FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case reference	:	**LON/00AE/OAF/2024/0600**
HMCTS code (paper, video, audio)	:	**Video hearing**
Property	:	**569 Kingsbury Road, London, NW9 9EL**
Applicant	:	**Mayuri Nitin Shah**
Representative	:	**Michael Buckpitt of Counsel, instructed by Sinclairs Solicitors**
Respondent	:	**The Warden and the College of the Souls of all Faithful People deceased of Oxford**
Representative	:	**Ellodie Gibbons of Counsel, instructed by Farrer & Co LLP**
Type of application	:	**Section 21(1) of the Leasehold Reform Act 1967**
Tribunal members	:	**Judge N Hawkes** **Mr D Jagger MRICS**
Date of hearing	:	**26 March 2025**
Date of decision	:	**7 April 2025**

DECISION

Summary of the Tribunal's decision

The Tribunal determines, pursuant to section 21(2) of the Leasehold Reform Act 1967, that the proposed restrictive covenant which forms the subject matter of these proceedings shall not be included in the freehold transfer.

Background

1. The Respondent is the freehold owner of the property known as and situate at 569 Kingsbury Road, London, NW9 9EL ("the Property"). The Applicant is the leasehold owner of the Property pursuant to a lease dated 11 February 1939 which was granted for a term of 99 years from 25 March 1935 ("the Lease"). The Property comprises a lock-up shop with flats situated above it.

2. The Applicant served a Notice of Tenant's Claim to acquire the freehold interest in the Property dated 31 March 2023 and the Respondent served a Notice in Reply dated 21 August 2023.

3. By an application dated 21 August 2023, the Applicant applied to the Tribunal for a determination pursuant to section 21 of the Leasehold Reform Act 1967 ("the 1967 Act").

4. The premium which is payable for the freehold interest in the Property has been agreed in the sum of £400,000 and the only matter remining in dispute is whether or not a restrictive covenant should be included in the transfer.

5. The Respondent initially sought to include a restrictive covenant against alterations in the following terms:

   "Not to erect any New Building nor make any alterations or additions to the exterior of any Building or any New Building on the Property without the previous consent in writing of the Transferor such consent not to be unreasonably withheld."

6. At the commencement of the hearing, the Tribunal was informed that the Respondent is prepared to agree that the proposed restrictive covenant should be in the following terms, which reflect the wording of the relevant covenant in the Lease:

   "And will not make or build or permit to be made or built any additional erection on any part of the said premises without the express consent in writing (not to be unreasonably withheld) of the Lessors or their surveyors or Agent And will not cut maim or alter or suffer to be cut maimed or altered any part of the principal timbers or walls of the said house shop and buildings or of the boundary walls or fence of the said premises or make any alterations in the plan or elevation of the said premises or in the architecture decoration thereof without such consent (not to be unreasonably withheld) as last aforesaid"

7. It was later agreed that the proposed restrictive covenant would also need to include wording to reflect the statutory protections which would apply to the relevant covenant in the Lease.

The hearing

8. The final hearing of this matter took place by video on 26 March 2025. The Applicant was represented by Mr Buckpitt of Counsel, instructed by Sinclairs Solicitors, and the Respondent was represented by Ms Gibbons of Counsel, instructed by Farrer & Co LLP.

9. The hearing was also attended by the Applicant, Mr R Lankani of Sinclairs Solicitors, and Mr J Mellor of Maunder Taylor for the Applicant. Ms K Chatters, Ms E James and Mr T Dobson of Farrer & Co LLP, and Mr E Roberts of Cluttons LLP also attended on behalf of the Respondent. An observer who played no part in these proceedings attended part of the hearing.

10. No inspection of the Property was requested by either party. Colour photographs were provided and the Tribunal is satisfied that it is neither necessary nor proportionate to the issue in dispute for an inspection to be carried out by the Tribunal.

11. At the commencement of the hearing, the Respondent orally applied for an extension of time in order to enable a document dated 19 March 2025 headed "Witness Statement of Einar Roberts" to be admitted in evidence. This application was opposed by the Applicant.

12. Having considered and given effect to the overriding objective pursuant to rule 3 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ("the 2013 Rules"), the Tribunal determined that it would be fair and just to extend time pursuant to rule 6(3)(a) of the 2013 Rules so as to admit this document in evidence.

13. The overriding objective includes provision that dealing with a case fairly and justly includes dealing with the case in ways which are proportionate to the importance of the case and seeking flexibility in the proceedings.

14. The outcome of these proceedings will have long term consequences and the Applicant was in a position to address Mr Roberts' evidence, having obtained an expert report dated 24 March 2025 from Mr Jason Mellor AssocRICS of Maunder Taylor in response. Accordingly, the Tribunal extended time for service pursuant to rule 6(3)(a) of the 2013 Rules so as to admit the document headed "Witness Statement of Einar Roberts" and the expert report of Mr Mellor in evidence.

15. It was not in dispute that, having prepared an expert report, Mr Mellor should give expert evidence and the Tribunal permitted him to do so. After the Tribunal had informed the parties of its decision to extend time, Ms Gibbons submitted that insofar as Mr Roberts' evidence is opinion evidence it should be treated as expert opinion evidence. This was disputed by Mr Buckpitt on behalf of the Applicant. Mr Mellor had

limited time available in which to attend the hearing and it was agreed that the status of Mr Roberts' evidence would be considered after the parties' closing submissions. The Tribunal's determination on this issue is set out below.

16. The Tribunal heard oral evidence from Mr Roberts and from Mr Mellor.

The law and the issues in dispute

17. Section 10 of the 1967 Act includes provision that (emphasis supplied) –

"(4) As regards restrictive covenants (that is to say, any covenant or agreement restrictive of the user of any land or premises), a conveyance executed to give effect to section 8 above shall include—

…

(b) such provisions (if any) as the landlord or the tenant may require to secure the continuance (with suitable adaptations) of restrictions arising by virtue of the tenancy or any agreement collateral thereto, being either—

(i) restrictions affecting the house and premises which ***are capable of benefiting other property and (if enforceable only by the landlord) are such as materially to enhance the value of the other property****;*

(5) Neither the landlord nor the tenant shall be entitled under subsection (3) or (4) above to require the inclusion in a conveyance of any provision which is unreasonable in all the circumstances, in view—

(a) of the date at which the tenancy commenced, and changes since that date which affect the suitability at the relevant time of the provisions of the tenancy; and

(b) where the tenancy is or was one of a number of tenancies of neighbouring houses, of the interests of those affected in respect of other houses."

18. Ms Gibbons summarised the relevant case law as follows.

"From the case law, the following principles emerge:

1) The concept of a material enhancement in value of other property includes the concept of maintaining a value which would otherwise deteriorate: see *Peck v Trustees of Hornsey Parochial Charities* (1971) 22 P&CR 789, *Le Mesurier v Pitt* (1972) 23 P&CR 389, *Moreau v*

Howard de Walden Estates Ltd (LRA/2/2002) and *Kutchukian v John Lyon's Free Grammar School* [2012] UKUT 53 (LC);

2) The concept is to be applied as a matter of general impression and not by attempting a detailed valuation exercise i.e. the quantification of enhancement in value is not needed: see *Moreau* at paragraph 185, *Higgs v Paul* [2005] Lands Tribunal LRA/2/2005 (unreported) at paragraph 60 and *Cadogan v Erkman* [2011] UKUT 90 (LC) at paragraph 105;

3) Material enhancement does not include a ransom position so as to enable the freeholder to charge the nominee purchaser or his successors for consent, for example, to convert the enfranchised property to a single house: *Kutchukian*;

4) Material enhancement in value must be distinctly proved; see *Cadogan v Erkman* [2011] UKUT 90 (LC) and *Trustees of Sloane-Stanley Estate v Carey-Morgan* [2011] UKUT 415 (LC) where it was said at paragraph 152 *"mere assertions by counsel on behalf of the freeholder are not evidence and are not sufficient."*; and

5) The expression *"suitable adaptations"* is a narrow one: see *Le Mesurier v Pitt* and *Moreau*. It gives a tribunal no general power to modify a covenant. It refers only to adaptations which may be required in order to take account of the rebirth of the relevant covenant as a covenant affecting a freehold, as opposed to a covenant in a lease.

In *Higgs* the relevant restrictive covenants in the lease included restrictions on additions, extensions and external structural alterations without the landlord's consent. The Upper Tribunal held that these should be included in a conveyance on enfranchisement as in the circumstances the restrictions were reasonable and were capable of benefiting and materially enhancing the landlords' neighbouring property, which consisted only of a single house."

19. A discussion took place with Counsel concerning the authorities, including concerning the nature of the evidence which is needed to prove material enhancement and the potential relevance of planning control. We accept Ms Gibbons' submissions that planning control is not a substitute for a restrictive covenant; that the concept of material enhancement is to be applied in a general manner; and that there is no requirement for a restrictive covenant to have been included by the freeholder in other transfers or for a property to be situated in Prime Central London in order to be subject to a restriction on alterations.

20. The Tribunal agrees with and adopts the helpful summary of the law provided by Ms Gibbons which is set out above.

21. The Respondent owns buildings on either side of the Property and the Respondent's position is that the value of that neighbouring property would deteriorate without the ability to control, reasonably, any development of the Property. The Respondent states that, consequently:

    i. the Lease contains a restriction on alterations without consent;

    ii. the restriction which it is proposed be included in the transfer would secure the continuance (with suitable adaptations) of that restriction in the Lease;

    iii. it is a restriction which is capable of benefiting other property, namely the Respondent's neighbouring properties; and

    iv. the restriction is such as materially to enhance the value of that other property, in that the value of that other property would otherwise deteriorate.

22. The Respondent submits that the covenant sought is not onerous or unreasonable: it is a covenant not to alter without consent and such consent is not to be unreasonably withheld. Accordingly, the Respondent asserts that the statutory test is met and the covenant proposed by the Respondent should be included in the freehold transfer.

23. The Applicant states that there is no evidence that such covenants have been imposed in other transfers and no evidence that the proposed covenant (or a covenant in similar form) is required at all. Further, the Applicant submits that the Respondent has failed to adduce any admissible (and compelling) evidence as to an actual impact on value if the covenant is not included.

24. In addition, the Applicant submits the proposed covenant is not reasonable in the context of section 10(5) of the 1967 Act and argues:

    "One would not ordinarily find a freehold lockup shop with flat(s) above, in a location such as this, for sale on the basis it was subject to a restrictive covenant that required the property owner to go 'cap in hand' to the neighbour and seek permission for example, to put in a dormer window."

25. The Applicant states that, if such a covenant is present and consent is refused, the remedies are:

    i. build out and risk enforcement;

    ii. go to court for a declaration consent has been unreasonably refused;

iii. apply to the Upper Tribunal for relaxation under s.84 Law of Property Act 1925;

iv. to avoid the cost/risk of the above – pay a premium.

26. The Applicant asserts that one must therefore question here whether the Respondent's intention is to extract a premium. The Applicant also states that the Property is held on a lease which was granted nearly 90 years ago; the Lease was a building lease and it appears from the Lease Plan that the area was not very developed at the time; the Lease required the erection of the Property and the Respondent argues that a restriction on alterations at that stage, and in a leasehold context, served some purpose but that the area has since changed beyond recognition.

The evidence

27. Mr Roberts orally confirmed his compliance with RICS Guidance and with Rule 19 of the 2013 Rules; matters which were not dealt with in his written evidence. He stated that the Applicant's solicitors had drafted paragraphs 1 to 9 of his written evidence and that he had drafted the remaining paragraphs, from paragraph 10 to paragraph 14. However, he confirmed that all of the facts set out in his written evidence were true to the best of his knowledge and belief.

28. At paragraphs 4 and 5 of his document headed witness statement, Mr Roberts states:

"4. The Property forms part of a wider, unregistered freehold interest owned by the Respondent being 567, 569, 571 and 573 Kingsbury Road and 1, 3 and 5 Fryent Way as shown on the Plan appended to this witness statement at page 1 ("the Retained Property").

5. The Respondent's freehold interest in the Retained Property (save for 567 Kingsbury Road) is subject to two headleases and, beneath those, a series of occupational leases, some of which (in relation to flats) have been extended pursuant to the Leasehold Reform Housing and Urban Development Act 1993. The title structure is set out in a Schedule of Interests appended to this witness statement at page 2. 567 Kingsbury Road is subject to a lease held by National Westminster Bank."

29. Mr Roberts agreed that 553 to 565 Kingsbury Road was previously owned by the Respondent until it was sold in 1988. He accepted that the Respondent had not required any covenant restricting alterations in 1988 and said that he had not looked into this sale in depth because it had taken place in a different market at a different time.

30. When asked whether his position was that this sale was irrelevant, Mr Roberts said that he did not know whether a mistake had been made in 1988.

He thought probably not because the circumstances would have been different then but that, if a mistake had been made, it would not be appropriate to repeat that mistake now.

31. Mr Roberts said that 1988 was before his time as an expert but that, if the area had not had any particular merit or potential in 1988, a restrictive covenant may not have been thought of. In his view, the area now has greater merit. Mr Roberts agreed that he had not put forward any evidence concerning this sale in his written document and he accepted that there is no evidence before the Tribunal that anything has happened to 553 to 565 Kingsbury Road from 1988 to date which has affected the value of the retained property.

32. At paragraph 11 of his written evidence, Mr Roberts states:

"I am not instructed to give evidence of the value of the adjoining interests, but based on the value agreed in this case, it would seem reasonable for illustrative purposes to assume an extrapolated value of c £1.5m for the Respondent's interests at 567, 571-573 & 1-5 Fryent Way."

33. In giving oral evidence, Mr Roberts said that the figure of £1.5m was approximate; that it was reasonable to assume a value between £1m and £2m; and that he had therefore arrived at £1.5m. He agreed that 571 Kingsbury Road contains extended leases and that this will have a significant impact on the value of the reversion but maintained that his estimate of £1.5 million was reasonable for the purposes of this hearing.

34. At paragraph 12 of his written evidence, Mr Roberts states:

"If the restrictive covenant is not included, and were the Applicant to redevelop or alter the Property in such a way that it becomes an eyesore or otherwise incongruous ('the incongruous works'), that would be likely to influence quantum and or number of bids for the Respondent's Retained Property if offered to the market. To give an example of this principle in action, if the incongruous works were such that they would be expected to cause prospective sub-lessees of the residential or commercial space to prefer other space, the hypothetical bidder would factor that in to their own bid. The principle of this is inarguable in my view, although the quantum of the loss would be a function of the changes undertaken."

35. When it was suggested that there would have similarly been a risk of "an eyesore" or incongruous works in 1988, Mr Roberts stated that he was not party to the decision making in 1988.

36. At paragraph 14 of his written evidence, Mr Roberts states:

"It is also likely to be relevant that there is precedent opposite the Property for a taller and deeper development, which with asset management, could potentially be replicated at the Retained Property…"

37. The precedent is not identified in Mr Roberts' written evidence. In the course of giving oral evidence, Mr Roberts informed the Tribunal that this is a reference to a Tesco Express which he had found through an internet search but had not inspected. He said that, with the benefit of hindsight, he would have liked to have included a photograph of the Tesco Express as part of his written evidence. Mr Roberts also said that he had last visited the area in which the Property is situated before Christmas for reasons which were unconnected to the Property and that he has never inspected the interior of the Property.

38. When it was suggested to Mr Roberts that it would be normal to include the date and the details of his inspection in any expert's report, Mr Robert stated that he had taken this case over this case from a colleague who had fallen ill. He had spoken to his colleague and he was familiar with the general location but he did not carry out any inspection for the purposes of giving evidence to the Tribunal in these proceedings.

39. Mr Roberts went on to say that, in his view, the Tesco Express demonstrates that there is potential to build a larger property on the site and that he has referred to the possibility of "an eyesore" because not all property owners behave reasonably and planning control does not cover everything.

40. Mr Roberts accepted that he has not set out any analysis of the type of work that he is concerned about but said he did not believe that it was necessary to include such an analysis. He stated that he is a property manager as well as a valuer and reiterated that sometimes people behave unreasonably. Mr Roberts went on to accept that the Tesco Express is a free-standing building with a car park at the front and whereas the retained property is smaller and part of a terrace. He said that the retained property could potentially be turned into a more modest version Tesco Express.

41. When it was put to Mr Roberts that the Property comprises a mid-terrace lock-up shop with flats above it in Kingsbury and that (in the context of this locality) he had not given any detail of the kind of work that he is concerned about, Mr Roberts agreed but said that unreasonable conduct could take any number of forms.

42. At paragraph 13 of his written evidence, Mr Roberts states (emphasis supplied):

"In terms of seeking to give guidance to the ***possible*** *quantum of the loss, I think it is informative to consider valuation tolerances and ranges of bids in bids in competitive situations.* ***Anecdotally****, 10%-15% would be a common range to consider valuation tolerances and subjectively is also a*

sensible range to consider competitive bids for a residential property investment excluding outliers. This range might therefore be reasonably representative of differences in perspective in relation to the underlying value (the difference between a more optimistic and a more pessimistic assessment of the value) and if the incongruous works changed the perspective by say half to whole of that 10%-15% (which seems to me to be a reasonable expectation subject to the detail) it suggests a value fall of not less than £75,000 to £150,000 on the headline numbers I have referred to for explanatory purposes."

43. When it was put to him that he was talking about "possible" quantum of loss rather than saying that in his opinion there would probably be a loss, Mr Roberts stated that it would be very difficult to prove how much any loss would be. When questioned concerning his use of the word "anecdotally", Mr Roberts stated that he had meant in conversation with legal colleagues talking about valuation tolerances in the context of other claims. He also said that the issue of the valuation tolerance range was something better dealt with by Counsel and that it was not a matter that he had expected to be challenged on.

44. Mr Roberts informed the Tribunal that he has given evidence as an expert many times over the course of his career. He said that he had had family affairs to deal with when the document headed "witness statement" had been sent to him and he had missed the fact that it was set out in the format of a witness statement rather than an expert report.

45. The Tribunal also heard oral evidence from Mr Mellor. Mr Mellor accepted that the Property is contiguous with the neighbouring properties which form part of the retained land and that there are similarities of architectural style and finish across the terrace.

46. At paragraph 4.5 of his expert report, Mr Mellor stated:

"At this point it is appropriate to note that in my view the FHVP of the subject would not be increased by the benefit of a restrictive covenant against its neighbours of the type in dispute. Therefore, as a corollary to that the FHVP is not diminished by the absence of such a restrictive covenant."

47. Mr Mellor gave oral evidence that the neighbouring retained property would be "in the same position." He stated that normally a restrictive covenant is needed in order to protect the inherent characteristics of an estate which drive value and he gave the example of Grosvenor Square. He said that, in his opinion, the properties in this case do not have an architectural style that drives value.

48. Mr Mellor agreed that the Property is a small, mid terrace building and that the retained Property is a larger plot with greater development value.

However, he stated that, looked at in terms of development, the retained property is not particularly large and that any development would be likely to be upwards. In his opinion, a developer would not place value on whether they had control over the Property due to the limitations on what a developer could realistically do on the retained land. He stated that this is a modest suburban London location and not Prime Central London.

49. It was put to Mr Mellor that property owners can be unreasonable and that, for example, to maximise return the owner of the Property might turn it into a house in multiple occupation and add to the roof and to the back of the Property in a way that was unattractive from an aesthetic point of view. Mr Mellor responded by stating that attractiveness is in the eye of the beholder and that if planning consent were obtained for an "ugly extension", there would then be a greater chance of being able to add value to the retained land by similarly extending.

50. Mr Mellor gave evidence that, in this location, if planning consent could be obtained to add extra space to the Property, then the highest bidder for the retained land would be willing to pay more because they would have a greater chance of doing the same. He said that in a traditional residential area or in a higher value area the situation may be different. However, the present case concerns flats above shops which are generally purchased by investors where aesthetic concerns carry less weight than the potential impact on the rental yield. He said that what comprises an "eyesore" is subjective and that if planning permission could be obtained to add three storeys to the Property, that would increase the value of the retained land because the planning risk would be lower.

51. When it was put to Mr Mellor that there must be something that could be done to the Property which would not add value to the retained land, he said that the only type of thing came to mind that would have a negative effect rather than a neutral or positive effect would be painting a giant swastika on the Property. When Mr Buckpitt pointed out that the proposed covenant does not deal with decoration, it was suggested that this could be done by changing the façade of the Property. However, (whilst accepting that not all property owners behave reasonably) neither Mr Mellor nor Mr Roberts gave evidence that a hypothetical purchaser, on the facts of this case, would consider that there was any likelihood or risk that such a modification would be made to the façade.

The Tribunal's determinations

52. The Tribunal has sympathy for Mr Roberts, who appears to have been instructed at short notice, due to the illness of a colleague, at a time when he had family matters to attend to. However, we do not give permission for Mr Roberts to give expert evidence. His written evidence fails to comply with rule 19(5) of the 2013 Rules which provides:

(5) A written report of an expert must—

(a) contain a statement that the expert understands the duty in paragraph (1) and has complied with it;

(b) contain the words "I believe that the facts stated in this report are true and that the opinions expressed are correct";

(c) be addressed to the Tribunal;

(d) include details of the expert's qualifications and relevant experience;

(e) contain a summary of the instructions the expert has received for the making of the report; and

(f) be signed by the expert.

53. Mr Roberts has not carried out any inspection for the purpose of giving evidence in these proceedings; the time, date and details of his last inspection of the general area out are not set out in his written evidence; full details of Mr Roberts' expert qualifications, relevant experience and instructions are not included in his written evidence; and the document headed "witness statement" does not contain a statement that it was prepared with an understanding of the expert's duties to the Tribunal. Further, for reasons which we accept are not of his making, Mr Roberts did not have sufficient time and resources to focus on these proceedings enough to notice that he was signing a witness statement rather than an expert's report when he received the relevant document from the Respondent's solicitors, notwithstanding that he has given expert evidence many times.

54. The Tribunal was informed that the Respondent's original expert has been unwell for some time. However, the Respondent did not seek to instruct an alternative expert at an earlier date or seek a postponement of the hearing on the grounds of the original expert's ill health. This is in the context of a well-represented Respondent which instructed Counsel and three solicitors to attend the hearing. Having considered and taken account of all the circumstances of this case and, in particular, the matters referred to above, the Tribunal declines to exercise its discretion to permit Mr Roberts to give expert evidence. There is therefore no expert evidence to contradict the expert opinion of Mr Mellor, which we accept on the balance of probabilities.

55. On the basis of Mr Mellor's evidence, we are not satisfied on the balance of probabilities that the proposed restriction is such as materially to enhance the value of the retained property. Accordingly, the statutory test has not been met and the Tribunal determines, pursuant to section 21(2) of the 1967 Act, that the proposed restrictive covenant which forms the subject matter of these proceedings shall not be included in the freehold transfer

56. Further, in any event, had we granted Mr Roberts permission to give expert evidence, we would have preferred the expert evidence of Mr Mellor. The matters set out at paragraphs 52 and 53 above decrease the weight which can be placed on Mr Roberts' evidence. We found Mr Mellor to be a credible

expert witness and we accept his expert opinion that in the particular circumstances of this case, for the reasons he gave, the proposed restriction would be unlikely to materially to enhance the value of the retained property.

Name: Judge N Hawkes **Date:** 7 April 2025

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber), then a written application for permission must be made to the First-tier Tribunal at the regional office which has been dealing with the case.

The application for permission to appeal must arrive at the regional office within 28 days after the tribunal sends written reasons for the decision to the person making the application.

If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed, despite not being within the time limit.

The application for permission to appeal must identify the decision of the tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal and state the result the party making the application is seeking.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).