

**Leasehold Valuation Tribunal for
Eastern Rent Assessment Panel**

File Ref No: CAM/00KF/OAF/2004/0001/01

Decision

Leasehold Reform Act 1967 ("the Act")

Tribunal Members: Mr John Hewitt (Chairman)
Mr Frank James FRICS
Mr Anthony Jackson JP

The House: 114 Tyrone Road, Thorpe Bay, Essex SS1
3HB

The Applicants:
David Edward Fuller
Debra Ann Fuller

The Respondent:
Thorpe Estate Limited

Appearances:
Mrs Debra Fuller

Mr Anthony Radevsky of Counsel
Instructed by Wallace & Partners

Witnesses:
Mrs Debra Fuller

Mr Anthony Dean

Hearing:
Monday 22 March 2004 at the Roslin Hotel, Thorpe Esplanade, Southend on Sea,
Essex

Notice: Dated: 23 October 2003
Notice in reply: Dated: 12 November 2003
Application: Dated: 29 January 2004

1. Introduction

1.1 This is an application made under section 21 of the Act. The House is let to the Applicants pursuant to a lease dated 11 November 1954. The lease granted a term of 953 years from 24 June 1954. The Applicants seek to acquire the freehold of the House. The Respondent does not dispute the Applicant's entitlement to have the freehold.

- 1.2 The notice in reply stated that the Respondent required any transfer of the freehold to contain restrictive covenants. The covenants sought were set out in a schedule attached to it.
- 1.3 Shortly prior to the hearing the parties reported that they had reached agreement on the price to be paid for the freehold interest.
- 1.4 Some of the restrictive covenants as originally sought by the Respondent were not acceptable to the Applicants. Prior to and during the course of the hearing the parties were able to agree the text of a number, but not all of, the restrictive covenants. Accordingly, it is those few but important areas of dispute that the Tribunal has to make determinations on pursuant to section 21(2)(a) of the Act.
- 1.5 Immediately prior to the hearing the Tribunal was able to inspect the House and its gardens. The Tribunal also drove around the estate on which the House is situated to get a feel for it. Immediately after the hearing the Tribunal inspected 27 Thorpe Esplanade, a property which was to feature in the evidence given to it.
- 1.6 Prior to the hearing the Tribunal had been provided with two volumes of documents, one from each party. At the hearing we were given copies of a witness statement made by Antony Dean, a surveyor employed by Regis Group Services Limited, a subsidiary of Regis Group (Holdings) Limited. Some further documents were handed to the Tribunal during the course of the hearing, and copies made available to both parties. After the hearing the Tribunal was provided with copies of correspondence suggesting that when Mr & Mrs N C Gould purchased 27 Thorpe Esplanade in January 1998, the purchase price was £475,000, and a further £4,750 was paid to the Respondent to vary some of the restrictive covenants. The Tribunal was told that Mr Gould is a director of the Regis Group, but that his company did not control the Respondent at the time of the transaction just referred to.
- 1.7 When opening the hearing, the Chairman stated that in his capacity as a partner in a London firm of solicitors he had, from time to time, instructed Mr Radevsky to advise his clients. No objections or representations were made by either party and the hearing proceeded.

2. The Law

- 2.1 The Act deals expressly with and the extent to which, the transfer or conveyance shall contain restrictions.
- 2.2 The Act provides, so far as material to this case, as follows:-

“10 (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:-

(b) such provision (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 other property

(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.

2.3 The expression "material enhancement" is important in the context of setting the standard of the burden of proof on the Respondent. The expression was re-considered recently by Mr P H Clarke FRICS in the Lands Tribunal in *Eric Moreau v Howard De Walden Estates Limited* Ref: LRA2/2002. He said at para 185:-

"The question of material enhancement can, in my view, only realistically be considered in general terms..... In my judgment, material enhancement is essentially a matter of general impression."

Mr Clarke adopted what Mr J Stuart Daniel said in *Peck v The Trustees of Hornsey Parochial Charities* (1970) 22 P. & C. R. at page 947:-

"The main conflict in evidence was whether the restrictions are such as materially enhance the value of other property. I have no hesitation in finding that they are. When I put the question to him in argument Mr Bramall conceded that the concept of material enhancement must include the concept of maintaining a value which would otherwise deteriorate. If this is right, and I think it is, Mr Bagnall-Oakeley's evidence that the quality of the estate was being threatened by un-self-contained sub-letting seems to me to be incontestable, and to decide this particular question in favour of the landlords."

This reasoning was followed in *Le Mesurier v Pitt* (1972) 23 P. & C.R. (at 981):-

"...I deemed the concept of material enhancement to include the concept of maintaining a value which would otherwise deteriorate..."

2.4 The Tribunal decides that the concept of material enhancement is as formulated above.

2.5 Before leaving the concept of material enhancement, the Tribunal must deal with the question of planning control, because Mrs Fuller submitted to us that

the local authority could and should be relied upon to exercise such control as was reasonably required to protect the Respondent's interests and thus the extent of the alterations restriction sought by the Respondent was too wide. In *Moreau* Mr Clarke said (para 187):-

"It has long been recognised by the courts and this Tribunal that there is a distinction between control under town planning legislation and control by restrictive covenants; the former is not a substitute for the latter.

2.6 In *Re Martin* (1988) 57 P. & C.R. 119, Fox LJ said (at 124):-

"Thus, it seems to me that, while the two regimes impinge upon each other to some extent, they constitute different systems of control and each has, and retains, an independent existence"

2.7 In *Peck* the member said (at p 947)

"Nor do I think that the existence of planning powers under the Housing Act makes it unreasonable to continue control by covenants. These powers are not always easy to enforce and on this estate it was the trustees and not the local authority who called a halt to un-self-contained multiple occupation."

2.8 The Tribunal accepts that the judicial statements set out above comprise a correct analysis of the law, and decides that planning control is no substitute for control by restrictive covenants in appropriate circumstances.

2.9 Mr Radevsky accepted that the burden of proof rested on the Respondent to satisfy the Tribunal that the covenants sought by the Respondent were properly required and come within the statutory provisions.

3 The Estate

3.1 Mr Dean told the Tribunal, and it was not contested, that the estate known as the Burges Estate is an area bounded by Thorpe Esplanade to the south, by Acacia Drive and Station Road to the north, by Maplin Way to the east, and by Lynton Road and Thorpe Hall Golf Course to the west.

3.2 Mr Dean said, and the Tribunal was able to see and confirm for itself, that the Estate is a high class residential area comprising a mix of large detached and semi-detached houses and bungalows. Included within the Estate is a double parade of high class shops, cafes and other commercial enterprises serving the local community.

3.3 Mr Dean also said many of the houses and bungalows were constructed between 1910 and 1960. The Estate now comprises some 870 homes. Originally all of the

houses and bungalows were let on extremely long leases at modest ground rents. It seems that the House was constructed in or about 1954 in what was formerly part of the large garden of 112 Tyrone Road.

3.4 Evidently the Estate was originally laid out by Major Y A Burges, and was transferred to Thorpe Bay Estate Company in 1958, and then to the Respondent in July 1984. Mr Dean told the Tribunal, and we accept it, that in August 2001 the Regis Group acquired the issued shares of the Respondent company so that since that date the Estate has been under the control of the Regis Group.

3.5 Mr Dean explained to the Tribunal that of the 870 homes on the Estate, by the time the Respondent company acquired the freehold interest in 1984, 240 freehold interests had been sold off. Since 1984 a further 50 freehold interests had been sold off by the Respondent, leaving about 580 leasehold properties on the Estate. Mr Dean was unable to tell the Tribunal which of the properties in the immediate vicinity of the House still comprised part of the Respondent's leasehold estate. It was clear from part of the evidence submitted by the Applicants that 79 and 112 Tyrone Road had been sold off.

4 The Restrictive Covenants

4.1 The restrictive covenants as originally sought by the Respondent were set out in a schedule annexed to the notice in reply. Prior to and during the course of the hearing the parties were able to agree the text of most of them.

4.2 Appendix 1 to this Decision sets out the restrictive covenants to be included in the transfer. Those numbered 2,3,4,5,6,7 and 9 were agreed by the parties. Those which were in contention were those numbered 1 and 8 and the Tribunal focussed on these. We shall take them in turn.

4.2.1 Covenant 1

1. The only issue on this covenant was whether it should restrict "one single" or "a" private dwelling house.
2. The Tribunal finds that the principle reason why Mrs Fuller sought "a private" rather than "one single private" was that it accords with what is in the transfer of 27 Thorpe Esplanade. This property is owned by Mr & Mrs Gould. Mr Gould is a director of the Regis Group. Mrs Fuller's case is that if it is good enough for Mr Gould, it is good enough for her. Mrs Fuller equates Mr Gould as being the landlord. However, it should be noted that at the time of the purchase of the freehold interest in 27 Thorpe Esplanade by the Goulds, The Regis Group had not acquired the Respondent company. Mrs Fuller did not advance any other argument to support the Applicants' case on this issue.
3. The attention of the Tribunal was drawn to the restrictive covenants affecting some of freeholds on the Estate, including 79 and 112 Tyrone Road, 134 St Augustines Avenue, 82 and 119 Marcus Avenue and 30 St James Avenue amongst others. All contained a covenant referring to "a single" private dwelling house. Evidence of this is contained within the documents submitted by the Applicants.

4. Our attention was also brought to an issue concerning 37 St Augustines Avenue. Correspondence about it was annexed to Mr Dean's witness statement. Evidently the covenant here was to "a private" dwelling house. Apparently the owner of the property proposed to add a new dwelling to the existing dwelling house. An issue arose as to whether this was or was not caught by the covenant. Evidently the owner of the property argued that it was not. Solicitors acting for the Burges Estate Residents Association took a different view and had written to the Respondent urging it to take action to enforce the covenant. Mr Dean said the Respondent was still considering its position and was taking legal advice. But he claimed that the legal effect would have been much clearer and more certain if the covenant had referred to "one single" rather than "a private" dwelling house.
5. Mr Dean explained to the Tribunal that the Respondent did not want to see an over development on the Estate or the conversion of larger houses into flats or HMOs. He said that the Respondent regards itself as the custodian of the Estate and wants to retain it as a high class estate. The Respondent did not want there to be more than one dwelling on each site. If this was allowed, it would detract from the overall appearance of the Estate and hence the value of the Respondent's interests. Mr Dean said that the policy of the Respondent was to uphold the covenants and protect the characteristics of the Estate. The Respondent sought uniform covenants across the Estate. Mr Dean was critical of the local council which he said took a more relaxed view and often granted permission for people to convert a house into flats.
6. The Tribunal noted that in agreed covenant 6 there was reference to "another" single private dwelling house and in agreed covenant 9 there was reference to "a single private" dwelling house.
7. The Tribunal also noted that in the lease of the House there is a covenant not to use the demised premises otherwise than as "a private" dwelling house.
8. The Tribunal accepted Mr Dean's evidence on the reasons why the Respondent contends for the phrase "one single" private dwelling house. The Tribunal finds that conversion of large houses on the Estate into flats or HMOs would have a material and adverse effect on the remainder of the Respondent's interests in the Estate.
9. The Tribunal also finds that the transfer to the Goulds in respect of 27 Thorpe Esplanade was probably a one off transaction, inconsistent with the previous policy of the Respondent. That transaction was effected before the present owners acquired the Respondent company and there was no evidence before the Tribunal as to the circumstances of it. The Tribunal accepts the evidence and documents submitted by Mrs Fuller that other than in the case of 27 Thorpe Esplanade, all the samples cited "a single" private dwelling house.
10. That said, 37 St Augustines Avenue is an anomaly. It is a transaction effected as recently as 19 August 2002. It is unfortunate that the Respondent having introduced it as an example of lack of clarity and the potential for dispute and litigation, did not adduce evidence as to the circumstances in which it effected the transfer as apparently drawn.

The Tribunal finds that there is scope for dispute and litigation as the correspondence shows. This can be avoided or minimised with wording of greater clarity.

11. The Tribunal finds that the wording sought by the Respondent should prevail. For many purposes the wording proposed by the Applicants might well be sufficient but it is not clear. The Respondents wording is clearer and ought to avoid, or at least minimise, the risk of litigation. The wording is also consistent with that in covenants 6 and 9 both of which were proposed by the Applicants and accepted by the Respondent. For these reasons, the Tribunal finds that the Respondents wording falls within the provisions of section 10(4)(c) of the Act.

4.2.2 Covenant 8

1. The Respondent proposes that there should be a restrictive covenant against alterations, and an obligation on the Applicants to seek and obtain retrospective licence in respect of any alterations which may have been effected up to now, but in respect of which licence has not yet been obtained.
2. The lease of the House contains a covenant
“...the Lessee will not without the previous license in writing of the Lessor or his surveyor erect or set up or suffer to be erected or set up on any part of the said premises hereby demised any additional building whatsoever nor make any alteration in the plan or elevation of the said messuage dwelling-house garage and buildings hereby demised or in any party walls or in the principal or bearing or internal walls or timbers”
3. The Respondent contends that the covenant it seeks comes within section 10(4)(b)(i) of the Act. During the course of the hearing the Respondent said it would accept a proviso that consent was not to be unreasonably withheld.
4. The Applicants are adamant that they do wish want the Respondent to have any covenant at all for reasons which are explained below.
5. Mr Dean gave evidence on this issue. He told the Tribunal that in addition to the evidence he had already given with regard to the Estate and the Respondent's interest in it, and the need to maintain control on development, the Respondent had plans to re-develop the Thorpe Hall Golf Course for a high class residential scheme. He explained the Respondent hopes to get a planning permission to relocate the golf club to the north of Southend. This would release about 87.3 acres of land. The Respondent plans to erect about 259 high class dwellings on about 46 acres of this land. as phase 1 of the project. The proposal is for large detached houses, with an element of smaller houses and some affordable housing. The Respondent wants to protect the potential investment by maintaining the character of the Estate. Mr Dean accepted the lease to the golf club still has a number of years to run and a deal has yet to be struck for its surrender. Given the scale of the proposed development, the project was medium to long term.
6. Mr Dean maintained that control on alterations and development was essential to maintain the quality of the Estate and hence its value. The

covenants sought were essential to materially enhance the value of the Respondents holdings.

7. Mr Dean accepted that during the stewardship of the previous owners of the Respondent company, a number of houses were sold off which did not contain a restriction on alterations. Since the Regis Group had acquired the Respondent in August 2001 the freehold of about 50 houses had been sold off. All were freely negotiated sales (no applications to LVTs) and all contained restrictive covenants more or less in standard form, particularly as regards alterations. Mr Dean said this was in accordance with policy. Mr Radevsky told us that he had received a fax from the Respondent's solicitors confirming the evidence of Mr Dean on this point. The letter was produced and the Tribunal adjourned to allow Mrs Fuller and her adviser to consider it.
8. In her evidence Mrs Fuller drew attention to a number of sales where no alterations covenants had been imposed. These include the properties mentioned in paragraph 4.2.1.3 above. All of these transactions pre-dated August 2001.
9. Mrs Fuller's principal concern was that following the purchase of the freehold interest she did not want to have any more to do with the Respondent. Mrs Fuller told us that she and many of her neighbours has found the Respondent difficult to deal with and often unhelpful. She said there was a general history of delay in processing applications for consents and licences. Substantial fees were charged for consents and there did not seem to be any uniformity or scales to justify the fees sought. Mrs Fuller illustrated her argument and drew our attention to the following:-

75 Parkanaur	04.06.03	£3500 consent fee – building works plus £250 admin fee
131 St James	17.06.03	£3000 consent fee – alterations plus £250 admin fee
5 Gloucester Ter	08.05.03	£1250 landlord's fee plus £125 agents fee – alterations

In her oral evidence Mrs Fuller gave examples of the Respondent policing the Estate with a van on which there was a camera mounted on telescopic device to look over properties and seek out evidence of unauthorised alterations or the erection of conservatories. Mrs Fuller claimed that the Respondent then required retrospective licences at exorbitant cost. Mrs Fuller cited cases that she knew about as follows:
 - a fee of £7500 was sought in respect of alterations
 - a fee of £3500 was quoted in respect of a sun lounge where the tenant was just about to exchange contracts for a sale of 98 Tyrone
 - a fee of £20000 for a retrospective licence in connection with an extension
 - a fee of £5500 for a consent in respect of an extension to a garage.Mrs Fuller explained that there were many cases where the Estate did not respond or respond timely to letters and applications. She said that residents of the Estate did not know where they stood, whether they would be able to obtain a consent, and, if so, at what cost.
10. Mrs Fuller gave as a further example of the Respondent's approach to applications, her experience with regard to her request to buy the

freehold which may be summarised from the documents provided as follows:

04.07.01	Enquiry about price
09.07.01	Not currently disposing of freeholds, contact us in a month
14.01.02	Enquiry about price – no response
24.01.02	Offer of £300 made
12.02.02	Offer rejected – increased offer sought
19.02.02	Enquiry as to what figure landlord had in mind – no response
17.04.02	Telephone enquiry – cannot be progressed - landlord requires tenant to enter into a confidentiality agreement
?	Offer of £1100
26.04.02	Offer rejected – increased offer sought
07.05.02	Offer of £2200 – to be followed up by landlord in due course.
03.08.02	Follow up by tenant
09.08.02	Landlord will not progress until confidentiality agreement returned
08.09.02	Follow up by tenant
18.09.02	Holding reply
02.10.02	Tenant sends detailed comments on confidentiality agreement
26.01.03	Tenant seeks fair price – no response
19.05.03	Offer of £600 plus costs – no response
22.07.03	Offer of £600 rejected – counter offer £3000, subject to no retrospective consent being granted
08.09.03	Conditional offer of £1000 open till 19.09.03
19.09.03	Offer accepted STC
25.09.03	Tenant says acceptance not compliant with conditions
23.10.03	Notice of Claim
12.11.03	Notice in Reply
05.12.03	Offer £136.60 made
24.02.04	Offer accepted

11. Mr Dean told us that the Respondent does not have a published policy for the processing of applications for licences or consents, nor does it issue guidance on indicative fees. He says that each application it dealt with on its own merits and facts. Mr Dean was not able to explain to us how the Respondent formulated its offer of “in the region of £3000” nor how it was that it finally accepted an offer of £136.60 after the issue of the application to the Tribunal. Mr Dean was keen to assure the Tribunal that the Respondent did not seek to make a profit on fees for consents; simply to cover its costs. He said that most of the work on the consents was done internally.
12. In his submissions Mr Radevsky urged the Tribunal to disregard the alleged overcharging. He said there was no evidence of what works/alterations was involved in each case. If money was charged on previous occasions it is hypothetical, it may have been charged, and may have been freely negotiated. Mr Radevsky also submitted that the

covenant sought materially enhances the value of the buildings and land. He said that the Estate maintains coherent development control of the Estate. If it loses such control there is a real risk of diminution in value. Mr Radevsky relied upon the Moreau case in support of his argument. He further submitted that the real concern of the Applicants was the fear of unreasonable charges for consents. He invited the Tribunal to impose the covenant as sought, subject to the modification suggested, namely that consent was not to be unreasonably withheld. He suggested that would be adequate to protect the Applicants. He reminded the Tribunal that all recent transfers of freeholds on the Estate had imposed the restrictive covenants as originally proposed.

13. The Tribunal accepted Mr Dean's evidence on the need to have some control over future development on the Estate, and that the absence of such control would indeed cause diminution of the Respondents interests in other property. Accordingly, the Tribunal finds that there is a need for some control on alterations, and this need brings the covenant proposed within section 10(4)(b) of the Act.
14. The Tribunal accepts the evidence of Mrs Fuller with regard to her understanding of the Respondent's management of applications for consent generally. Whilst the Tribunal must look carefully at the minimal information given about the examples cited by Mrs Fuller, the Tribunal accepts that a general trend is shown. The Tribunal considers, having regard to its general experience in matters of this type, that some of the fees cited appear to be very high for a residential property, even one in a high class district. This general view is supported by the detailed evidence available to the Tribunal and which we accept, about the course of events and efforts made by the Applicants to try and negotiate the purchase of the freehold interest prior to the service of the Notice of Claim. The evidence shows an attitude of mind by the Respondent which many might find worrying. This is demonstrated by Mr Dean's inability to explain to the Tribunal the basis of the offer to sell the freehold interest for "in the region of £3000" with the Respondent's decision ultimately to accept an offer of £136.60. The Tribunal understands the fears that the Applicants genuinely have about the processing of any future applications for licence for alterations which they might make. Such fears and concerns might well be eased if the Respondent were to publish an open and transparent policy as to its future management on the processing of such applications, to cite indicative time lines and to quote indicative fee levels likely to arise.
15. The Tribunal is required to balance the competing interests of both parties. The Tribunal finds that the imposition of a restrictive covenant is appropriate to the circumstances of this case, but that such covenant should be qualified to oblige the Respondent not to unreasonably withhold or delay a consent and that the fees the Applicants are required to pay should be restricted to those reasonably and properly incurred by the Respondent.
16. Before leaving covenant 8 there is one more matter we must deal with. The Respondent originally proposed, and at the hearing sought a covenant requiring the Applicants to obtain a retrospective licence in

respect of any unlawful alterations carried out to date. Mr Dean told us that he was not aware of any such unlawful alterations. He told us the Respondent has had an opportunity to inspect the House. Mr Dean told us that sometimes the Respondent inspected the property and sometimes it did not. He said that normally an inspection would be made prior to completion. Mr Dean said there might have been some unlawful internal alterations, but that the Respondent would not know if it does not have floor plans of the original building. Mr Dean was not able to demonstrate any material enhancement to other property of the Respondent that would be affected by this proposed covenant. He said the obligation of this covenant was not intended to apply or continue after the transfer of the freehold. The Tribunal accepted Mr Dean's evidence on this matter, but in the light of it we do not consider that the proposed covenant comes within the requirements of section 10(4)(b) of the Act. In particular we noted Mr Dean's evidence that the covenant was not intended to have any relevance after the transfer of the freehold interest. For this reason alone we consider it inappropriate that it is included.

pp JPk

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John Hewitt (Chairman)
8 May 2004

Appendix 1

The Restrictive Covenants to be included in the transfer of the freehold interest, whether as agreed between the parties or determined by the Tribunal shall be as follows:

1. not to use the Property or permit the same to be used or occupied for any other purpose whatsoever than for one single private dwelling house and usual outbuildings belonging thereto
2. not at any time to exercise or to carry on upon or any part of the Property any trade, manufacture, business, work or occupation of any kind and not to do or suffer to be done in or upon the Property any act or thing which may be or become a nuisance or damage to the Vendor and its tenants and occupiers of adjoining premises or the neighbourhood
3. not to park or permit to be parked on and in front of the Property any commercial vehicle, boats, caravan, trailer for a period exceeding 24 hours at any one time
4. to maintain proper and satisfactory boundary walls or fences on the side of the Property where the letter "T" (if any) appears on the plan
5. to keep the garden and grounds of the Property in good order and where appropriate neatly cultivated
6. not to demolish the dwelling house now erected on the Property other than for the purpose of enabling another single private dwelling house to be erected on the Property
7. at all times to contribute a fair and proper share towards the cost and expense of maintaining, cleaning, repairing and securing all party walls, fences, sewers, drains, gutters, watercourses and easements used or capable of being used in common by occupiers of the Property with occupiers of the adjoining or neighbouring properties or lands
8. the Purchaser shall not make any alteration in the plan or elevation to the existing dwelling house at the Property without the previous consent in writing of the Vendor, such consent not to be unreasonably withheld or delayed, and the Purchaser shall discharge the fair and reasonable costs or fees of professional surveyors and/or solicitors reasonably and properly incurred by the Vendor in connection with the giving of such consent
9. not to permit any building other than a single private dwelling house with ancillary buildings to be erected on the Property