



8/65

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

**Case Reference** : **CHI/43UC/OAF/2013/0005**

**Property** : **8 Hookfield Mews, West Hill,  
Epsom, KT19 8JN**

**Applicant** : **Mrs May Violet Payne**

**Representative** : **Mr Payne (son)**

**Respondent** : **Grange Management (Southern)  
Ltd**

**Representative** : **Mr C Bayne-Jardine, Shakespeares,  
Solicitors**

**Type of Application** : **Section 21(2) of the Leasehold  
Reform Act 1967**

**Tribunal Members** : **Judge I Mohabir  
Lady Davies  
N I Robinson**

**Date and venue of  
Hearing** : **22 May 2013  
Reigate Manor Hotel, Reigate,  
Surrey, RH2 9PF**

**Date of Decision** : **17 July 2013**

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**DECISION**

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## ***Introduction***

1. This is an application made by the Applicant under section 21(2) of the Leasehold Reform Act 1967 ("the Act) for a determination of the terms of the transfer (TP1) to convey the freehold interest in the property known as 8 Hookfield Mews, West Hill, Epsom, Surrey, KT19 8JN ("the property") to her.
2. The Applicant is the lessee of the property pursuant to a lease dated 14 July 1989 made between Meridian Housing Association and (1) Ronald George Payne and (2) May Violet Payne for a term of 125 years from 29 September 1987 ("the lease").
3. The property is a house within a development comprised of 8 houses and two bungalows located on West Hill, Epsom and is a conversion of a stable block in a square around a courtyard. There is a roadway through the development leading to a car park and small garden at the rear.
4. By a Notice of Claim dated 25 January 2013, the Applicant exercised the right to acquire the freehold interest in the property under Part I of the Act. By a counter notice dated 21 March 2013, the Respondent admitted the Applicant's right to enfranchise and subsequently a purchase price of £1,250 was agreed by the parties for the freehold interest.
5. The parties were unable to agree the terms upon which the transfer of the freehold interest should take place and on 25 March 2013, the Applicant made this application to the Tribunal to determine this issue.

## ***The Relevant Law***

6. Section 21(2) of the Act provides:  
*"...[a leasehold valuation tribunal] shall have jurisdiction either by agreement or in a case where an application is made to [a tribunal] under sub-section (1)...with reference to same transaction,-*

- (a) *to determine what provisions ought to be contained in a conveyance in accordance with section 10... of the Act...*
- (b) *...*
- (c) *..."*

*Section 8 of the Act provides:*

*“(1) Where a tenant of a house has under this Part of this Act a right to acquire 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 from incumbrances.*

*(2) For purposes of this Part of this Act “incumbrances” includes rent charges and, subject to subsection (3) below, personal liabilities attaching in respect of ownership of land or interest in land though not charged on that land or interest; and “tenant’s incumbrances” includes any interest directly or indirectly derived out of the tenancy, and any incumbrance on the tenancy or any such interest (whether or not the same matter is an incumbrance also on any interest reversionary on the tenancy).*

*(3) Burdens originating in tenure, and burdens in respect of the upkeep or regulation for the benefit of any locality of any land, building, structure or works, ways or watercourses shall not be treated as incumbrances for the purposes of this Act, but any conveyance executed to give effect to this section shall be made subject thereto except thereto except as otherwise provided by section 11...*

*(4)...*

*(5)..."*

*Section 10 of the Act sets out the right to be conveyed to the tenant on enfranchisement.*

### **Hearing**

7. The hearing took place on 22 May 2013 following the Tribunal’s earlier inspection of the development. The Applicant was represented by Mr Payne, her son. The Respondent was represented by Mr Mr C Bayne-Jardine, a Solicitor from the firm of Shakespeares.

- (a) to determine what provisions ought to be contained in a conveyance in accordance with section 10... of the Act...
- (b) ...
- (c) ...”

*Section 8 of the Act provides:*

*“(1) Where a tenant of a house has under this Part of this Act a right to acquire 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 from incumbrances.*

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8. By clause 4 of the lease, the landlord covenanted, *inter alia*, to repair, maintain, decorate and renew the main structure and exterior of the properties on the estate and the common parts (which includes the communal gardens). Clause 4(1)(d) obliges the landlord to insure the estate. Clause 4(1)(f) also obliges the landlord to enforce any covenants contained in clause 5 of the leases against any other lessee if necessary.
9. Clause 3 of the lease sets out the lessee's covenant to pay a service charge contribution towards the costs and expenses incurred by the landlord in relation to the estate and the other matters set out in the Third Schedule. It is common ground that the Applicant's liability under the terms of the lease is placed at 9.8% of that expenditure. Clause 5 sets out the other covenants given by the lessee generally.
10. It was the Applicant's submission that, upon enfranchising, the Respondent should not continue to maintain and insure the property and she should not be required to pay a service charge contribution towards this expenditure, as she would in effect be subsidising the cost of maintaining and insuring other properties on the estate. It follows, therefore, that she also objects to paying a service charge contribution towards the reserve fund. The Applicant is willing to continue to pay a contribution of 9.8% towards the cost of maintaining the common parts.
11. The Respondent submitted that the terms of the transfer should preserve the covenants and conditions in the leases otherwise the Respondent will be in breach of the obligation imposed by clause 4(1)(f). Furthermore, to do otherwise would engage clause 4(1)(g), which obliges the landlord to observe and perform tenants the covenants in relation to the properties on the estate, especially if "any lease may have been determined in any way". It was argued that it would not be reasonable if, by reason of enfranchising, any occupier were able to take the benefit of covenants imposed and services provided for the other lessees on the development.

## **Decision**

12. It was accepted by the parties that there are no previous authorities that have dealt with the issue raised in this case. Indeed *Hague on Leasehold Enfranchisement*<sup>1</sup> accepts that the Act fails to provide satisfactory machinery for dealing with cases such as this. It is clear that this development for elderly residents was intended to function as a whole with shared facilities and amenities, even though it is comprised of separate dwellings. This can be the only reason why the leases were drafted in the terms that exist and present the difficulties encountered by the parties in transferring the freehold interest in the property.
13. The issue to be determined by the Tribunal was whether the positive covenants given by the lessee under the terms of the lease regarding the maintaining, repairing (including the reserve fund contribution in so far as it relates to the property) and insuring the property should be included in the transfer (“the covenants in issue”). To do so, the Tribunal had regard to the Act. Issues about reasonableness do not arise because the Act does not provide this discretion.
14. Section 8(1) requires the landlord to transfer the freehold estate to the tenant, subject to any tenants incumbrances (section 8(2)) or burdens originating in tenure or burdens in respect of the upkeep or regulation for the benefit of any locality of any land, building, structure or works, ways or watercourses (section 8(3)).

### ***Are the Covenants in Issue Incumbrances?***

15. Section 8(2) of the Act attempts to define what may amount to an incumbrance, but does not do so exhaustively. Although it has a wide meaning, it expressly includes such matters as leases, mortgages and restrictive covenants, which do not arise here. However, the expression of “*any interest directly or indirectly derived out of the tenancy, and any incumbrance on the tenancy or any such interest (whether or not*

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<sup>1</sup> 4<sup>th</sup> edition at 6-20, page 147

*the same matter is an incumbrance also on any interest reversionary on the tenancy)*” under the section is less certain. However, it is considered to include any incumbrance affecting the freehold.

16. In the Tribunal’s judgement, the positive covenants in issue do not amount to a tenant’s incumbrance within the meaning of section 8(2) of the Act because they are not expressly defined in the section nor are they an incumbrance that will continue to affect the freehold in relation to the property. Once the Applicant enfranchises, the Respondent will be relieved of the contractual burden of repairing, maintaining and insuring the property and will no longer affect the freehold. In so doing, the Respondent does not “*convey any better title than which he has*”<sup>2</sup>. Accordingly, the Tribunal concluded that the covenants in issue are not tenant’s incumbrances and should not form part of the terms of the transfer.

#### ***Are the Covenants in Issue Other Burdens?***

17. Section 8(3) of the Act is concerned with other burdens on the freehold interest which do not amount to an incumbrance under section 8(2). It is considered that “*burdens originating in tenure*” are limited to manorial incidents and do not apply here.
18. “*Burdens in respect of the upkeep or regulation for the benefit of any locality of any land, building, structure or works, ways or watercourses*” have been held to include positive obligation, which are reciprocal to the benefits enjoyed and require a contribution towards the cost of maintaining common estate roads<sup>3</sup>. This would have direct application in the present case to the Respondent’s continuing obligation to repair and maintain the common areas (including any reserve fund contribution relating to these areas) and, indeed the Applicant has agreed that her contractual liability under her lease should continue under the terms of the transfer. It follows, therefore,

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<sup>2</sup> section 10(1) of the Act

<sup>3</sup> *Halsall v Brizell* [1957] Ch. 169

that the covenants in issue do not fall within section 8(3) of the Act also.

19. In conclusion, the Tribunal finds that the covenants in issue do not fall within either sections 8(2) or (3) of the Act and cannot, therefore form part of the terms of the transfer and the Applicant takes the freehold title free from them.
20. As to the Respondent's concerns about the potential shortfall that will occur in the service charge expenditure that can be collected from the remaining lessees once the Applicant has enfranchised, it seems that this difficulty can only be overcome by the remaining leases being varied in the same terms. Any increased liability may be partially offset by the reduced overall expenditure in relation to the subject property.
21. The Tribunal was satisfied that clause 4(1)(g) of lease was not engaged because a proper reading of the clause reveals that it was only intended to apply in the event that any of the properties remained unsold or, for example, any of the leases had been forfeited. That is clearly what is meant by the words "*if any lease has been determined*".
22. Having regard to the Tribunal's findings above, the parties are now invited to agree the terms of the transfer. In the Tribunal's view the remaining semantic differences are and should be capable of agreement. In default, the parties may apply for further directions, but this is not encouraged unless real and substantive differences remain between them.

### ***Appeals***

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case.



2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.
3. If the person wishing to appeal does not comply with the 28-day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.
4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.