them as a "bona fide refreshment house" which was to be managed in a manner described in eight detailed sub-clauses covering more than 2 pages of text. These included a requirement that all food and alcoholic drinks served to the public were to be "of good quality and unadulterated", and others concerning furnishing the premises appropriately, employing an experienced manager, and so on.

20. By 2011 the lease had been acquired by the applicant, and the pub was being operated by a tenant, but by 2019 the tenant's business had failed and the pub had closed. The applicant does not appear to have taken any steps to commence trading in its own right but it continued to offer the premises as available for letting to anyone who wanted them. Nobody did.

21. The Black Horse site and the adjoining land are considered by Southwark to be suitable for residential development. On 29 May 2020, in its capacity as a local planning authority, Southwark granted planning permission for the demolition of the pub and its replacement with a predominantly residential building of six storeys with commercial premises, including a new pub, on the ground floor. Between about 2016 and August 2021 occasional discussions took place between the applicant and Southwark over a possible sale of the freehold, or the surrender of the lease, or the grant of an extended term to facilitate development. Those discussions came to nothing and ended in August 2021 when Southwark made it clear that it was not interested in disposing of its freehold interest.

22. On 9 September 2021 the applicant applied to the Tribunal under section 84, 1925 Act for an order modifying the covenants to enable the planning permission obtained of 29 May 2020 to be implemented. A copy of the proposed proceedings and their accompanying statement of case had previously been sent in draft to Mr Warner of Southwark, in January 2021 and he had passed them on to Mr Paul Davies, head of Southwark's Property Team. On 6 August 2021, a month before he issued the application, the applicant's solicitor, Mr Michael Maunsell of Bryan O'Connor & Co, had spoken to Mr Davies on the telephone to alert him that the proceedings were about to be issued and to reassure him that the applicant wished to continue negotiating with Southwark. After that telephone conversation Mr Maunsell did not hear any more from either Mr Davies or Mr Warner.

23. By Rule 33(1) of the Tribunal's rules, on receipt of an application under section 84 the Tribunal is required to give directions to the applicant for notice of the application to be given to all those who appear to be entitled to the benefit of the restrictions. On 10 September 2021 the Registrar therefore directed the applicant to serve the application and the attachments received with it on Southwark. He did not specify an address or method of service, nor did rules require him to do so.

24. The address given for Southwark in the application was a PO Box address. Nevertheless, Mr Maunsell decided to serve the application in person at Southwark's main administrative offices at 160 Tooley Street, which is also the address given for Southwark in the Land Register entry for the property. On 12 October 2021 Mr Maunsell attended at 160 Tooley Street and delivered the application under cover of a letter which listed the documents enclosed, including the statement of case and the other documents filed with the Tribunal in support of the application.

25. In a witness statement prepared in response to the application to set aside the order, Mr Maunsell explained that Southwark does not accept post at its front desk at 160 Tooley Street and directs deliveries to a window at the side of the building. The person at that window provided Mr Maunsell with a receipt for the envelope he handed over which he in turn provided to the Tribunal on 19 November 2021 with a certified copy of the application as proof of compliance with the rule 33 direction.

26. At the hearing of the application Mr Maunsell was cross-examined on his witness statement. He explained that he had delivered the application by hand so that there could be no doubt that it had been received. It was suggested to him by Mr Rainey KC that service by hand, rather than by a post or email addressed to Mr Davies or one of his colleagues with whom the applicant had been negotiating, was a deliberate tactic adopted in the hope that Southwark's administrative arrangements would be so chaotic that the application would not come to the attention of Mr Davies or anyone else who would understand its significance. Mr Maunsell refuted that suggestion, and I accepted his evidence that the purpose of serving the documents by hand was so that he could provide the necessary confirmation to the Tribunal that they had reached Southwark.

27. Mr Maunsell did not email another copy of the application to Mr Davies, Mr Warner or anyone else at Southwark. Nor did his client, Mr Heldreich, a director of the applicant's parent company, Acorn Property Group, who had been conducting negotiations with Southwark. Mr Maunsell explained that, in view of his previous telephone conversation with Mr Davies warning that the proceedings were about to begin and inviting further

proposals, he considered that the ball was in Southwark's court and that it was for it to contact him to discuss the application if it wished to do so.

28. The covering letter was marked for the attention of Mr Davies (although his name was mis-spelt as Davis) of the Property Team, but it did not come to his attention. Mr Davies explained in a witness statement that there are other Paul Davis or Paul Davies working for Southwark, and that it is "not unusual for post to be misdirected". He did not say whether there were any arrangements in place to redirect post misdirected in this way.

29. Southwark's evidence was that in 2021 post delivered to 160 Tooley Street was liable to be left unattended for many months, as staff (including I assume Mr Davies) were working from home in the aftermath of the Covid 19 pandemic. Mr Davies candidly acknowledged that the Property Team did not address its backlog of 2021 deliveries until March 2022. He did not then find the envelope delivered by Mr Maunsell (nor a second envelope containing notice of a separate application in relation to a different pub). I assume that it has been lost somewhere in Southwark's administrative innards.

30. Rule 34(1) of the Tribunal's Rules requires that a person who wishes to object to an application under section 84 must file a notice of objection within one month of being given notice of the application. Southwark did not do so and therefore did not become a party to the application. In consequence, it received no communication from the Tribunal in connection with the application and was not served with a copy of the order of 24 February 2022 modifying the covenants in the lease.

The Tribunal's Order

31. Where no objection has been received to an application under section 84, the Tribunal's frequent (but not invariable) practice is to consider the application on paper and to determine it without a hearing. That is what happened in this case. The order of 24 February 2022 was made by a Tribunal member without a hearing, on being satisfied after considering the Tribunal's file that that was an appropriate course to take.

32. The Tribunal's order recited that it had read the application of 8 September 2021 and the lease containing the restrictions. The restrictions which the applicant had applied to have modified were then set out in the form in which they had been identified in a schedule to the application. That schedule stated that the restrictions which the applicant sought to have modified were there set out "in full, word for word". These extracts did not comprise the whole of the covenants at clauses 3(i), (k), (n), (o) and (p), but only specific parts, and the only inference which can be drawn from the schedule is that only those parts, and not the remainder of the covenants, were the subject of the application.

33. The application identified the following part of clause 3(i):

> "Not to assign any part or parts (as opposed to the whole) of the demised premises …"

36. The Tribunal modified that text by omitting part of the original and introducing an additional qualification so that in place of the extract above, clause 3(i) would now include the following:

> "3(i) Not to assign any part or parts of the premises demised except where all of the following circumstances apply:
>
> (i) An assignment of part of separate self-contained commercial or residential purposes by way of a sub-tenancy is permitted;
>
> (ii) any such sub-tenancy must expire before the end of this Lease; and
>
> (iii) any such sub-tenancy of any commercial premises is not a protected tenancy for the purposes of the Landlord and Tenant Act 1954, Part 2"

37. No other part of clause 3(i) was modified by the Tribunal's order and, in particular, the remaining words which had not been identified in the application were not referred to, namely: "… and not without the previous written consent of the Lessor to assign the whole or to underlet (other than by way of mortgage) or part with possession of the demised premises or any part thereof PROVIDED that the consent of the Lessor shall not be required to the underletting of the demised premises for a term not extending three years"

38. Clause 3(k), the covenant prohibiting alterations, was recited in full in the order, as it had been in the application. It was modified so that the original restriction is now prefaced by the words:

> "Save in so far as is necessary to implement the planning permission dated 29.5.2020, ref no. 19/AP5641, or to convert the ground floor of the existing building on the demised premises for residential use …"

39. Clause 3(n) was also set out in full in the order, as in the application. In place of the covenant requiring the Lessee to keep the premises open as a "licensed victualling house" only, the modified text substituted a covenant defining the permitted uses of the demised premises by reference to the Town and Country Planning (Use Classes) Order 1987. Thus, the ground floor premises were not to be used other than within classes C1 and C3 (i.e. residential) or for commercial purposes within classes E or F1. The upper storey was not to be used other than within classes C1 and C3 only (residential).

40. The text of clause 3(o), requiring the Lessee to use its best endeavours to obtain a renewal of all licences, was shown in its original form in the Third Schedule of the order and then repeated but with the same text struck through completely in its modified form in the Fourth Schedule. A footnote explained that "for the avoidance of any doubt, the Lease is modified so that clause 3(o) is removed from the Lease".

41. The only part of clause 3(p) which had been set out in the application was the first of the eight stipulations as to the manner in which the business was to be conducted. This was repeated in the order as the part which was to be modified, i.e. "So long as the demised

premises shall be licensed (i) to use the demised premises as a bona fide refreshment house for supplying food and exercisable and non-exercisable liquors to the public". Paradoxically, the modified version of clause 3(p) requested by the applicant made no change to that part of the covenant. Nor did the modified version indicate that the remainder of clause 3(p) was to be "removed from the lease" in the manner indicated for clause 3(o). Thus, although it appeared in the schedule of modifications in the application and in the Fourth Schedule to the order, no changes were made at all to that particular stipulation.

The grounds of the application to set aside the order

42. Mr Rainey KC began his submissions by pointing out that, because the order of 22 February 2022 was not served on Southwark by the Tribunal (it obtained a copy from the Land Registry) the one month time limit in rule 54(3) for the making of an application to set aside had not begun to run and the application was not out of time. Mr Upton did not disagree, and I accept that Southwark does not require an extension of time to make its application. That does not mean that the time which elapsed between Southwark becoming aware that an order had been made, and the date of its application are of no importance, but it will only become relevant if, after considering the threshold conditions, I am satisfied that the Tribunal has a discretion to exercise.

43. On paper, the application to set aside the order had four separate strands, which Mr Rainey KC summarised as: non-service of the application on Southwark; that the Tribunal had been misled by the form of the application; that the order lacked coherence; and that because the order varied positive covenants it was outside the Tribunal's jurisdiction under section 84.

Service

44. A failure by the applicant properly to serve notice of the application on Southwark would satisfy one of the conditions for setting aside an order under rule 54(2)(a) ("a document relating to the proceedings was not sent or delivered to, or was not received at an appropriate time, by a party or a party's representative").

45. In his cross examination of Mr Maunsell, Mr Rainey KC did not challenge his account of having delivered the envelope containing a copy of the application to 160 Tooley Street and obtained a receipt. I am satisfied that the delivery took place but that, for reasons unknown, the documents were never received by Mr Davies for whose attention they were addressed. I am also satisfied that 160 Tooley Street, which was the address given by Southwark in the Proprietorship Register for the Blackhorse at HM Land Registry was an appropriate address for service of documents concerning the land (see the decision of the Court of Appeal in *Oldham Metropolitan Borough Council v Tanna* [2017] 1 WLR 1970).

46. The first point taken by Mr Rainey about service was that no copy of the applicant's statement of case had been included by Mr Maunsell with the certificate he filed on 19 November 2021 confirming that he had complied with the Registrar's direction to serve the application and its supporting documents on Southwark. The proper inference, he

submitted, was that the statement of case had not been served with the application on 12 October, which provided grounds to set the order aside under rule 54(2)(a).

47. I am satisfied that there is nothing in that point. It is for Southwark to prove that there are grounds to set aside the order. Mr Maunsell gave evidence in his witness statement and in person at the hearing that the documents he delivered to Southwark on 12 October included a copy of the statement of case. The covering letter he prepared listing the contents of the envelope referred to the statement of case as among them; it also referred to a number of other documents which were said to be enclosed. It is true that no copy of the statement of case (or of other documents mentioned in the covering letter) was included with the documents certified by Mr Maunsell on 19 November as having been delivered, but that does not establish that no copy was in fact delivered, as Mr Maunsell now says. I am therefore unable to conclude, on a balance of probability, that a copy of the statement of case was not served.

48. Furthermore, service of a statement of case is not a condition precedent to the making of an order under section 84 and notice under rule 33 is often given by advertisement in a newspaper or by displaying information on the land itself, with other documents being supplied only on request. What is required is that the making of the application is brought to the attention of those who may be entitled to the benefit of the restriction.

49. In any event, an omission to include a copy of the statement of case (if that is what happened) would have made no difference to the course this application has taken; it would simply have been one additional document left unread by Southwark. In those circumstances any such omission would be unlikely to justify setting aside the order in the exercise of the Tribunal's discretion.

50. Mr Rainey KC next submitted that service had been ineffective because the address given by the applicant for Southwark in the application form was the PO Box number of its Finance, Governance, and Legal Services department, and the Registrar must be taken to have intended that service would be effected using that address when he gave his direction under rule 33. Use of that address would have ensured that the delivery got to the appropriate destination.

51. I do not accept that service was ineffective because the PO Box address was not used. In his oral submissions Mr Rainey KC did not suggest that service by hand at its principal administrative office which was also the address given for it on the Proprietorship Register for the Black Horse, was not service on Southwark. It cannot therefore be said that that the condition in rule 54(2)(a) is satisfied. The Tribunal did not direct service at any particular address, and the Registrar subsequently approved the certificate of compliance filed by Mr Maunsell stating that service had taken place by hand. In those circumstances it cannot be said that service at an address different from the PO Box specified by the applicant in the application was "some other procedural irregularity in the proceedings" which would bring the case within rule 54(2)(d), or that it would be sufficient to justify a discretionary decision to set the order aside despite proper service having been achieved.

52. In summary, the circumstances in which service of the application took place do not provide any ground in rule 54(2) which would enable the Tribunal to consider whether it was in the interests of justice to set aside the order.

53. Mr Rainey KC additionally submitted that even if service was valid, the fact that the application did not come to the attention of the relevant persons at Southwark would be relevant to the exercise of the Tribunal's discretion to set aside. That is no doubt true, up to a point, but the Tribunal's discretion only arises on being satisfied of one of the conditions in rule 54(2), and in that event, consideration would also have to be given to the circumstances in which an envelope delivered to Southwark's offices, addressed to the correct department and identifying (subject to a spelling mistake) the officer concerned, nevertheless failed to come to the attention of that officer.

"Misleading" application

54. Mr Rainey KC submitted that where a party misleads the Tribunal in its application, a procedural irregularity will have occurred for the purposes of rule 54(2)(d), particularly in circumstances where the Tribunal proceeded on the papers and therefore relied entirely on what the applicant has lodged in support of the application without an opportunity for correction or argument from an opposing party.

55. Three features of the application were relied on as "misleading" in Southwark's application to set aside. They were: the assertion in the application form that the applicant was not in breach of the restrictions which it sought to have modified; failure to quote clauses 3(i) and (p) in full in the schedule identifying the clauses of the lease of which modification was sought; and, the assertion in the statement of case that the restrictions secured no practical benefit for Southwark.

56. In support of the proposition that misleading the Tribunal is a ground for setting aside an order which finally disposes of proceedings, Mr Rainey KC relied on an analogy with the Civil Procedure Rules, and in particular CPR 3.1(7), and on the decision of the Court of Appeal in *Tibbles v SIG* [2012] 1 WLR 2591.

57. CPR 3.1(7) states: "A power of the court under these Rules to make an order includes a power to vary or revoke the order." Mr Rainey suggested that this court rule bears some similarity to the Tribunal's rules 54. It was also common ground decisions in relation to the CPR may provide guidance on the application of Tribunal procedure rules.

58. *Tibbles* was a case under CPR 3.1(7) which concerned the circumstances in which a court could vary or revoke a previous interim decision giving directions. Having referred to earlier decisions on the rule, Rix LJ summarised the position (so far as material to this application) as follows, in para [39]:

> "(i) …. The rule is apparently broad and unfettered, but considerations of finality, the undesirability of allowing litigants to have two bites at the cherry, and the need to avoid undermining the concept of appeal, all push towards a principled curtailment of an otherwise apparently open

discretion. Whether that curtailment goes even further in the case of a final order does not arise on this appeal.

(ii) The cases all warn against an attempt at an exclusive definition of the circumstances in which a principled exercise of the discretion may arise. Subject to that, however, the jurisprudence has laid down firm guidance as to the primary circumstances in which the discretion may, as a matter of principle, be appropriately exercised, namely normally only (a) where there has been a material change of circumstances since the order was made, or (b) where the facts on which the original decision was made were (innocently or otherwise) misstated.

(iii) It would be dangerous to treat the statement of these primary circumstances, originating with Patten J. and approved in this court, as though it were a statute. That is not how jurisprudence operates, especially where there is a warning against the attempt at exhaustive definition. ……..

(vii) The cases considered above suggest that the successful invocation of the rule is rare. Exceptional is a dangerous and sometimes misleading word: however, such is the interest of justice in the finality of a court's orders that it ought normally to take something out of the ordinary to lead to variation or revocation of an order, especially in the absence of a change of circumstances in an interlocutory situation."

59. *Tibbles* therefore indicates that, at least in cases involving an attempt to set aside an interim order of a court, such as an injunction or procedural direction, a misstatement of facts on the basis of which the decision was made, may provide grounds for the court to exercise its discretion. But it also demonstrates that, where there is no material change of circumstances and no prior misleading of the court, the discretion will rarely be successfully invoked. Something unusual is likely to be required to persuade a court to overlook the importance of finality and the undesirability of displacing the proper use of the appeals procedure, and to persuade it to set aside its own order.

60. However informative this guidance may be when the Tribunal exercises its power to amend, vary or set aside its own case management orders (rule 5(2)), I do not accept that *Tibbles* provides useful guidance to the Tribunal on the exercise of its discretion under rule 54, which is concerned only with decisions which finally dispose of proceedings. That is for two principal reasons.

61. First, *Tibbles* was a case about varying or setting aside procedural directions and specifically did not consider whether an even stricter approach was required in the case of final orders (as the final sentence of sub-paragraph (i) above confirms). The *White Book* Commentary at 3.1.17.1 and 3.1.17.2 distinguishes between varying or revoking "interim" and "final" orders and in *Terry v BCS Corporate Acceptances Ltd & Ors* [2018] EWCA Civ 2422, at [75], having referred to *Tibbles* and cases involving attempts to set aside final orders, Hamblen LJ approved that distinction:

> "In summary, the circumstances in which CPR 3.1(7) can be relied upon to vary or revoke an interim order are limited. Normally, it will require a material change of circumstances since the order was made, or the facts on

> which the original decision was made being misstated. General considerations such as these will not, however, justify varying or revoking a final order. The circumstances in which that will be done are likely to be very rare given the importance of finality."

If assistance on the application of rule 54 is to be sought by analogy with the CPR, *Terry* may therefore provide a more reliable comparator than *Tibbles,* and *Terry* indicates that "general considerations", including a misstatement of the facts, will not justify revoking a final order.

37. Secondly, and more generally, there are significant differences between the procedural rules of courts and tribunals, especially in the context of varying and setting aside decisions. Unlike the CPR, the Tribunal's Rules distinguish between varying and setting aside case management decisions (rule 5(2)), on the one hand, and setting aside decisions which finally dispose of proceedings (rule 54). Unlike CPR 3.1(7) the latter power is not "broad and unfettered", and it is not necessary to refer to the CPR jurisprudence to identify the conditions in which it may be exercised. Those conditions are listed in rule 54(2). Only after one of those conditions has been satisfied will the Tribunal consider whether it is in the interests of justice to set aside a final order.

38. The Tribunal's rule 54 covers a variety of situations for which the CPR makes specific and quite different provisions. All decisions of the Tribunal which finally dispose of proceedings are judicial decisions, and unlike the CPR the Tribunal's Rules do not provide for a party to be able to obtain a decision in their favour administratively, in default of some step being taken by another party (as in CPR Pt 12). Nor are separate conditions laid down by the Tribunal's Rules for setting aside a decision made where a party failed to attend a trial, as are found in CPR 39.3(5); instead rule 54(2)(c) does that job. Thus, rule 54 is intended to have a much wider field of application than CPR 3.1(7) and statements about how rarely an application under the court's rule may be expected to succeed cannot simply be read across and applied to the Tribunals' rule.

39. The Tribunal is also empowered by section 10, Tribunals, Courts and Enforcement Act 2007 to review its own decisions and, where it concludes that a particular error was made, to set them aside without the need for a full onward appeal and to re-decide the matter.

40. Considerable care should therefore be taken when looking to decisions about the CPR rules on varying or setting aside judgments and orders for assistance on the application of rule 54. But saying that does not diminish the general importance of achieving finality in the resolution of disputes, which is of equal significance to courts and tribunals.

41. *Terry* might provide some assistance in identifying cases of "some other procedural irregularity in the proceedings" falling within the residual category in rule 54(2)(d) in which the discretion to set aside may arise. Alternatively, it may shed light on the circumstances in which it will be in the interests of justice to set aside a final decision on the basis of some other procedural irregularity. It is not necessary to consider those refinements in any detail because, on consideration of the facts relied on by Southwark in support of its suggestion that the Tribunal was "misled" into making the order, it is quite clear that they come nowhere near providing a justification for setting it aside.

42. The Tribunal's standard form T379 for applications under section 84 asks the applicant whether they are in breach of the restrictions which are the subject of the application. In this case the applicant ticked the box marked "no" in response to that question.

43. Mr Rainey KC criticised that answer as misleading, but the claimant made no attempt to conceal from the Tribunal either that clause 3(n) required the Lessee to keep the premises open as a "licensed victualling house", or that the premises were currently closed and had ceased trading. On the contrary, the applicant specifically pleaded in its statement of case (now said to have been settled by leading counsel) that the Black Horse had not been used as a public house since October 2018 and that the failure to use it for that purpose was not a breach of the Lease. The statement of case was supported by a statement of truth confirming that the applicant believed the facts stated in the pleading were true.

44. I refrain from speculating about how the applicant might have intended to substantiate its pleaded case. It is not necessary to do so, because it is simply impossible to accept Mr Rainey's proposition that it is a procedural irregularity accurately to plead a set of facts supported by a statement of truth and then to assert a conclusion of mixed fact and law which Southwark would have had the opportunity to refute if its administrative arrangements had not been so chaotic. The statement in form T379 was consistent with the applicant's pleaded case and there is no reason to consider that the Tribunal overlooked or was misled by it.

45. The applicant's statement of case also asserted that the restrictions in the Lease for which modification was sought secured no practical benefit for Southwark or, if they did, that an award of money would provide adequate compensation for the disadvantage it would sustain as a result of the proposed modifications. It is now suggested that that too was a misleading statement which amounted to a procedural irregularity, but it was plainly nothing of the kind. The applicant pleaded the case which it intended to deploy before the Tribunal. It was not an implausible or incomplete case, and it is quite credible that a covenant restricting premises to a use which is no longer commercially viable will be of no value or advantage to a landlord. The suggestion that the Tribunal was misled by it is fanciful.

46. Finally, Southwark suggests that the Tribunal was misled because clauses 3(i) and (p) were not quoted in full in the schedule identifying the clauses of the lease of which modification was sought. The effect of this selective quotation is said to have been that the Tribunal was persuaded to delete the consent provision from the alienation covenant, when there was no suggestion that Southwark were unreasonably withholding consent, and to delete the whole of the stipulations regarding the manner in which the licensed premises were to be operated. These propositions are completely untenable. The applicant identified specific portions of the covenants which it wished to have modified; it did not ask that any other parts of the Lease be modified. It supplied, from the relevant Land Registry entries, a full copy of the Lease, parts of which were difficult, but not impossible, to read because of the poor quality of the Land Registry document. I have been able to read the text more or less completely, but at the very least it is clear from the copy that each of the relevant covenants includes substantial text which had not been recited in the application and which was therefore not the subject of the proposed modification. The suggestion that the Tribunal was asked to modify parts of the covenant

which were not reproduced in the schedule, or that its order had the effect of doing so, is based on a misreading of the application and the order and is wrong.

Order "lacking coherence"

47. The third strand of Southwark's application is based on the contention that there had been "a manifest mistake on the part of the judge in the formulation of his order". Mr Rainey KC dubbed this his "incoherence" point.

48. Southwark's proposition was that the effect of the applicant not having correctly and fully set out the lease covenants was that the Tribunal had made an order which was incoherent, in the sense that the changes to the lease made by the order do not dovetail with what is left over of the existing text. This point is therefore the converse of the previous proposition that the Tribunal was misled by selective quotation into making an order which modified the covenants more extensively than had been foreshadowed in the application. It is now said that, by leaving so much of the original text unaltered, the order did not leave obligations which make sense. That proposition is equally unsustainable.

49. The Tribunal's order modified the covenants precisely as had been requested in the applicant's statement of case. Those parts of the covenants which were not included in the Fourth Schedule to the order were not modified and remain part of the Lease. As a piece of drafting the end result is inelegant, but it is not difficult to understand if it is read with a view to identifying its intended meaning rather than with a predisposition to finding it incomprehensible.

50. Combining the modified part of clause 3(i) with the part which was not the subject of the application (reproduced below in italic script) produces the following obligation:

> "3(i) Not to assign any part or parts of the premises demised except where all of the following circumstances apply:
>
> (i) An assignment of part of separate self-contained commercial or residential purposes by way of a sub-tenancy is permitted;
>
> (ii) any such sub-tenancy must expire before the end of this Lease; and
>
> (iii) any such sub-tenancy of any commercial premises is not a protected tenancy for the purposes of the Landlord and Tenant Act 1954, Part 2
>
> *and not without the previous written consent of the Lessor to assign the whole of the demised premises or underlet (otherwise than by way of mortgage) or part with possession of the demised premises or any part thereof PROVIDED that the consent of the Lessor shall not be required to the underletting of the demised premises for a term not exceeding three years*."

51. The modified part of the covenant prohibits "assignment" of part except where three conditions are met. It is clear from the first of those conditions that what will be permitted if they are all satisfied is not an assignment at all, but a subletting. That is

explicit – "An assignment of part … by way of a sub-tenancy is permitted" and "any such sub-tenancy must expire before the end of this Lease", so there is no room for confusion about what transaction is contemplated, however ineptly the applicant chose to describe it.

52. Next, the text which survives from the original form of the covenant then requires that the consent of the Lessor be sought to any assignment, underletting or parting with possession of the whole or part of the premises unless it is by underletting for less than three years. There is no inconsistency between that requirement and the modified part which precedes it. Their effect in combination is that, if what is proposed is a sub-tenancy of part of the demised premises, in addition to satisfying the three newly introduced conditions, the Lessee will have to seek the Lessor's consent, unless the proposed sub-tenancy is for less than three years. The modification does not bite on any other form of alienation, and in such a case the only requirement will be to obtain the Lessor's consent.

53. Mr Rainey KC suggested that reading the modified clause in that way would mean that paradoxically the Tribunal's order would have made it more restrictive, rather than less restrictive, but that is clearly not the case. In its original form, alienation of part of the demised premises was absolutely prohibited, and there was no contractual opportunity for the Lessee to request consent to sublet the upper floor separately from the ground floor. Now, if the first three conditions are met, the two floors can each be let separately, if Southwark consents (and by section 19(1)(a), Landlord and Tenant Act 1927, Southwark will not be entitled to withhold its consent unreasonably). There is nothing "incoherent" in that and it provides the Lessee with considerably more flexibility in the use of the premises than it previously enjoyed.

54. The only suggested "incoherence" in the modification of clause 3(p) was that, if it was construed as relating only to the opening words of the clause, it made no change to the Lease at all. That would indeed appear to be the effect of the modification requested by the applicant. It is certainly peculiar, but it does not seem to me to amount to a procedural irregularity, or to provide any basis on which the Tribunal could set aside the order.

Jurisdiction

55. The final strand of Southwark's application, and the only ground which raises arguments of substance, is that parts of the Tribunal's order were made without jurisdiction. Those parts were said to be the modifications to clauses 3(i), (n), (o) and (p). It was not suggested that the Tribunal did not have power to modify clause 3(k), the covenant against alterations, but Mr Rainey KC nevertheless argued that the proper course would be to set aside the whole of the order rather than leave one small portion in force.

56. The Tribunal's jurisdiction under section 84(1) allows it "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."

57. By section 84(12), that jurisdiction is extended to covenants in leases of more than 40 years: "… this section shall, after the expiration of twenty-five years of the term, apply to restrictions affecting such leasehold land in like manner as it would have applied had the land been freehold." The correct reading of section 84(12) may be that the power applies to restriction which affect the leasehold land "in like manner" to those described in section 84(1), or it may be that it applies "in like manner" as if the land had been freehold, but in either case the effect is the same. Section 84(12) does not give the Tribunal power to modify or discharge all restrictions affecting leasehold land, but only those which are "restrictions … as to the user thereof or the building thereon".

58. As Mr Rainey KC acknowledged, clause 3(k) is a restriction "as to … the building thereon" and the modification made was undoubtedly within the Tribunal's jurisdiction. But, he submitted, clause 3(i), the alienation covenant, was not a restriction "as to the user" of the Black Horse, and clauses 3(n), (o) and (p) were positive covenants which required the Lessee to use the Black Horse as a public house, rather than simply to refrain from using it for other purposes, and so they were not "restrictions" in the sense in which section 84(1) has been interpreted.

Clause 3(i)

59. Dealing first with clause 3(i), the modification made by the Tribunal's order was to that part of the covenant which prohibited the assignment of "any part or parts (as opposed to the whole) of the demised premises". Examples of cases in which the Tribunal and its predecessor have considered whether similar restrictions are to be treated as restrictions on use within the scope of section 84(1) are noted in *Preston & Newsom: Restrictive Covenants* (2020, 11th ed.) at 11-012, where the authors observe that "The parameters of any jurisdiction in relation to restrictions on occupation and disposal have yet to be fully explored."

60. Until 1950, jurisdiction under section 84(1) was given to an arbitrator, referred to as "the authority" and the earliest reported decisions are of cases heard from that year on by this Tribunal's statutory predecessor, the Lands Tribunal. The earliest relevant example identified by *Preston & Newsom* is *Re Hickman & Sons, Ltd's Application* (1951) 7 P & CR 33 in which a covenant prohibiting ownership of more than one building plot on an estate was discharged by the Lands Tribunal (J.P.C. Done FRICS) without consideration of whether it was a restriction "as to the user".

61. The next case which it is necessary to mention, *Stannard v Issa* [1987] 1 AC 175 (PC), is not a decision of a Tribunal, but a judgment of the Privy Council, on appeal from a decision of the Court of Appeal of Jamaica under the Jamaican equivalent of section 84(1). Reversing the trial judge, the Court of Appeal had ordered the discharge of a series of freehold covenants including one which provided that individual building plots on a private estate "shall not be sub-divided". Before the Privy Council there was no challenge by the appellant to the jurisdiction of the courts below to entertain the application, notwithstanding that the relevant statute conferred power to modify only a "restriction … as to the user" of land. The issues in the appeal concerned the various statutory grounds on which the restrictions had been discharged and nothing said by Lord Oliver, who delivered the judgment of the Board, suggests that he was in doubt about the jurisdiction to discharge a covenant prohibiting sub-division. The only

possible indication why the Board may have considered that the restriction being debated was "as to user" is at the end of Lord Oliver's judgment where he considered the scope of what in section 84(1) is ground (c) ("the proposed discharge or modification will not injure the persons entitled to the benefit of the restriction"). He said this, at p.188H:

> "Whilst the trial judge found that some of the objections raised on behalf of the objectors were of an insubstantial nature, on no analysis could it be said that the principal objection to a modification which would permit an unrestricted sub-division of (*and thus an unrestricted density on*) the subject land was frivolous or vexatious." (emphasis added)

It may be that the appeal in *Stannard v Issa* proceeded on the basis that a covenant against subdivision of a plot was, effectively, a density restriction, and thus a restriction on "user". None of the restrictions of which modification was sought specifically referred to the assignment of part or the grant of leases, and the proposed use of the land which was under consideration involved the construction on one plot of blocks of flats containing 40 residential apartments for separate occupation. The focus was therefore on the use which was to be made of the land, and the extent of the building which would be permitted on it, and not on alienation.

62. In *Re Barclays Bank PLC's Application* (1990) 60 P & CR 354 the Lands Tribunal (V.G. Wellings QC, President) discharged two restrictions which had been imposed by an agreement under section 52 of the Town and Country Planning Act 1971 as a condition of the grant of planning permission for a new farm dwelling in a rural area, one of which prohibited any sale, assignment or letting of the new dwelling except with substantially the whole of the farm. In the course of the decision the President said that the "restrictions impede some reasonable use of the bungalow and its site for ordinary private purposes in that the restrictions prevent it from being used for ordinary domestic residential purposes free from the restrictions". There was no consideration of the question whether a prohibition on dealing with one parcel of land separately from a larger parcel was a "restriction as to the user thereof".

63. *Re Milius's Application* (1995) 70 P & CR 427 concerned the proposed discharge of a restriction which prevented disposal a flat above a shop (other than to a local resident) without the written consent of the council which had sold it to the applicant under the statutory right to buy scheme. The application was dismissed on substantive grounds, but the Lands Tribunal (HH Judge Marder QC, President) entertained "considerable doubt" as to whether it had jurisdiction to modify the restriction because it:

> "… does not purport to restrict the user of the property in any way, but is a restriction on the 'relevant disposal', in effect a conveyance of the freehold or the grant of a lease for more than 21 years."

Having expressed that doubt, the President went on:

> "It is perhaps arguable that the user of the property may in practice be limited or restricted by the restriction on free disposition of a legal interest.

> On the other hand some limitation on user may be seen as a possible indirect consequence of the restriction on disposal and not as the effect or the purpose of the covenant. As Mrs Williams [solicitor for the objecting authority] put it, reasonable user of the property could not be said to be impeded by this restriction, but only if an application for consent to a disposal were unreasonably refused. The issue is not without difficulty, and I am unaware of any direct judicial authority."

64. The Lands Tribunal's unreported decision in *Re Dart's Application* (2006) LP/68/2005 again concerned a planning condition which prevented the sale, letting or disposal of a shop, tearoom and living accommodation otherwise than as a whole. The Tribunal (Mr P. Francis FRICS) followed the same course as in *Milius;* it expressed the view, at [37], that a condition which was "restrictive of disposal rather than of user, … on the face of it would not appear to fall within section 84(1)" but dismissed the application on other grounds without reaching any firm conclusion on that point.

65. In *Lee's Application* [2012] UKUT 125 (LC) this Tribunal (George Bartlett QC, President) refused an application to modify leasehold covenants which, amongst other things, prohibited underletting of a flat or its use otherwise than for the sole occupation of the tenant and his family. The single ground on which the application was advanced was not made out on the facts, and it does not appear to have been suggested that the Tribunal lacked jurisdiction.

66. In *Shaviram Normandy Ltd v Basingstoke and Deane Borough Council* [2019] UKUT 256 (LC) the Tribunal expressed a concluded view, albeit without much discussion, on its jurisdiction to modify a leasehold covenant to dispense with the need for the lessee to obtain the consent of the lessor to the terms and rent at which a former office building could be under-let. At [147] we said that: "We are not satisfied that a covenant the effect of which is to require consent to the terms and rent of a proposed underletting before that underletting can proceed, but which is subject to the proviso that consent cannot be unreasonably withheld or delayed, is a restriction "as to the user" of the land in question (as it must be for the Tribunal to have jurisdiction under section 84(1))." The point had arisen at a very late stage in the proceedings and had not been the subject of reasoned argument. Nor was it the only basis on which the Tribunal refused that aspect of the proposed modification.

67. In both *Hickman* and *Barclays*, the Tribunal exercised its power to discharge or modify a restriction on alienation or subdivision, but in neither case was the issue of jurisdiction considered. In *Milius* and *Dart* the existence of the jurisdiction was doubted, but no conclusion was reached, while in *Lee,* the issue was again left unaddressed, but the application was dismissed on other grounds. In *Shaviram* the absence of jurisdiction was given as one reason for refusing to modify a particular form of alienation covenant.

68. The final and most recent consideration of the scope of section 84(1) was my own decision in *Young Camiade's Application* [2023] UKUT 96 (LC) (which post-dated the making of the order in the current case). The application was for the discharge of a covenant which prohibited the registration of a transfer of a registered lease without the consent of the covenantee. The application was not contested but the Tribunal raised

the issue of its own jurisdiction to discharge the restriction. Having referred to the doubt expressed by the Tribunal in *Milius*, I addressed that issue at [18]-[19] as follows:

> "18. Section 84(1) allows the modification or discharge of a restriction affecting land where the restriction is "as to the user thereof or the building thereon". The section as a whole is concerned with what may lawfully be done on land, and in that context both "user thereof" and "building thereon" appear to be intended to refer directly to the activity being conducted on the land and for which it is being used. The same focus on physical activity is apparent in Shephard v Turner [2006] 2 P & CR 28, at [58], where Carnwath LJ said that the reference in ground (aa) of section 84(1) to "reasonable user" "seems to me to refer naturally to a long term use of land, rather than the process of transition to such a use".
>
> 19. In my judgment the restriction in this case is clearly not a restriction "as to the user" of No. 1 Acacia Grove. It is concerned only with the completion of a disposition by registration in the register of title. It does not impinge, directly or indirectly, on what the flat may lawfully be used for. I am not persuaded that the effect of such a restriction in limiting who may become the registered proprietor of the flat is relevant or that any possible practical impact which such a limitation may have on the use which may be made of the flat is sufficient to bring the restriction within the Tribunal's power. Even if, in practice, the effect of the restriction was that the flat could not be sold and was left unoccupied for a time, that would not demonstrate that the restriction itself was a restriction on the use of the land."

69. On behalf of the applicant, Mr Upton submitted that, although the restriction in clause 3(i) does not *directly* affect the activity being conducted on the land, the use of the property was in practice restricted by the prohibition on the sub-letting of part. He also relied on the fact that it had not been suggested in *Lee* that a covenant against sub-letting was beyond the scope of section 84(1), although he acknowledged that since the application had been dismissed and the issue of jurisdiction had not been considered, that was perhaps not a very weighty point.

70. It may be that a distinction can be drawn between a restriction on alienation (the transfer of title to the land or the grant of a tenancy or sub-tenancy) and a mere restriction on sub-division (which would explain the absence of any discussion of jurisdiction in *Stannard v Issa)*. The latter may properly be regarded as a restriction on the use of the land, because it prohibits the creation of separate units of occupation and is not expressly concerned with the ownership of those separate units. The former is much more difficult to treat as a restriction on use. If the approach suggested in *Young Camiade* is correct, a restriction on assignment or letting is of a type which is not concerned with the activity conducted on the land or with what it is being used for, but only with the ownership of one interest in the land, which may not be the interest of the person using the land at all.

71. I prefer to say nothing further about a covenant which restricts sub-division, because it is not necessary to do so to determine Southwark's application. I nevertheless accept Mr Rainey KC's submission that a covenant in the terms of clause 3(i), which prohibits

the assignment of "any part or parts (as opposed to the whole) of the demised premises", is not a restriction as to the user of the land. I do not accept Mr Upton's submission that it is sufficient to confer jurisdiction that the practical effect of a restriction may inhibit a particular type of use, and I adhere to what I said in *Young Camiade* at [19].

72. In my judgment clause 3(i) was not a restriction which the Tribunal had jurisdiction to modify.

Clauses 3(n), (o) and (p)

73. Southwark's ground of objection to the modification of the covenants requiring the demised premises to be used as a licensed victualling house only and to be kept open as such so long as the necessary licences could be obtained (clause 3(n)), to use its best endeavours to obtain a renewal of all licences (clause 3(o)), and for so long as the demised premises shall be licensed, to use them as a bona fide refreshment house for supplying food and liquor to the public (clause 3(p)(i)), is that each of these stipulations imposes a positive obligation on the Lessee. It is not in dispute that section 84(1) does not give the Tribunal jurisdiction to discharge or vary positive covenants.

74. A relatively early example of the Lands Tribunal recognising that it had no power to modify a positive covenant is *Re Blyth Corporation's Application* (1962) 14 P & CR 56 in which the Tribunal dismissed an application to discharge a covenant to erect and maintain a boundary fence on the grounds that it fell outside the jurisdiction. *Young Camiade* is a more recent example.

75. Mr Upton submitted that the substance of clause 3(n) was the restriction that the premises were to be used as a "licensed victualling house only", which was plainly negative, and that the remainder of the restriction and the whole of clauses (o) and (p) were, as he put it, "parasitic" on the opening words of clause 3(n) and should be considered as part of a single composite prohibition on any use other than as licensed premises. I do not accept that submission.

76. A keep open covenant is undoubtedly positive, whether it is included in the lease of a pub or of any other sort of premises. In *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1998] AC 1, Lord Hoffmann described such a covenant in the lease of a supermarket as "a positive obligation to keep the premises open for retail trade during the ordinary hours of business".

77. The text of clause 3(n) is quoted in full at [17] above, and it is apparent that it contains different types of obligation. I accept that the opening portion, down to the word "only", are restrictive; they prevent the use of the premises for any purpose other than as a licensed victualling house. But the remainder of the covenant goes much further than simply emphasising that negative obligation. It requires the Lessee positively to keep the premises open as a pub and to conduct the business of a pub or to cause someone else to do so. The covenant also requires the achievement of a positive outcome, namely, preserving "the character of the said premises with the licensing

authorities and the public". That could not be achieved except by causing the premises to be operated a pub.

78. Whether, despite imposing positive obligations, a keep open covenant could nevertheless be brought within the scope of section 84(1), was a question to which the answer did not seem to me to be entirely obvious. Such a covenant would preclude the use of the premises for any other sort of business (or at least any other business incompatible with the continued use of the premises as a pub). While the keep open part of the covenant was being complied with the premises could not, for example, be used as a school, or to provide accommodation for recovering alcoholics. The possibility that such a keep open covenant did impose a restriction on the use of the land was addressed during the hearing.

79. Mr Rainey KC relied on *Westminster City Council v Duke of Westminster* [1991] 4 All ER 136 which concerned a head lease of 604 residential flats on the Millbank Estate which had been constructed by the Duke and the City at their joint expense following a private Act of Parliament, and which were let by the Duke to the City on terms which included a covenant that the demised premises would be "kept and used only for the purposes of the Grosvenor Housing Scheme as dwellings for the working classes." The question arose whether the Lands Tribunal had jurisdiction to modify or discharge the covenant under section 84. Harman J held that it did not because the obligation undertaken by the covenant was positive in nature, as indicated by the word "used", which he considered carried a connotation of a duty to use. The parties were in agreement that "the Lands Tribunal can only modify restrictive covenants" (page 147f) and, having construed the relevant part of the covenant as positive it followed that that part fell outside the jurisdiction of the Tribunal (although other negative restrictions in the same covenant could be the subject of an application, page 149j). It is clear that Harman J did not consider that the restrictive consequences of a positive obligation were sufficient to bring it within the scope of the section. At page 147e he said this:

> "It is of course true that a duty to use land for some purpose necessarily means that the land shall not be used for other purposes. Nevertheless the duty to use remains a positive obligation although a negative implication may flow from it."

80. A subsequent appeal to the Court of Appeal in the *Westminster* case was substantially settled on terms agreed between the parties; one esoteric point could not be resolved because the parties were not free to contract out of the private Act, but the appeal was unopposed and the decision on that point was reversed: (1992) 24 HLR 572 (CA). Nevertheless, Harman J's dictum is cited in the leading textbooks in support of the proposition that a positive covenant cannot be modified, even if its main effect might be negative. More importantly, it was specifically relied on with evident approval by the Court of Appeal in *Blumenthal v Church Commissioners for England* [2005] 1 EGLR 78 in which the issue was whether the Lands Tribunal had jurisdiction to modify a restriction which limited the use of a basement flat to the provision of accommodation for a caretaker in connection with a business conducted elsewhere in the building. In the course of his judgment, at [24], Sir William Aldous, with whom Waller and Carnwath LJJ agreed, said this of section 84:

> "It confines the Land Tribunal's jurisdiction to covenants which restrict user. Thus it would be natural when deciding this case to consider whether the covenant related to use of the land and then go on to decide whether it was restrictive. There is no dispute about user. In one sense all covenants as to user are restrictive. For example the covenant to paint a house blue is a positive obligation requiring the tenant to paint the house a particular colour and it is also a negative obligation preventing the tenant painting the house any other colour. The fact that positive covenants have a negative effect was recognised by Harman J in the *Westminster* case in the passage of his judgment set out above. The authorities show that the Lands Tribunal and the Courts have excluded from the jurisdiction of the Lands Tribunal covenants which are positive even though they also contain a restrictive element. No doubt that is because the Lands Tribunal's jurisdiction is confined to modifying restrictive covenants."

81. Since Harman J's concise statement in the *Westminster* case more than 30 years ago it has been accepted that the practical effect of a positive covenant in preventing the use of the land for any other purpose is not a sufficient consideration to confer jurisdiction on the Tribunal to modify or discharge such a covenant. It might be argued that that approach gives greater weight to form than to substance, but there is undoubtedly a substantive difference between a covenant to run a pub and a covenant to use premises for no purpose other than the running of a pub. It was not argued by Mr Upton that Harman J was wrong, nor was *Blumenthal* referred to in argument. I therefore accept Mr Rainey KC's submissions on this point.

82. To the extent that clause 3(n) is restrictive (i.e. so far as it requires the Lessee "to use the demised premises or cause or permit the same to be used as a licensed victualling house only") the Tribunal had jurisdiction to modify it. But for the reasons I have given it had no jurisdiction to modify the rest of the clause. The introduction of the new restrictions in clauses 3(n)(i) and (ii) preventing the use of the premises other than within the specified use classes might be seen as a modification of the original prohibition on use other than as a licensed victualling house. But they are also plainly inconsistent with what must remain of clause 3(n), the positive obligation to trade and keep open as licensed premises (except to the very limited extent that they permit the ground floor to be used as licensed premises). The Tribunal had no jurisdiction to modify that part of the covenant and for that reason, or because the two halves cannot exist side by side, the covenant should not have been modified in the way it was by the order.

83. The most the Tribunal had jurisdiction to do was to modify clause 3(n) so that it read:

> "So long as the requisite licences could be obtained to … keep the demised premises open as a licensed victualling house during all lawful hours and conduct or cause to be conducted the business thereof in a lawful and orderly manner and so as to preserve or cause to be preserved the character of the said premises with the licensing authorities and the public".

84. The Tribunal's order purported to discharge clause 3(o) in its entirety. In my judgment the Tribunal had no jurisdiction to release the applicant from its positive obligation to

use its best endeavours to obtain a renewal of all requisite licences and to appeal any refusal.

85. For the reasons given in paragraph 54 above, the Tribunal's order made no modification to clause 3(p). No issue of jurisdiction therefore arises.

Conclusions

86. Mr Rainey KC invited me to set aside the whole of the order. I am not prepared to do that. With the exception of the issue of jurisdiction, none of the grounds on which Southwark relied disclosed a procedural irregularity within rule 54(2)(a) or (d). Those parts of the order which were within the Tribunal's jurisdiction were obtained in compliance with the Rules and the directions of the Registrar. There is no power to set them aside because the conditions in rule 54(2) are not met with respect to them.

87. Even if there is such a power, perhaps because the order as a whole contains parts which exceeded the Tribunal's jurisdiction, in my judgment it would not be in the interests of justice to set aside those parts which were obtained regularly. The applicant relied on the modifications to clause 3(k) when carrying out alterations which converted the Black Horse into two flats. Southwark obtained a copy of the order on 15 June 2023 but it delayed in making its application to set the order aside until 1 November, four and a half months later. There has been no explanation of that delay (it is not enough to say that Southwark prioritised its response to the enfranchisement claim notice). Between June and November the applicant commenced proceedings in the County Court in relation to the proposed enfranchisement. In these circumstances, the interests of justice do not require that the order be set aside except to the extent that it was made without jurisdiction.

88. For his part, Mr Upton submitted that the order ought not to be set aside at all because of the prejudice which would be caused to the applicant and its associated companies.

89. I do not accept that the Tribunal could properly leave in place an order which it is apparent on its face was made in part without jurisdiction. The Tribunal has no power to make an effective order altering the relations between the parties to any extent which is not provided for by section 84. Southwark is entitled to say that, to the extent that the order exceeded the Tribunal's jurisdiction, it was of no effect and that the covenants which it purported to vary were not varied but have remained at all times in their original form.

90. Mr Rainey KC drew my attention to Lewison LJ's observation in *Golding v Martin* [2019] Ch 489 (CA) at [22], with regard to a possession order made without jurisdiction, that "in general court orders must be obeyed unless and until set aside" and he felt he was constrained to accept for the purposes of this application (as he had been in the Court of Appeal in *Golding*) that it was "debatable" whether the parts of the order made without jurisdiction were a nullity. I disagree. This is not a case of an order of a court (or tribunal) which must be obeyed. It is an order which purports to change the parties' relationship to a greater extent than Parliament has allowed. Moreover, that defect is clear on the face of the order. A better analogy is the decision

of the Court of Appeal in *Nicholls v Kinsey* [1994] QB 600, in which it was held that a tenant had been entitled to apply to the court for a new tenancy under Part 2, Landlord and Tenant Act 1954 despite the court having previously authorised an agreement between the parties excluding that right under section 38. As the order recited, the tenancy which the court had authorised was a periodic tenancy, not a term of years, and so the order was made without jurisdiction. The consequence, as Hirst LJ put it at page 607A, was that the order was "inherently invalid" and did not prevent an inconsistent application for a new tenancy being made without the order first having been set aside. Sir Michael Kerr said that the order "bore the brand of invalidity on its forehead"; it was therefore "always a nullity" (page 608G-609C).

91. I am therefore satisfied that a new order must be made under rule 54. That order will set aside the original order in part and remake it, confirming for the avoidance of doubt that clauses 3(i), (o) and (p) remain in their unmodified form and that clause 3(k) remains in its modified form, and modifying clause 3(n) so that it is takes the form shown in paragraph 83 above. The Tribunal's order will then properly reflect the parties' rights as they have been since the order of 24 February 2022 was made.

92. There are two further matters which I should mention.

93. First, as I have previously explained, under the Tribunal's Rules only a person who gives a notice of objection becomes a party to a section 84 application; and only parties are notified of the outcome of an application. Most section 84 applications concern freehold covenants and notice of an application will often be given to a large number of potential objectors, including by advertisement or the display of public notices. It would not be practical for the Tribunal then to communicate its final order individually to all potential beneficiaries of a covenant who chose not to identify themselves as objectors. But it may be possible to find ways of publicising the outcome of an application more widely than at present. Leasehold cases are much less common, and there would be no practical obstacle to the Tribunal sending a copy of its decision to the landlord identified in the application, whether or not they have filed a notice of objection. It is clearly not desirable that landowners should be left in ignorance that their rights have been modified or discharged and, although no provision is made in section 84 itself for publicising orders, the Tribunal will consider whether changes should be made to its own administrative arrangements and to the directions given to successful applicants in both leasehold and freehold cases.

94. Secondly, during the hearing it became clear that Southwark was unaware that the Tribunal had made two orders on 24 February 2022. The second order, in separate proceedings, modified the lease of another public house, the King William IV in Harper Road, Southwark. The lease was in a slightly different form to that of the Black Horse but the circumstances of the application and the making of the Tribunal's order were almost identical. The parties should urgently consider whether they can agree a draft form of order setting aside the original in that case and remaking it within the limits of the Tribunal's section 84 jurisdiction. If they cannot, Southwark should make an appropriate application without delay.

Martin Rodger KC,

Deputy Chamber President

5 February 2024

Right of appeal

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