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

Case Reference : **CHI/00HN/OCE/2015/0044**

Property : **Holmdene, 11 Wimborne Road,
Bournemouth, Dorset, BH2**

Applicant : **Holmdene Freehold Ltd**

Respondent : **The Trustees of the Alice Ellen
Cooper-Dean Foundation**

Tribunal Members : **Judge D Dovar
Mr C Harbridge FRICS**

Date of Decision : **3rd May 2016**

DECISION

1. This is an application for the determination of the terms of transfer of the freehold of the Property from the Respondent to the Applicant under s24 of the Leasehold Reform Housing and Urban Development Act 1993 ('the 1993 Act').
2. The application was made in October 2015 and by directions issued on 26th January 2016, the Tribunal notified the parties that this matter would be determined without a hearing and on the papers.
3. The Applicant served an initial notice dated 17th February 2015 under s13 of the 1993 Act in respect of the Property. The Respondent served a counter-notice dated 24th April 2015 which took issue with the premium, the extent of the property to be transferred and the terms of the transfer. There remain five points of dispute between the parties as to the terms of the transfer.
4. In considering this application, the Tribunal has regard to section 34 (9) and schedule 7 of the 1993 Act as to what the terms of transfer should be where the parties are unable to reach agreement.
5. The first two items in dispute are connected and relate to the definition of 'Estate Grounds' and the rights granted for the benefit of the Property over that land. The Applicant had sought the freehold of an area wider than the building itself. The Respondent, in its counter-notice, reduced the transfer to that of the freehold of the building only but through the terms of the proposed transfer introduced terms to replicate existing rights over the wider estate.

Applicant's wording is appropriate. The Applicant has also proposed the insertion of 'in connection with the use of the flats'. This also mirrors more closely the wording of the Underlease (which uses the words 'in connection with the use and enjoyment of the Demised Premises' in the Second Schedule) and so the Tribunal allows this additional wording.

8. The next two contentious amendments relate to the definition of '*the Service Media*' and rights granted under paragraph 12.6.3. The Respondent has proposed the following definition

'all cisterns tanks sewers drains pipes watercourses cables wires ducts conduits together with other ancillary mechanical and electrical plant'.

The Applicant seeks to include within the definition additional wording at the end, being

'now running or situated in under or upon the estate grounds.'

9. Neither the Headlease nor the Underlease provides a definition of Service Media. The proposed definitions relate to rights of access granted in order to repair service media under paragraph 12.6.3. In that paragraph, the Applicant has sought to introduce the wording

'for the purpose of repairing cleansing maintaining or renewing any existing Service Media and laying down any new Service Media servicing the Property'

instead of

'for the purpose of repairing cleansing maintaining or renewing any Service Media servicing the Property'.

The Applicant's proposed wording in paragraph 12.6.3, although possibly superfluous more accurately reflects the rights granted in the Underlease in Schedule 2 and should therefore be included. However, it is not necessary to make the additions proposed to the definition of the Service Media as the rights at paragraph 12.6.3 provide for this. Therefore their proposed amendment to the definition is rejected.

10. There is a further dispute over the wording of 12.6.3. The Respondents propose

'Such rights of access to and entry upon the Estate Grounds as are necessary for the proper performance by any lessee for the time being of the Headlease and of the Underleases of such lessee's obligations under the terms of and in accordance with the stipulations contained in the Headlease and the Underleases for the purpose of repair or maintenance of the Property ...';

whereas the Applicant proposes

'Such rights of access to and entry upon the Estate Grounds as are necessary for the proper performance by any flat owner or occupier of a flat and their visitors and all others having the like right under the terms of the of [sic] Headlease and of the Underleases for the purpose of repair or maintenance of the Property'

11. The Tribunal considers that the Applicant's wording goes too far in relation to extending the right to occupiers and their visitors. However, in terms of the right of access, this should be open to not just the leasehold owner but also the freehold owner. Accordingly whilst the first part of the Applicant's wording is not allowed, the second part is, so that the wording should read

'Such rights of access to and entry upon the Estate Grounds as are necessary for the proper performance by any owner of a flat and all others having the like right under the terms of the Headlease and of the Underleases for the purpose of repair or maintenance of the Property ...'

12. The final issue arises over the covenants as to title which are implied by virtue of the Law of Property (Miscellaneous Provisions) Act 1994 and the impact of paragraph 2 of Schedule 7 of the 1993 Act. The Respondent has sought to limit the effect of the 1994 Act by provisions at paragraphs 12.3.1, 12.3.2 and 12.3.3. The Applicant seeks to strike out those paragraphs so that the usual covenant as to title applies without limitations. The Respondent contends that the covenant should be limited as: a.) it is a charity; b.) there is no restriction in the 1993 Act which prevents a limitation; and c.) these provisions are standard practice. The Tribunal is not persuaded by these arguments as (dealing with those points in turn): a.) the Tribunal cannot see the relevance (it has not been spelled out) of the Respondent being a charity; b.) whilst there is no prohibition on restriction, the Tribunal's view is that in default of agreement, the covenant as to title should not be restricted;

and c.) that is merely an assertion as to practice and provides no rationale for limiting the covenant. Accordingly, in the absence of agreement between the parties, the covenant as to title should not be restricted and the Applicant's amendments are approved.

13. In conclusion, in relation to the proposed draft, the Tribunal makes the following determination:

- a. The definition of Estate Grounds is as proposed by the Applicant;
- b. The definition of Service Media is as proposed by the Respondent;
- c. The limitations on the covenant for title are removed as per the Applicant's amendment;
- d. The Applicant's amendments to paragraph 12.6.1 are approved;
- e. The first part of paragraph 12.6.3 is as set out above at paragraph 11, the second part of paragraph 12.6.3 is as per the Applicant's amendment.



Judge D Dovar

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.