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**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)**

Case Reference : **MAN/OOCG/OC6/2013/0003**

Property : **3 Causeway Gardens Dore
Sheffield S17 3EY**

Applicant : **Elizabeth Jean Derbyshire**

Representative : **Fowler Sandford Surveyors**

Respondent : **Mrs Kaur**

Representative : **Lester Aldridge LLP**

Type of Application : **A determination of provisions
which ought to be contained in
the conveyance under the
Leasehold Reform Act 1967-
Section 21(2)**

Tribunal Members : **Mrs J. E. Oliver
Mrs S. A. Kendall**

Date of Determination : **27th January 2014**

Date of Decision : **7th March 2014**

DECISION

Decision

1. The transfer of the freehold reversion of 3 Causeway Gardens Dore Sheffield shall contain the following restrictive covenants:
 - 12.4 (a) No building (other than those already erected) shall be erected on the Property and no alteration of the elevation of any building for the time being thereon shall be made without first submitting plans and specifications thereof to the Transferor or its surveyors and obtaining their approval thereto such consent not to be unreasonably refused or delayed
 - 12.4 (b) No building erected upon the Property shall be used for the manufacture distribution or sale or supply of intoxicating liquor nor for any purpose which might constitute a nuisance or annoyance to the Retained Land
 - 12.4 (c) No wooden building or erection (other than a greenhouse and a garden shed) shall be erected made placed or used upon the Property without the written consent of the Transferor such consent not to be unreasonably refused or delayed
 - 12.4 (d) No building erected upon the Property shall be used as dog kennels or as an aviary and no pigs pigeons or fowls shall be kept upon the Property
 - 12.4 (e) No building or part of a building (except bay windows and porches of ordinary size) shall be erected nearer to any road which the Property abuts than the prescribed building line the space between the said building line on the said road to be laid out and maintained as an ornamental garden or grass plot only
 - 12.4 (g) Not to do or permit anything to be done on or upon the Property which may be or become a nuisance or annoyance or offensive to the neighbourhood

Reasons

Introduction

2. This is an application by Elizabeth Jean Derbyshire (The Applicant) for a determination of the provisions to be contained within a transfer of the freehold title of 3 Causeway Gardens Dore Sheffield (The Property) pursuant to Section 21(2) of the Leasehold Reform Act 1967 (The Act).
3. The Respondent to the application is the freeholder of the title Avtar Kaur.
4. The issue of the price payable for the freehold reversion has already been the subject of an application before the First-tier Tribunal, the issue being determined on 12th August 2012.
5. On the 22nd November 2013 directions were issued providing for the filing of statements and bundles.
6. Neither party requested a hearing.

The Issues

7. The issue to be determined is the restrictive covenants to be included within the transfer.
8. The Tribunal had sight of a copy of the proposed transfer, although the final copy was itself in dispute. The transfer included 9 covenants within paragraph 12.4. Of these two were agreed by the Applicant, the remainder were in dispute.
9. The Respondent argued that since they had engrossed the transfer, following amendments made by the Applicant, this should stand and the Applicant was prevented from challenging its terms.
10. The Applicant stated that the final copy did not contain the necessary amendments and consequently she was not bound by it.
11. The restrictive covenants to be included in the transfer as agreed are as follows:
 - 12.4 (b) No building erected upon the Property shall be used for the manufacture distribution sale or supply of intoxicating liquor nor annoyance to the Retained Land
 - 12.4 (g) Not to do or permit anything to be done on or upon the Property which may be or become a nuisance or annoyance or offensive to the neighbourhood
12. The remaining covenants are in dispute and are as follows:
 - 12.4 (a) No building (other than those already erected) shall be erected on the Property and no alteration of the elevation of any building for the time being thereon shall be made without first submitting plans and specifications thereof to the Transferee or its surveyors and obtaining their approval thereto
 - 12.4 (c) No wooden building or erection (other than a greenhouse) shall be erected made placed or used upon the Property without the written consent of the Transferor
 - 12.4 (d) No building erected upon the Property shall be used as dog kennel or as an aviary and no pigs pigeons or fowls shall be kept upon the Property
 - 12.4 (e) No building or part of the building (except bay windows and porches of ordinary size) shall be erected nearer to any road which the Property abuts than the prescribed building line the space between the said building line on the said road to be laid out and maintained as an ornamental garden or grass plot only
 - 12.4 (f) Not to cut down destroy or fell any trees now growing or hereafter to be planted on the Property without the permission in writing of the Transferor and the local authority and so far as is reasonably practicable to preserve the same but nothing in this clause shall prevent the Transferee from carrying out normal pruning of the said trees as and when such action is deemed to be necessary
 - 12.4 (h) Not to use the Property for any trade or business and not to use the Property for any other purpose other than the erection of a single private dwelling house only or for the professional residence of a doctor dentist surgeon or architect and to use or permit to be used the garage on the Property as a garage for the housing of a private motor car or motor cars

12.4 (h) To maintain a good and sufficient fence approved by the Transferor along such part or part of the boundaries of the Property as are not occupied by buildings and as marked with a "T" turned inwards on the plan annexed

12.4 (i) Not to put out any window light or other opening in any building or wall on the northerly and southerly boundaries of the Property and the Transferor reserves full right and liberty of erecting buildings up to such boundaries

The Law

13. Section 21(1) of the Act provides for the appropriate Tribunal to determine the price payable for the freehold reversion of a leasehold property.
14. Section 21(2) thereafter provides:
"Notwithstanding section 20(2) or (3) above, the appropriate tribunal shall have jurisdiction, either by agreement or in a case where an application is made to a tribunal under subsection (1) above with reference to the same transaction-
 - (a) to determine what provisions ought to be contained in a conveyance in accordance with section 10 or 29(1) of this Act, or in a lease granting a new tenancy under section 14".*
15. Section 10 deals with the rights to be transferred to the leaseholder upon enfranchisement.
16. Section 10(4) provides as follows:
"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
 - (a) such provisions (if any) as the landlord may require to secure that the tenant is bound by, or to indemnify the landlord against breaches of, restrictive covenants which affect the house and premises, otherwise than by virtue of the tenancy or any agreement collateral thereto and are enforceable for the benefit of other property: and*
 - (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: or*
 - (ii) restrictions affecting other property which are such as materially to enhance the value of the house and premises;*
 - (c) such further provisions (if any) as the landlord may require to restrict the use of the house and premises in any way which will not interfere with the reasonable enjoyment of the house and premises as they have been enjoyed during the tenancy but will materially enhance the value of other property in which the landlord has an interest".*
17. Section 10(5) of the Act provides as follows:

“Neither the landlord nor the tenant shall be entitled under subsection (3) or (4) above to require the inclusion within 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. In this case the Tribunal have jurisdiction to deal with the application given the previous determination pursuant to section 21 (1) of the Act.
19. The provisions of a lease are also governed by section 19(2) of the Landlord and Tenant Act 1927 which provides as follows:

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

Submissions

20. In respect of the argument the Applicant was bound by the terms of the transfer, having received an engrossed copy, it was stated that the engrossment did not include all the amendments made on her behalf. Consequently the Applicant should not be bound by it.
21. In reply, the Respondent stated that the transfer was drawn correctly but if not, then the objection only relates to the restrictive covenants contained within paragraph 12.4 of the proposed transfer.
22. With regard to the restrictive covenants, the Applicant stated that:

“the landlord cannot require the continuance of any of the covenants imposed by the tenant’s lease although exceptions can be made in the case of any restrictive covenants which are capable of benefitting other property and which meet further qualifying criteria.

Section 10(4)(b) of the Leasehold Reform Act 1967 (as amended) provides for a landlord to insist on “such provisions (if any) (which he) may require to secure the continuance (with suitable adaptations) or

restrictions arising by virtue of the tenancy or any agreement collateral thereto in either:

- (1) restrictions affecting the house and premises which are capable of benefitting other property and (if enforceable only by the landlord) are such as materially enhances the value of the other property; or
- (2) restrictions affecting other property which are such as materially to enhance the value of the house and premises.

The freehold title now embraces only 17 of what we understand to be the original estate of 30 units, including the subject property, where a number of the properties have been altered or extended-the Local Authority planning records detail 10 applications within the estate. Planning controls will continue to regulate alterations and user, and properly reflect development policies where, as I understand the position, the freeholder has no formal estate management scheme in place. With an unexpired lease of 157 years it is reasonable to expect that the property will be redeveloped within the term.”

23. The Applicant therefore argued that only clauses 12.4 (b) and (g) fulfilled this criteria. The remaining covenants should be excluded.
24. In reply the Respondent argued that a restrictive covenant falling within section 10(4) of the Act would also have to satisfy the following:

“(1) the test of material enhancement of the value of the property
(2) the test of reasonableness in the light of “(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 a number of tenancies of neighbouring houses, of the interests of those affected in respect of other houses: s 10(5)

The Respondent relies upon *Moreau v Howard de Walden*. It and the earlier cases of *Peck and Pitt* set put accurately the test to be applied under both the 1967 Act and the 1993 Act . The Respondent’s proposals satisfy the test. The test of material enhancement is not a particularly stringent one. Decisions of the LVT and the Lands Tribunal show clearly that the maintenance of value of other property owned by the freeholder would satisfy this test. There is no need for evidence as to effect on value. There is no suggestion and no evidence that the proposed covenants are unreasonable.

Planning controls are insufficient protection: see *Moreau* at para 187 and 114 Tyronne Road paras 2.5-2.7.”

25. The Respondent referred the Tribunal to ***Moreau v Howard de Walden [LRA/2/2002]***, ***Higgs v Paul [LRA/2/2005]*** and a decision of the LVT in **114 Tyronne Road Thorpe Bay [CAM/00KF/OAF/2004/0001/01]**.

26. The Respondent further stated:

“The Restrictive covenants in the proposed transfer at pages 15-21 are similar to the restrictions to which all other properties on the estate are subject whether by virtue of their leases (where the freehold interest is still owned by the Respondent) or by virtue of their conveyance (where the tenants have, since the date of the original leases, acquired their freehold interest)”

27. In further submissions to the Tribunal the Applicant stated the freeholds of several properties on the development had been sold prior to the Respondent's acquisition of her interest and consequently the statement made by the Respondent was questionable.

Determination

28. The Tribunal noted the arguments as to whether the Applicant was bound by the terms of the engrossed transfer. It was noted that when approving the draft transfer the Applicant's representatives had made amendments and then returned the transfer for engrossment. When returned by the Respondent the Tribunal noted that the engrossment did not contain all the amendments, in particular to clause 12.4(f). In those circumstances the Tribunal did not consider the transfer to be agreed and the Applicant was not bound by its terms.
29. The Tribunal considered the criteria established by the Lands Tribunal in *Moreau v Howard de Walden Estates Ltd* [LRA/2/2002]. At paragraph 174 of his judgement Mr Clarke stated:

“ The scheme of the Act is that, in the absence of agreement, there are two routes by which a landlord can include restrictive covenants in the conveyance. First, where he wishes to secure the continuance of existing restrictions in the tenancy of the house and premises, then section 10(4)(b)(i) applies. Second, where he wished to introduce new restrictions or continue existing restrictions in a modified form or where the requirements of subparagraph (b)(i) cannot be met, then section 10(4)(c) applies. In both cases the requirement of reasonableness in subsection (5) must be satisfied. Accordingly, the following questions must be answered in respect of each restriction:-

- (1) Is there a restriction on the same subject in the existing tenancy? If so, section 10(4)(b)(i) applies; if not, the paragraph (c) of this subsection applies.
- (2) Where subparagraph (b)(i) applies, does the restriction secure the continuance (with suitable adaptations) of the existing restriction?
- (3) If so, then two questions must be answered. First, is the restriction capable of benefiting other property? Second, if enforceable only by the landlord, is the restriction such as to materially enhance the value of the other property?
- (4) If the restriction does not secure the continuance (with suitable adaptations) of the existing restriction (eg because the existing restriction is modified and therefore falls outside the term “suitable adaptations”) or it is a wholly new restriction or negative answers are given to either of the questions in (3) above the paragraph (c) applies. The relevant questions are as follows. First does the restriction restrict the use of the house and premises in anyway which will not interfere with the reasonable enjoyment of the property as it has been enjoyed during the tenancy? Second, will the restriction materially enhance the value of other property in which the landlord has an interest?
- (5) In all cases subsection (5) applies. Is the restriction 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; (b) where the tenancy is one of a number of tenancies of neighbouring houses, of the interests of those affected in respect of other houses?”
30. The Tribunal, having been provided with a copy of the original lease under which the Property is held and dated 25th March 1971 and made between P. Hassall Ltd (1) and David John Forrester and Elizabeth Forrester (2) (the Lease) noted that the restrictive covenants are contained within the Schedule to the Lease.
 31. Of those restrictive covenants contained within the proposed transfer clauses 12.4 (a), (b), (d), (e) and (f) are in the Lease. Clause 12.4(c) is mirrored in the Lease but with modifications. The other clauses, namely 12.4 (g), (h), and (i) are new covenants.
 32. The Tribunal considered the submissions made on behalf of the Applicant, namely that planning control was sufficient to regulate alterations and user and it therefore followed that restrictive covenants, dealing with these, were unnecessary. The Tribunal did not accept this argument. In doing so it took note of the decision in *Moreau v Howard de Walden Estates Ltd* that in turn referred to *Re Martin* (1988) 57 P & CR 119 and *Re Memvale Securities Ltd* (1974) (unreported LP/37/73). In all these cases it was determined that planning control and restrictive covenants are not the same and each has a different function. The Tribunal therefore determines that the existence of planning controls does not remove the need for the appropriate restrictive covenants within the transfer.
 33. The Tribunal thereafter considered those covenants already contained within the Lease. Following the decision in *Moreau* those are governed by section 10(4)(b)(i).
 34. The Tribunal determined that clause 12.4(a) should be included within the Transfer but subject to the modification that “such consent not to be unreasonably refused or delayed”. This clause, as amended, would ensure the continuance of the existing covenant, whilst taking into account the provisions of section 19(2) of the Landlord & Tenant Act 1927 as referred to above. This clause should also be amended to reflect that the approval is required of the Transferor and not the Transferee as stated within the proposed transfer.
 35. The Tribunal thereafter considered clause 12.4(b) and determined that this should be included without modification. The Applicant had indicated, within her submissions, that this clause was agreed. For the same reasons, the Tribunal accepted that clause 12.4(g) should also be included within the transfer.
 36. The Tribunal considered Clause 12.4(c) and as amended by agreement between the parties to include “such consent not to be unreasonably refused or delayed”. This clause reflects a continuance of the covenant in the lease amended to delete the reference to a caravan. The Tribunal considered it reasonable to include within this, a provision for a garden shed.
 37. The Tribunal determined that Clause 12.4 (d) should be included but it should reflect the original lease and refer to “dog kennels” rather than “dog kennel” in the singular. The Tribunal assumed this to be an error when drafting the transfer but nevertheless, to restrict the use of the

Property by prohibiting the use of a single dog kennel was unreasonable. The Tribunal considered that such a restriction would materially enhance the value of the Retained Property (this being the Respondent's other properties within the original development). For the same reasons clause 12.4 (e) should also be included within the transfer.

38. The Tribunal considered clause 12.4(f). Whilst this clause was in the lease the Tribunal did not consider it would benefit the Retained Property, nor would it materially enhance its value. Consequently the provisions of section 10(4)(c) will apply. The Tribunal determined that such a provision could interfere with the reasonable enjoyment of the property and would not materially enhance the value of other property owned by the Respondent. The Tribunal also considered section 10(5) and determined that this was no longer relevant given the age of the Property. This clause is therefore excluded from the transfer.
39. The Tribunal thereafter considered the three remaining clauses numbered 12.4(h) and (i). Two clauses had been given the same letter. All are new clauses and are not contained in the lease. They are therefore governed by sections 10(4)(c) and (5). The Tribunal noted that all the proposed covenants impose new restrictions on the Property, all of which are onerous. The Tribunal considered that such covenants were likely to interfere with the Applicant's reasonable enjoyment of the Property, taking into account the fact that they had not been included within the lease. The Tribunal did not find any evidence within the submissions to suggest that their inclusion would materially enhance the value of the Retained Property. They are therefore excluded from the transfer.