

SOUTHERN RENT ASSESSMENT PANEL
LEASEHOLD VALUATION TRIBUNAL

Case No: CHI/00HN/OCE/2006/0092

Decision of the Tribunal under Section 24 of the Leasehold Reform, Housing and Urban Development act 1993

Applicant: Bracken Court Freehold Limited

Respondents: Trustees of the A.E. Cooper-Dean Charitable Foundation

Re: **Bracken Court, 16 Dean Park Road, Bournemouth**

Date of Application 17th November 2006

Date of Inspection None

Date of Hearing None

Representing the Applicant DTW Solicitors

Representing the Respondent Preston & Redman, Solicitors

Members of the Leasehold Valuation Tribunal:

M J Greenleaves	Lawyer Chairman
P R Boardman	Lawyer

Date of Tribunal's Decision: 12th April 2007

Decision

1. The following determinations are made as to the disputed terms of the draft transfer in this case:
 - a. Clause 13.3.1. The Clause as drafted shall be replaced wholly by a Clause in the following terms: "The Transferee hereby indemnifies the Transferor in respect of any costs incurred by the Transferor in complying with the covenant implied by virtue of Section 2(1)(b) of the Law of Property (Miscellaneous Provisions) Act 1994"
 - b. Clause 13.3.2. The Clause shall be deleted.
 - c. Clause 13.3.3. The Clause shall stand as originally drafted.
 - d. Clause 13.6. The words deleted by the Applicant shall remain deleted and this introductory provision shall instead read "The Property is transferred together with the following rights in connection only with the permitted use and enjoyment of the Property:"
 - e. Clause 13.11.1. The Clause shall be deleted.
 - f. Clause 13.11.2. The Clause shall, as now agreed between the parties, be deleted.

Reasons

Introduction.

2. This is an application made by Bracken Court Freehold Limited (the Applicant) on 17th November 2006 under Section 24 of the Leasehold Reform, Housing and Urban Development Act 1993 (the 1993 Act) for determination of the provisions to be contained in the transfer of Bracken Court, 16 Dean Park Crescent, Bournemouth (the Property) by the Respondents to the Applicant. All other issues arising from the lessees claim for enfranchisement under the 1993 Act had been agreed between the parties.
3. The Respondents' solicitors had drafted the Transfer. This had been amended by the Applicant's solicitors by deletion of certain Clauses or parts of Clauses. The resulting amended draft was annexed to the application. The issues related only to whether each of those deleted provisions should be deleted, stand as drawn or replaced by other wording.
4. The Tribunal had determined that the matter should proceed by way of a paper determination.
5. The Respondents' solicitors written submissions are dated 29th January 2007 and letter dated 13th March 2007. The Applicant's submissions are dated 12th February 2007.

Consideration

6. The Tribunal considered the law, all the submissions received and taking into account also its expert knowledge made its decisions on the following grounds.
7. Clause 13.3.1.

The Tribunal found that the Applicant was entitled to the covenant implied by Section 2(1) of Law of Property (Miscellaneous Provisions) Act 1994 (the 1994 Act) and that under Paragraph 2(2) of Schedule 7 to the 1993 Act, the Respondents are entitled to an indemnity for costs incurred in complying with Section 2(1)(b) of the 1994 Act. The Applicant proposed a new Clause (as set out in the decision) which gives the Respondent the indemnity sought in Respondents' submissions and that was adopted by the Tribunal.

8. Clause 13.3.2.

- a. Section 3(3) of the 1994 Act provides, in summary, that there is an implied covenant on the part of the Respondents themselves that since the last disposition for value they have not (nor suffered others to have) charged or incumbered the property or granted third party rights over it which still subsist and are not aware that anyone else has done so.
- b. That provision is not varied by the 1993 Act, but the Respondents submit that as there has been no disposition for value for about a century and that because of changes in trustees over the years and that they have not occupied the Property during that time, the present trustees should have further protection.
- c. The Respondents are giving limited title guarantee and are governed by the 1994 Act. It appears to the Tribunal that the Section relates only to "actions" or knowledge of the Respondents as present Trustees, not to the action or knowledge of their predecessors, referring as it does to "the person making the disposition". The Tribunal therefore agreed with the Applicant that the Clause should be deleted.

9. Clause 13.3.3.

- a. By Section 6(1) of the 1994 Act, the Respondents are not liable for Section 3 matters so far as the disposition is expressly made subject to them; and further that the Respondent is not liable for Section 3 matters so far as they are within the knowledge of the Applicant. The Respondents seek to include within the Applicant's knowledge matters which it could ascertain by inspection of public registers.
- b. That seems entirely reasonable and is normal practice in property transactions. The Tribunal considered it to be all the more important that the Applicant should shoulder

this responsibility in what is in effect a compulsory purchase transaction from the point of view of the Respondent. Accordingly the Clause should stand in the draft as drawn.

10. Clause 13.6.

Under Section 1 of the 1993 Act qualifying tenants are entitled, in respect of appurtenant land, to either the freehold or permanent rights. If the Respondent is for any reason unable to grant permanent rights without qualification, the Respondent can only transfer the freehold. The Tribunal assumes that the Respondent is not willing to transfer the freehold, so its grant of permanent rights cannot be qualified in the manner originally drafted. Accordingly the Applicant's deletions were accepted by the Tribunal.

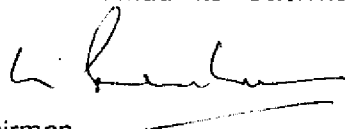
11. Clause 13.11.1.

- a. The Respondent says, and the Tribunal accepts, that the 1993 Act permits exclusion or restriction of the general words implied by Section 62 of the Law of Property Act 1925 (the 1925 Act) if made for the purposes of preserving or recognising any existing interest of the freeholder in tenant's incumbrances.
- b. Paragraph 2(3) of Schedule 7 to the 1993 Act defines "tenant's incumbrances" to include "any interest directly or indirectly derived out of a lease, and any incumbrance on a lease or any such interest (whether or not the same matter is an incumbrance also on any reversionary interest on the lease); and "incumbrances" has the same meaning as it has for the purposes of Section 34 of this Act".
- c. Section 34(4) of the 1993 Act defines "incumbrances" to include rentcharges and personal liabilities attaching in respect of the ownership of land or an interest in land though not charged on that land or interest.
- d. Taking that Section 34(4) definition (which the Tribunal accepts is not an exclusive definition), the Tribunal does not consider that a reservation of a right to light or air is an incumbrance. It is a restriction or limitation on a grant, but it does not impose a burden on a tenant and it is to that type of provision which the Tribunal considers Paragraph 2(1)(a) of Schedule 7 to the 1993 is directed. In the Tribunal's opinion, the existence of such a reservation out of the headlease is not relevant. The parties are bound by Section 62 of the 1925 Act in this respect and that fact may be reflected in determining the price to be paid under the 1993 Act.
- e. Concerning Clause 13.11.1 in relation to restrictive covenants, the Tribunal was not satisfied that, as the Respondent submitted, the value of its remaining restrictive covenants over other properties might be adversely affected if part of the benefit of those covenants passes to the Applicant. It appeared to the Tribunal that the value of the benefit of those covenants to the Respondents' remaining properties would be the same whether or not it continued to own the Property. If that is not right, it is a matter which could be reflected in the price to be paid in this transaction and should be dealt with in that way.
- f. In respect of both aspects of this disputed Clause 13.11.1, the Tribunal accepted the Applicant's contentions that there is no provision in the 1993 Act enabling the Respondent to require this clause. Accordingly it would be deleted.

12. Clause 13.11.2.

The Applicant had deleted from the draft a reference to Section 62 of the 1925 Act. The Respondent conceded this in its letter of 13th March 2007 and accordingly the Tribunal accepted that it should be deleted.

13. The Tribunal made its decisions accordingly.



Chairman
A member of the Leasehold Valuation Tribunal
appointed by the Lord Chancellor