

LEASEHOLD VALUATION TRIBUNAL

Ref: MAN/00CG/OAF/2009/0003

LEASEHOLD REFORM ACT 1967 – PART 1. SECTION 21(1) & (2)**RE: 32 BISHOP GARDENS, SHEFFIELD S13 7EX****Applicants.**

JOHN ROGER HOLDEN & CAROLINE MARGARET BERESFORD.

Respondents.

AA HOMES LIMITED.

Tribunal members; C R Wormald FRICS.
M J Simpson LL.B.

8th June 2009.**DETERMINATION**

1. The price to be paid is determined in the sum of £1750.
2. It is agreed that the Perpetuity Period should be 80 years from 1 September 2004.
3. We agree with the inclusion of the reference to the 'Storm Water Retention System'
4. The Transfer should contain a declaration as to Party Walls and fences etc. in the same terms as Clause 6.7 of the Lease, and the plan to be attached to the Transfer should be marked accordingly with "T"s as on the Lease plan.
5. Rights of Third Party access for the purposes set out in Clause 3.9.1 & 3.9.2 (but not 3.9.3) should be granted in the terms of the opening paragraph of 3.9, but limited to 'To permit the Lessees owners or occupiers for the time being....etc '
6. There should be added to paragraph 2 of Schedule 3 in the Transfer
 - a prohibition in terms of 3.10.1.2 of the Lease as 'Not to store on or keep on the Premises or Estate any caravan boat or moveable dwelling or similar thing'

- **A prohibition in terms of 3.11.2 with the added words 'except any sign to advertise the property for sale or to let'**
 - **a prohibition in the terms of clause 9.2 of Schedule 3 of the Lease**
 - **a prohibition in the terms of clause 11 of Schedule 3 of the Lease.**
- 7. We regard the modification of clauses 3.13.1 and 3.13.2 as reasonable.**
 - 8. If Bishop Gardens is not yet adopted then the inclusion of a Covenant in the terms of clause 10.3 of Schedule 3 of the Lease would be reasonable. If the highway is adopted, such a covenant would be otiose.**
 - 9. The costs of the Lessor payable by the Lessees on completion are determined at £400 plus vat. plus the cost of Office copy Entries of the Lessor's title.**

Application.

The applicants seek a determination under S.21(1) of the price payable to the landlord for the freehold reversion of the property under S.9, the amount of costs payable under S.9(4) and, under S.21(2)(a), of the provisions that ought to be contained in the Transfer, under S.10.

The Notice of the applicants' exercise of their rights under Part 1 of the Act is dated 19th August 2008. The respondent's Notice in Reply is dated 15th October 2008. It is common ground that the applicants have a right to acquire the freehold and that the basis of valuation is that set out in Section 9(1) of the Act.

The applicants served a Section 10 Notice, dated 20th November, requiring that they be informed by the respondent company as to the provisions that the respondents required to be included in the Transfer. The response was that the respondents required all of the existing rights, restrictions, covenants, conditions and provisions as set out in the Lease (save for payment of rent). That has remained the respondent's stance on that issue.

On 13th May 2009 the applicants lodged this Application.

The Lease.

32 Bishop Gardens is held by the applicants under a lease ("the Lease") dated 26th November 2004 for a term of 125 years from 1st September 2004 at a Ground Rent of £125 pa. payable yearly in advance on 29th September in every year.

The property is clearly defined by a plan attached. The definition section is reasonably comprehensive. Clause 3 sets out typical lessee's covenants (repair, decoration, inspection, compliance with Section 147/147 notices, access, alterations insurance etc.) Clause 4 requires observance and performance of Schedule 3, which imposes restrictive covenants regarding user (noise nuisance, livestock, obstructions and erections etc.). Clause 6 sets out agreements and declarations re dispute resolution, re-entry for breach of covenant, enforcement, approval of plans and party walls and fences. It also permits the Lessor to release any conditions or restrictions relating to the Estate.

Clause 5 impose an obligation on the Lessor, if so required by the Lessee, to enforce the covenants for repair and insurance and the stipulations and restrictions entered into by the Lessees of other plots on the Estate.

The Law.

The relevant Statutory provisions of the Leasehold Reform Act 1967 (as amended) are:-

8. Obligation to enfranchise

- (1) Where a tenant of a house has under this Part of this Act a right to acquire the freehold, and gives to the landlord written notice of his desire to have the freehold, then except as provided by this Part of this Act the landlord shall be bound to make to the tenant, and the tenant to accept, (at the price and on the conditions so provided) a grant of the house and premises for an estate in fee simple absolute, subject to the tenancy and to tenant's incumbrances, but otherwise free of incumbrances.

9. Purchase price and costs of enfranchisement, and tenant's right to withdraw

(1) Subject to subsection (2) below, the price payable for a house and premises on a conveyance under section 8 above shall be the amount which at the relevant time the house and premises, if sold in the open market by a willing seller (with the tenant and members of his family not buying or seeking to buy), might be expected to realise on the following assumptions:--

- (a) on the assumption that the vendor was selling for an estate in fee simple, subject to the tenancy but on the assumption that this Part of this Act conferred no right to acquire the freehold; and if the tenancy has not been extended under this Part of this Act, on the assumption that (subject to the landlord's rights under section 17 below) it was to be so extended;
- (b) on the assumption that (subject to paragraph (a) above) the vendor was selling subject, in respect of rentcharges to which section 11 (2) below applies, to the same annual charge as the conveyance to the

tenant is to be subject to, but the purchaser would otherwise be effectively exonerated until the termination of the tenancy from any liability or charge in respect of tenant's incumbrances; and

(c) on the assumption that (subject to paragraphs (a) and (b) above) the vendor was selling with and subject to the rights and burdens with and subject to which the conveyance to the tenant is to be made, and in particular with and subject to such permanent or extended rights and burdens as are to be created in order to give effect to section 10 below.

.....

.....

(4) Where a person gives notice of his desire to have the freehold of a house and premises under this Part of this Act, then unless the notice lapses under any provision of this Act excluding his liability, there shall be borne by him (so far as they are incurred in pursuance of the notice) the reasonable costs of or incidental to any of the following matters:--

- (a) any investigation by the landlord of that person's right to acquire the freehold;
- (b) any conveyance or assurance of the house and premises or any part thereof or of any outstanding estate or interest therein;
- (c) deducing, evidencing and verifying the title to the house and premises or any estate or interest therein;
- (d) making out and furnishing such abstracts and copies as the person giving the notice may require;
- (e) any valuation of the house and premises;

but so that this subsection shall not apply to any costs if on a sale made voluntarily a stipulation that they were to be borne by the purchaser would be void.

10. Rights to be conveyed to tenant on enfranchisement

(1) Except for the purpose of preserving or recognising any existing interest of the landlord in tenant's incumbrances or any existing right or interest of any other person, a conveyance executed to give effect to section 8 above shall not be framed so as to exclude or restrict the general words implied in conveyances under section 62 of the Law of Property Act 1925, or the all-estate clause implied under section 63, unless the tenant consents to the exclusion or restriction; but the landlord shall not be bound to convey to the tenant any better title than that which he has or could require to be vested in him,

(1A) The landlord shall not be required to enter into any covenant for title beyond those implied under Part I of the Law of Property (Miscellaneous Provisions) Act 1994 in a case where a disposition is expressed to be made with limited title guarantee; and in the absence of agreement to the contrary he shall be entitled to be indemnified by the tenant in respect of any costs incurred by him in complying with the covenant implied by virtue of section 2(1)(b) of that Act (covenant for further assurance).

(2) As regards rights of any of the following descriptions, that is to say,—

- (a) rights of support for any building or part of a building;
- (b) rights to the access of light and air to any building or part of a building;
- (c) rights to the passage of water or of gas or other piped fuel, or to the drainage or disposal of water, sewage, smoke or fumes, or to the use or maintenance of pipes or other installations for such passage, drainage or disposal;
- (d) rights to the use or maintenance of cables or other installations for the supply of electricity, for the telephone or for the receipt directly or by landline of visual or other wireless transmissions;

a conveyance executed to give effect to section 8 above shall by virtue of this subsection (but without prejudice to any larger operation it may have apart from this subsection) have effect—

- (i) to grant with the house and premises all such easements and rights over other property, so far as the landlord is capable of granting them, as are necessary to secure to the tenant as nearly as may be the same rights as at the relevant time were available to him under or by virtue of the tenancy or any agreement collateral thereto, or under or by virtue of any grant, reservation or agreement made on the severance of the house and premises or any part thereof from other property then comprised in the same tenancy; and
- (ii) to make the house and premises subject to all such easements and rights for the benefit of other property as are capable of existing in law and are necessary to secure to the person interested in the other property as nearly as may be the same rights as at the relevant time were available against the tenant under or by virtue of the tenancy or any agreement collateral thereto, or under or by virtue of any grant, reservation or agreement made as is mentioned in paragraph (i) above.

(3) As regards rights of way, a conveyance executed to give effect to section 8 above shall include—

- (a) such provisions (if any) as the tenant may require for the purpose of securing to him rights of way over property not conveyed, so far as the landlord is capable of granting them, being rights of way which are necessary for the reasonable enjoyment of the house and premises as they have been enjoyed during the tenancy and in accordance with its provisions; and

(b) such provisions (if any) as the landlord may require for the purpose of making the property conveyed subject to rights of way necessary for the reasonable enjoyment of other property, being property in which at the relevant time the landlord has an interest, or to rights of way granted or agreed to be granted before the relevant time by the landlord or by the person then entitled to the reversion on the tenancy.

(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--

(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.

(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.

(6) The landlord may be required to give to the tenant an acknowledgment within the meaning of section 64 of the Law of Property Act 1925 as regards any documents of which the landlord retains possession, but not an undertaking for the safe custody of any such documents; and where the landlord is required to enter into any covenant under subsection (4) above, the person entering into the

covenant as landlord shall be entitled to limit his personal liability to breaches of the covenant for which he is responsible.

The applicants' evidence and representations.

The applicants' case, generally, is set out on the statements dated 27th May 2009 and 1st June 2009. They set out the brief history of the matter. As to valuation, they refer to, and rely upon the valuation report of Mr John Francis of Crapper & Haigh dated 12th May 2009.

As to the terms of the Transfer they attach a draft TP1 setting out their proposals for suitable terms having regard to the provisions of the Act and Section 10(4) in particular.

They respond to the Lessor's claims for administration charges and retrospective consent charges, indicating that the invoice for the Ground Rent has always been paid promptly and that consent was given for the erection of the shed, for which £75 was paid in cash.

The statement of 1st June deals with the points of draftsmanship of the Transfer that had been raised in correspondence in the interim by the respondent's solicitors. It explains the position re the clause re the 'storm water retention system', concedes that the perpetuity period should be 80 years from 1st September 2004 and responds to the Lessor's continuing requirement that most of Clauses 3, 5 and 6 from the Lease be incorporated in the Transfer. A distinction is drawn between positive and negative covenants, and reliance upon Section 10(4) is reiterated.

The valuation evidence of John M Francis FRICS is set out in his report of 12 May 2009. It includes a helpful and reliable valuation commentary to justify his assertion that an appropriate value is £1500 based on an interest rate of 8% and assuming that a lease with 121 year to run should be regarded as a perpetuity.

The respondent's evidence and representations.

Formal statements and valuations have not been filed. The respondent relies upon the correspondence which it has sent to or copied to the Tribunal.

The tribunal has before it the respondent's solicitors' letters of 12th December 2008, 12th January, 22 May, 3rd June 2009 and 5th June 2009 (in response to applicants' solicitors letter of 4th June). There is also a letter of 18th May 2009, which was marked 'Without prejudice save as to costs' but which is referred to by the respondent's solicitors as an open letter in their open letter of 22nd May 2009.

On the issue of valuation, they initially contended for 30 years purchase. Subsequently they contend for 18 years purchase (£2250). They do not set out the rationale for either figure.

There is no evidence offered to contradict the applicants' version of events supporting the applicants' assertion that there are no administration or retrospective consent charges payable.

On the issue of the clauses to be included in the Transfer, they aver that all of the clauses in the lease, apart from rent, need to be included so as to enable the Lessor to comply with clause 5(2) of the Lease on the basis that that clause is common to all the leases presently granted to other lessees on the development.

The Inspection.

The Tribunal inspected the subject property at 10.00 am on Monday 8th June 2009 and found it to be as described in Mr Francis' report. We took note of the immediate environs and the other properties on the development. This being a S9 (1) valuation of the reversion, it was not necessary to consider other, wider, valuations.

Hearing.

A hearing was not required or requested by either party, both of whom relied upon their written evidence and submissions.

The Decision.

On the issue of the S9 (1) valuation, we regard the valuation of Mr. Francis as perfectly tenable, but to the lower end of the range of valuations with which we are familiar. We take the view, in the circumstances of this case, having regard to the length of the remaining term, the level of ground rent and the date of the Lease, that 14 years purchase is an appropriate figure. The price to be paid is accordingly determined in the sum of £1750.

On the issue of outstanding administration fees and retrospective consent charges we find, on the evidence, that there are none. Any condition purported to be imposed regarding payment of the same upon completion of the Transfer would be unreasonable and unsustainable.

On the issue of the form of the Transfer, we utilise the draft supplied by the applicants' solicitors. No draft has been supplied by the respondent's solicitors.

It is agreed that the Perpetuity Period should be 80 years from 1st September 2004.

We agree with the inclusion of the reference to the 'Storm Water Retention System'. The respondent's solicitors may be correct in suggesting that that duplicates the items covered by the definition of 'Conduits', but it is not certain to be the case. The item is one of great importance and the risk if duplication

of grant is far less than the risk of the property not having an unequivocal right to the use of the system.

The respondent's insistence that all covenants, restrictions and conditions, except rent, should be imported wholesale into the Transfer is not in accord with Section 10(4), nor is it tenable or reasonable. A careful examination of, for example, clause 3 of the Lease readily illustrates that many of the sub clauses could only, sensibly, relate to leasehold property (e.g. 3.2, 3.3, 3.4, 3.5, 3.6, 3.7, 3.8 [especially] etc.)

The Lessor's argument that the imposition of all these matters is essential so as to facilitate its obligations under clause 5.2 of the Lease is flawed. Firstly it is an obligation for the benefit of the applicants, which, upon enfranchisement they will lose. The respondents, no longer being Lessors of the property will be released from that obligation just as they are released from the status of Lessor. Secondly, so far as that obligation is included in the leases of other plots (as recited in the Lease by way of intention but not obligation) it is an obligation to enforce the covenants etc entered into by other lessees (our emphasis). Upon enfranchisement the applicants will no longer be the lessees of the property and will be beyond the scope of the respondent's obligations, if any, to other Lessees. Thirdly clause 6.5 of the Lease gives the respondent the liberty to release or vary etc. any condition or restriction relating to the Estate. The benefit of clause 5.2 to any lessee is therefore much reduced, as the Lessors could waive or vary any such condition or restriction in a third party's lease so as to avoid the conditional obligation of enforcement.

The Transfer should contain a declaration as to Party Walls and fences etc. in the same terms as Clause 6.7 of the Lease, and the plan to be attached to the Transfer should be marked accordingly with "T"s as on the Lease plan.

Rights of Third Party access for the purposes set out in Clause 3.9.1 & 3.9.2 (but not 3.9.3) should be granted in the terms of the opening paragraph of 3.9, but limited to 'To permit the Lessees owners or occupiers for the time being....etc '

There should be added to paragraph 2 of Schedule 3 in the Transfer

- a prohibition in terms of 3.10.1.2 of the Lease as 'Not to store on or keep on the Premises or Estate any caravan boat or moveable dwelling or similar thing'
- A prohibition in terms of 3.11.2 with the added words 'except any sign to advertise the property for sale or to let'
- a prohibition in the terms of clause 9.2 of Schedule 3 of the Lease
- a prohibition in the terms of clause 11 of Schedule 3 of the Lease.

We regard the modification of clauses 3.13.1 and 3.13.2 as reasonable.

If Bishop Gardens is not yet adopted then the inclusion of a Covenant in the terms of clause 10.3 of Schedule 3 of the Lease would be reasonable. If the highway is adopted, such a covenant would be otiose.

We determine as above having regard to the criteria set out in Section 10(4)(b) of the Act, as being reasonably necessary to preserve the value of the Estate generally and of other dwellings in particular. The prohibitions are usual in modern Transfers on estates of the type of which the subject house forms part.

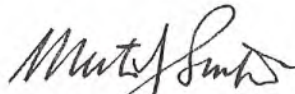
We do not find that clause 18 of the draft Transfer is inadequate. Where all the covenants in Schedule 3 of the Transfer are negative covenants there is no reasonable need to impose any obligation wider than that currently set out in clause 18.

Costs.

The applicants are liable to pay the Lessor's reasonable costs of or incidental to those matters set out on Section 9 (4), above.

The respondent has contended for a figure of £450 plus vat plus (unspecified) disbursements. It is apparent from the latter of 12th January that that includes the cost of negotiations, which are not within Section 9 (4).

The rate of charge of £145 per hour set out in the respondent's solicitors letter of 12th December 2008 is reasonable. The applicants solicitors have drafted the Transfer, which will now incorporate the amendment as a result of this Determination. The title is Registered. The whole of the work envisaged by Section 9 (4), including correspondence charges at one tenth of an hour per item and attendances upon the client would not, if carried out by a reasonably competent conveyancer, incur reasonable charges of more than £400 plus vat. plus the cost of Office copy Entries of the Lessor's title.



Martin J Simpson.
Chairman.