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

**Case Reference** : **MAN/36UC/OAF/2013/0010**

**Property** : **The Hall, Potto Hall, Potto,  
Northallerton, North Yorkshire DL6  
3EY**

**Applicant** : **Steven and Angela Crosbie**

**Representative** : **(unrepresented)**

**Respondent** : **Potto Hall Management Company  
Limited**

**Representative** : **Mr Kemp (Counsel)  
Thorp Park Solicitors**

**Type of Application** : **Application pursuant to section 21(2)  
of the Leasehold Reform Act 1967**

**Tribunal Members** : **Mr S Moorhouse LLB (Chairman)  
Mr IR Harris BSc FRICS**

**Date and venue of  
Hearing** : **17 October 2013,  
Teesside Magistrates Court**

**Date of Decision** : **27 January 2014**

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**DECISION**

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## **DECISION**

- i. In pursuance of subsection 10(4) of the Leasehold Reform Act 1967 the restrictive covenants on the part of the Applicants set out within the Schedule to this decision document shall be included within the deed giving effect to the transfer to the Applicants of the Property.
- ii. No reciprocal covenants on the part of the Respondent shall be included within the deed of transfer.
- iii. The Respondent's application for an award of costs pursuant to Rule 13(1)(b) of The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 is denied, the Tribunal makes no order for costs.

## **REASONS**

### **The Application**

1. The application ('the Application') is made under section 21(2) of the Leasehold Reform Act 1967 ('the Act') in relation to the proposed acquisition by the Applicants of the freehold interest in their (currently leasehold) home at The Hall, Potto Hall, Potto, Northallerton, North Yorkshire DL6 3EY ('the Property'). Both parties agree that the Tribunal shall have jurisdiction in accordance with the provisions of section 21(2).
2. The Property comprises the majority of the original Potto Hall including the front entranceway to the Hall and reception rooms, the front driveway and much of its garden. The Applicants purchased the Property in 2010 and are in the course of restoring it. They are also the freehold proprietors of a larger area of land to the south of the Property.
3. The Property was designated as "No. 2 Potto Hall" in the context of a development completed in 2004 that subdivided Potto Hall itself and with additional works of construction created a total of 6 residential properties on the Potto Hall site. The Respondent company, of which the leaseholders are the directors, is the freehold proprietor and management company in relation to all 6 properties. Upon transferring its interest in the Property the Respondent will therefore retain its freehold interest in 5 residential properties and their associated communal areas (collectively referred to as 'the Retained Property').
4. In the course of enfranchising the Applicants have applied to the Tribunal for a determination:
  - (a) that a schedule of restrictive covenants sought to be imposed by the Respondent within the transfer document be excluded;
  - (b) alternatively, that a modified schedule of restrictive covenants proposed by the Respondent be included in their place; and

(c) that if any restrictive covenants are to be included they should be reciprocal.

The Applicant's preferred option is that set out in sub-paragraph (a). The Applicant confirms that the other terms of the transfer document and the purchase price have been agreed.

### **Directions**

5. Directions were issued on 16 August 2013 requiring the submission of bundles setting out the parties' statements of case and other relevant documentation. It is relevant to note that these directions superseded an earlier set of directions issued in error in a form that related to section 21(1) of the Act.
6. Following the inspection and hearing referred to below and deliberations by the Tribunal, Further Directions were issued. These set out a number of restrictive covenants that the Tribunal was minded to include in its decision. Since these did not correlate entirely either with the set of covenants requested by the Respondent or with those that are counter-proposed by the Applicant the Tribunal invited any additional comments the parties might wish to make on the wording of the covenants. The Tribunal, through its Further Directions, also invited submissions on the issue of whether the draft covenants should be reciprocal and on the issue of costs.

### **Inspection & Hearing**

7. The Tribunal inspected the Property and the Retained Property on 17 October 2013. The inspection related to external areas and the Tribunal additionally noted the internal restoration work underway within the Property. The inspection was attended by one of the Applicants, Mr Crosbie, by Counsel for the Respondent, Mr Kemp, and by the Respondent's Solicitor, Mrs Warburton of Thorp Parker Solicitors. The inspection was followed by a hearing at Teesside Magistrates Court attended additionally by Mrs Crosbie and by Mr Leyburn of No. 4 Potto Hall in his capacity as a director of the Respondent company.

### **The Lease**

8. The lease of the Property ('the Lease') was entered into between Pyrgi Limited (1) and Domenico Peretti and Anna Peretti (2) on 3 November 2003 for a term of 999 years from and including 25 March 2002. Under the terms of the Lease numerous restrictive covenants and positive covenants are entered into by the leaseholder. Covenants on the part of the landlord include a covenant for quiet enjoyment and a covenant (subject to certain provisos) that at the written request of the leaseholder the landlord will enforce covenants equivalent to the leaseholder's covenants entered into by the other leaseholders on the Potto Hall site.

## The Law

9. Subsection 21(2) of the Act includes the following provisions:

*21(2) Notwithstanding section 20(2) or (3) above, a tribunal shall have jurisdiction, either by agreement or in a case where an application is made to a tribunal under subsection (1) above with reference to the same transaction, -*

*(a) to determine what provisions ought to be contained in a conveyance in accordance with section 10 or 29(1) of this Act.....*

10. Subsections 10(4) and (5) of the Act include the following provisions:

*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 -*

*(a) such provisions (if any) as the landlord or the tenant 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 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.*

## Submissions - General

11. The parties' submissions are divided within these 'reasons' into three different categories. Submissions relating to the specific wording of a restrictive covenant are noted later on a 'covenant by covenant' basis, followed by submissions on the specific issue of whether there should be reciprocal covenants. Submissions that are more general in nature are noted first.

### *Applicants' submissions*

12. In the course of the hearing the Applicants supplemented their written statement of case with a detailed presentation which included helpful background information, the Applicants' experiences in relation to the Respondent company, their views on the legal implications of these experiences, the events that precipitated the Application, legal arguments on the overall issue of covenants and the admissibility of evidence, comments on the particular covenants sought by the Respondent and submissions on the timeliness of the Respondent's responses within the enfranchisement process. The issues noted here are ones that the Tribunal considers to be of particular relevance to its findings.

13. The Applicants submit that the relevant provisions within subsection 10(4) Act to be addressed in the present case are those at subsections 10(4)(b) and (c). In the context of subsection 10(4)(b) the Applicants submit that the restrictions currently affecting the Property are indeed only enforceable by the landlord and therefore the final words in the subsection apply, namely that the restrictions must be '*such as materially to enhance the value of the other property*'.

14. The Applicants go on to quote from the publication Hague on Leasehold Enfranchisement (5th Edition) paragraph 6.28 which states:

*"The basic rule is that the landlord cannot require the continuance of any of the covenants imposed by the tenant's lease. But an exception is made in the case of any restrictive covenant which is capable of benefiting other property, and which also fulfils one of two further alternative conditions. These are as follows.*

*(i) The covenant is enforceable by one or more persons other than the landlord.....*

*(ii) The covenant, although enforceable only by the landlord, is "such as materially to enhance the value of other property". A covenant falls within this category if it is likely to maintain the value of other property".....'*

15. The Applicants submit that the landlord may therefore require the continuance of certain covenants (i.e. covenants which restrict the use of the property); however, those restrictions must be proven to materially enhance the value of other property belonging to the landlord.

16. The Applicants quote the case of *Trustees of the Sloane Stanley Estate and Charles Carey-Morgan [2011] UKUT 415 (LC)*. The Applicants submit that in that case the Upper Tribunal, on a collective enfranchisement claim, held that "material enhancement" is a matter of general impression. They submit that it does not have to be quantified in exact monetary terms but that some form of evidence must be presented to establish that the restriction will materially enhance the freeholder's property, mere assertions by Counsel are not sufficient.
17. The Applicants contend that the only evidence submitted by the Respondent on the issue of material enhancement is in the form of a valuation report. The report is by GSC Grays of Stokesley. It relates to Number 1 Potto Hall and is stated to have been prepared on behalf of Doctor Richard Cree and Nicola Cree, Potto Hall Management Company Ltd c/o Thorp Parker Solicitors. The Applicants challenge the admissibility of this report, the nature, quality, and content of the report and submit that there is an apparent conflict of interest. The Applicants submissions on the issue of admissibility can be summarised as follows.
18. The Applicants quote the requirements of Rule 19(5) of The Tribunal Procedure (first-tier Tribunal) (Property Chamber) Rules 2013 on the issue of expert evidence. Rule 19 (5) states as follows:
- 'A written report of an expert must -*
- (a) contain a statement that the expert understands the duty in paragraph (1) and has complied with it;*
  - (b) contain the words "I believe that the facts stated in this report are true and that the opinions expressed are correct";*
  - (c) be addressed to the Tribunal;*
  - (d) include details of the expert's qualifications and relevant experience;*
  - (e) contain a summary of the instructions the expert has received for the making of the report; and*
  - (f) be signed by the expert.'*
- The duty in paragraph (1) referred to in sub-paragraph (5)(a) is "*to help the Tribunal on matters within the expert's expertise.....*".
19. The Applicants submit that the requirements of sub-paragraphs (a), (b) and (c) have not been met.
20. Turning to the provisions of subsection 10(5) of the Act the Applicants submit that the words 'changes since that date' within subsection 10(5)(a) should be interpreted as including, in the present case, changes in behaviour and attitude on the part of the Respondent. If this is so, the Applicants contend that it would be unreasonable for the Tribunal to Order the inclusion of any restrictive covenants within the transfer document

because the Respondent has demonstrated through previous events that it is likely to seek some ransom value from any power it is able to retain.

21. The Applicants additionally submit that the words 'changes since that date' within subsection 10(5)(a) of the Act should be interpreted as including, in the present case, physical and practical changes that have been made to increase the degree of separation between the Property and the Retained Property.
22. The Applicants state that over the last three years the Property has been re-orientated so that mail, deliveries, refuse collection and recycling collection are all via the dedicated access to the Property and not via the communal areas of the Retained Property. Additionally the boundaries and hedges established around the Property have matured to form a definite separation from the Retained Property. The Property and the Retained Property now have different postcodes which, the Applicants submit, reflect that the property is recognised as being in the vicinity of, and accessed from, a different road. The Applicants also state that they have agreed to relinquish upon enfranchisement their current rights to use the shared access way and common areas of the Retained Property at will.
23. It is noted by the Applicants that the covenants the Respondent seeks to impose within the transfer document are not exclusively 'restrictive' in nature. The Applicants contend that, in any event, positive covenants may not be included and cite a Leasehold Valuation Tribunal Decision of the London Panel in which the applicant landlords were The Portman Estate Nominees (One) Limited and The Portman Estates Nominees (Two) Limited and the respondent tenant was great Peter Nominees Limited (case reference LON/00BK/OAF/2009/0032). In that case the following finding is highlighted by the Applicants:

*'Perhaps we may firstly deal with the terms of the Transfer. The real issue in this case was whether or not the Transfer as worded creates a positive or restrictive covenant. We do not think that it is a matter of contentions that the Act does not permit the imposition of a positive covenant.'*

24. The Applicants raise a number of additional arguments to support their contention that the transfer document should be free of restrictive covenants:
  - the Respondent has demonstrated an inability to meet the standard of reasonableness that the Applicants are entitled to expect in their dealings with the Respondent and as such the Applicants should not be placed at the ongoing mercy of the Respondent post-enfranchisement
  - the Applicants are entitled to quiet possession and enjoyment and the Respondent has through its actions deprived the Applicants of the same
  - the restrictive covenants sought by the Respondent would in practice amount to an incumbrance and the Applicants are entitled to take free from incumbrances

- the Respondent owes to the Applicants a duty of care in its present role and it has comprehensively failed in that duty, acting negligently as a management company
  - the Respondent has breached its contractual commitments under the Lease specifically in relation to quiet enjoyment and service charge accounting
  - the Respondent is corporately responsible for the actions of its individual directors in the course of their 'company activities'.
25. The Tribunal sought to clarify the authorities upon which the Applicants were relying to support their contention that the reasonableness or otherwise of past actions on the part of the Respondent is a matter that the Tribunal should take into consideration. The Applicants stated that within the cases submitted by the Applicants to the Tribunal (these being the *Sloane* and *Portman Estate* cases) there was evidence that reasonableness was a relevant consideration.

*Respondent's submissions*

26. In addition to submitting its written statement of case pursuant to Directions, the Respondent made oral representations at the hearing through Counsel.
27. Mr Kemp emphasises that the issues to be determined centre on the imposition or not of restrictive covenants and that the allegations raised by the Applicants concerning the past conduct of the Respondent are irrelevant to the present case. Mr Kemp contends that, whilst the Applicants state that they are concerned that the Respondent will act unreasonably in enforcing future covenants, this is not a relevant consideration under the legislation.
28. Mr Kemp submits that the issue of 'reasonableness' arises only twice in the relevant provisions: in subsection 10(4)(c) and subsection 10(5). He submits that in these subsections the tests of reasonableness relate to whether the clause itself is unreasonable (subsection 10(5)) or the clause itself would interfere with the reasonable enjoyment of the house (subsection 10(4)(c)). Mr Kemp states that the subsections are about the covenants themselves, not how they might be dealt with if they were required to be enforced. The transferor must be free to enforce restrictive covenants and if the future enforcement of a covenant became vexatious then that would be a matter for the courts.
29. Mr Kemp makes reference to the issues raised by the Applicants concerning the timeliness of the Respondent's actions within the enfranchisement process. The Respondent responded on this issue within its written statement of case. Mr Kemp suggested that the issues might be relevant to costs and therefore left these aside to be addressed in that context.



30. On the issues raised by the Applicants concerning the admissibility of the valuation report prepared by GSC Grays Mr Kemp comments that this issue has been raised for the first time at the hearing. Mr Kemp makes reference to an Order issued in the context of the present proceedings on 9 August 2013, requiring the submission of a bundle. It is recognised by the Respondent that under the Tribunal's procedure rules that came into force in July 2013 the Tribunal's permission is required if expert evidence is to be submitted. Mr Kemp comments that these rules derive back to the Civil procedure rules and that the matter is dealt with under Rule 9 and under the case management regulations. He acknowledges that the Tribunal did not give permission for expert evidence but submits that the Tribunal did give permission for valuation evidence to be submitted.
31. Mr Kemp further comments that it would have been good if a statement of truth had been included in the valuation report however it was not being submitted as an expert report. The valuer had been asked for an opinion of value with and without covenants. Mr Kemp submits that the report is more detailed than the Solicitors had intended or is necessary, but nevertheless the Tribunal have the discretion to allow it as evidence. What weight to give to the evidence would be a matter for the Tribunal. Mr Kemp additionally comments on the issues raised by the Applicants concerning the valuation report however these are not relevant to the Tribunal's findings.
32. Turning to the *Sloane* case, Mr Kemp comments on the Applicants' contention that some form of evidence must be presented by the Respondent to establish that restrictions would materially enhance the value of the Retained Property, and that mere assertions of Counsel are not enough. Mr Kemp contends that the matter is clarified by the extract from the case of *Cadogan v Erkman [2011] UKUT 90 (LC)* set out at paragraph 151 of the *Sloane* decision. Quoting from this extract:
- 'We conclude that it is not necessary for there to be quantified valuation evidence to show that the inclusion of a restriction will uplift the value of other relevant property by £x or will prevent the diminution in value of other relevant property by £y (where £x and £y are quantified sums). However there must be evidence to satisfy the Tribunal, albeit as a matter of general impression, that there will be some monetary uplift in value (albeit unquantified) or the preventions of some monetary diminutions in value (albeit unquantified).'*
33. Mr Kemp submits that whilst this extract indicates that quantified valuation evidence is not necessary, this does not mean that evidence before the Tribunal cannot be taken into account. Even if the Tribunal decides not to rely upon the valuation report by GSC Grays, in Mr Kemp's submission this is not fatal to the Respondent's case. It is a matter of general impression whether the covenants will enhance the value of the Retained Property.
34. Mr Kemp refers also to the case of *Le Mesurier v Pitt (1972) 23 P. & C.R. 389* as authority that maintaining the present value is sufficient to meet

the requirement in subsection 10(4)(b) of the Act that the restrictions "*are such as to materially enhance the value of the other property*". Quoting from this decision: "*...I deem the concept of material enhancement to include the concept of maintaining a value which would otherwise deteriorate*". Mr Kemp submits that there is no contradiction between the *Sloane* and *Pitt* cases, the two sit side by side.

### **Submissions - Covenant Wording**

35. Turning to the particular wording of the restrictive covenants sought to be imposed by the Respondent, a schedule of covenants has been submitted by the Respondent and a counter-proposal submitted by the Applicants by way of an alternative schedule. Both schedules commence with the words:

*" 12.6 The transferees jointly and severally covenant with the transferor and its successors in title the owners for the time being of the retained land as follows:-"*

36. The paragraphs that follow are numbered 12.6.1 to 12.6.9 in both schedules. For ease of reference each paragraph in the Respondent's preferred schedule of covenants and the related submissions are set out in turn below.

37. *'12.6.1 To keep the garden area if any tidy and properly cultivated and not to erect within the curtilage of the property any fences gates or walls without the prior consent in writing of the local planning authority and the transferor.'*

The Applicant contends that the first part of this covenant (up to 'cultivated') is positive not restrictive in nature. The Respondent accepts this and admits that under the case law it is unlikely to succeed. In relation to the remainder of the clause the Applicant submits that it would be unreasonable to manage a 2.5 acre garden without an occasional gate or fence and that these matters are in any event well controlled by existing planning regulations: to the extent that the garden can be seen from the Retained Property the planning regulations are more than capable of regulating matters.

The Respondent submits that reliance upon planning control does not adequately protect the other residents, since the Property is not situated in a conservation area the planning authority is not required to consider matters that the other residents might consider to be relevant to their property. Mr Kemp refers to the *Hague* publication referred to earlier and quotes: *'An argument that planning control achieves the same results as covenants against alterations and user, thereby making the imposition of covenants unnecessary, was rejected'* (the reference being to the case of *Moreau v Howard de Walden Estates Ltd LRA/2/2002 Lands Tribunal*).

Mr Kemp comments further that there has been no action or argument over the equivalent restriction within the Lease. Sizeable parts of the garden of the Property can be viewed from various parts of the Retained Property and as a consequence the erection of fences, gates or walls would

affect the value of the Retained Property. Mr Kemp refers also to a ballustrade along the southern boundary to the garden noted at inspection and comments that new fences, gates or walls might affect the nature of the garden. The Respondent's general impression is that if the garden is interfered with this would affect the value of the Retained Property but the Respondent is content to add the rider 'without the prior consent of... the transferor'

38. *'12.6.2 Not to cause or permit to be caused any nuisance annoyance or harm to the owners occupiers or any other part of the building by the presence of any animal (domestic or otherwise) and in particular but without prejudice to the generality of the foregoing not to permit such animal into the Retained Land apart from the drive'*

The Applicants state that in principle they have no difficulty with this clause. The Respondent submits that the clause is relevant to property value.

39. *'12.6.3 Not to make any structural or external alterations or any additions to the Property without the prior written consent of the Transferor and not without prejudice to the generality of the foregoing to place any aerial (radio or television) or satellite dish on the Property in any place so as to become obtrusive visually in the opinion of the Transferor'*

In relation to the first part of this clause, dealing with structural or external alterations or any additions the Applicants have counter-proposed that the word 'external' should be removed and that, instead of the consent of the 'Transferor', any necessary consent of the planning authority should be required. The arguments made in the context of clause 12.6.1 apply to this issue. The Applicants raise also a number of further points.

The Applicants submit that in the context of this clause planning authority consent should suffice in view of the particular planning history of the site. They point out that an extension of No. 1 Potto Hall is by way of subterranean extension and submit this is because the leaseholder recognises there would be no prospect of gaining planning permission for an extension above ground. The Applicants contend that gaining planning permission represents a significant challenge because of the rural nature of the site and that the planning history does not reveal any permission that would allow any significant change to the outside of the buildings.

Mr Kemp submits that structural and external alterations are a matter that would affect the value of the adjoining properties. Any exterior alteration to the Property could affect the general impression of the site as a whole and impact on value within the Retained Property. Within its written submission the Respondent states that 'a structural alteration not in keeping with the style of the rest of the building would be immediately obvious and detract from the appearance of the buildings as a whole'. The Respondent also submits, by reference to various sample documents, that similar restrictions are imposed in most freehold developments by builders

who are anxious to retain the appearance of the development whilst selling other units.

In relation to the second part of the clause, concerning aerials and satellite dishes, the Applicants note that the existing equivalent lease clause is not observed within the Retained Property. The Respondent submits that these matters should be handled under consultation.

40. *'12.6.4 To use the Property for the purposes of a private residence in the occupation of one family only and not to construct any building shed or greenhouse on any part of the garden land within the Property'*

The Applicants state that whilst they have no objection in principle to the Property being restricted to one family, it is inappropriate to impose this restriction for time immemorial. Whilst the Applicants have no plans to do anything other than live in the Property, it would seem wrong in a time of housing shortage to impose such a restriction when it is of no genuine benefit to the Respondent, especially in view of the separation of the Property. The Applicants also submit that there may be difficulties in the future over the definition of a 'single family' and that in the past there have been 3 family units living within the Property. The Applicants' counter proposal restricts the use of the Property to 'residential purposes'.

The Respondent submits that it is extremely important that the Property is used only as a private residence for one family. A general residential purpose would allow the property to be occupied by a group of adults or used as a hostel, student accommodation or occupied by more than one family, all of which would be disruptive to the rest of the development. Mr Kemp submits that the proposed restriction is one that is relevant to the value of the Retained Property and quotes the extract from the case of *Cadogan v Erkman* set out within paragraph 151 of the decision in the *Sloane* case: *'A restriction which sufficiently controls the nature of the occupation is a restriction which will in our opinion materially enhance the value of other property owned by the Freeholder....'*

Turning to the issue of sheds and greenhouses, the Applicants counter-propose that this restriction should apply 'except as permitted within planning regulations, or where necessary with prior consent having been granted by the local planning authority'. The Applicants submit that it is unrealistic to manage a 2.5 acre garden without a shed, for example to store tools.

The Respondent submits that the arguments on the issue of sheds and greenhouses are equivalent to those on the issue of fencing. Mr Kemp suggests that the words 'without the consent of the transferor' should be inserted for example so that the 'final say' on type and location should rest with the transferor.

41. *'12.6.5 Not to use the Property for a sale by auction or for any trade or business manufacture or profession or for any illegal or immoral act or purpose'*

The Applicants counter-propose that the words 'or for any trade or business manufacture or profession' should be deleted. They submit that no evidence has been provided to demonstrate that the restriction would materially enhance the value of the Retained Property.

The Respondent submits that the clause is extremely important because otherwise the building could be used as a bed and breakfast, hotel or even an outdoor pursuit centre. The Respondent submits that all of the residents purchased their properties on the basis that they would be protected as part of a residential development and that the ability to object to planning permission is not the same as the ability to enforce a covenant.

42. *'12.6.6 Not to do on the Property or bring or allow to remain on the Property anything that may be or become or cause a nuisance annoyance disturbance or inconvenience injury or damage to the Transferor or the owners or occupiers of adjacent properties or neighbouring property'*

Within its written statement of case the Respondent submits that all 5 properties within the Retained Property would be affected by any noise or disturbance or increase in activities at the Hall - the buildings are all connected and are part of the original buildings or built in a similar style.

The Applicants agree with the Respondent on this point within their written reply and counter-propose that the clause should be limited to 'anything that may be or become a cause of nuisance to occupiers of adjacent properties or neighbouring property'. The Applicants also submit that no evidence has been produced that the covenant is relevant to value. Mr Kemp submits that the clause is relevant to value.

43. *'12.6.7 Not to affix or exhibit on the outside of the Property or outside of any building on the Property or display anywhere on the Property any placard sign notice or board or advertisement except notice advertising the Property for sale'*

The Applicants have simplified this covenant within their counter-proposal by deleting the words 'on the outside of the Property or outside of any building on the Property or display anywhere on the Property' and substituting the words 'on any building'. The Applicants also contend that the covenant is not relevant to value.

The Respondent contends that the clause is relevant to value and that the issue concerns aesthetics. The Respondent would be content to add a rider requiring consent.

44. *'12.6.8 Not to throw any dirt rubbish rags or other refuse or permit any dirt rubbish rags or other refuse to be thrown into the sinks banks lavatories cisterns or waste or soil pipes in the Property'*

The Applicants accept this clause as written within their counter-proposal but contend that it does not go to the value of the Retained Property. They also contend that pipework is adequately protected by legislation. The

Respondent submits that in view of the shared drainage system the clause is important and relevant to value.

45. '12.6.9 Not to hang or expose in or upon any part of the Property so as to be visible from the outside any clothes or washing of any description or other articles out of the windows of the Property'

The Applicants accept this clause as written within their counter-proposal but contend that it doesn't materially enhance the value of the Retained Property.

Mr Kemp submits that the concerns addressed by this clause are similar to those in relation to changes to the garden. Mr Leyburn comments that the Respondent seeks to avoid there being any washing lines or stands or any washing hanging out of windows.

46. Additional submissions are made by the Applicants relating to the schedule of draft covenants set out in the Tribunal's Further Directions. Various alterations to the draft restrictions are proposed by the Applicants, including in one case the removal of the restriction. The Respondent opposes the alterations, replying to the effect that the Applicant's submissions have been advanced already and thus fail to take the issues further, with one exception. The Respondent identifies that one of the proposed alterations (imposing a time limit to a restriction on use) raises an issue that has not been raised previously and the Respondent opposes this on the basis that it would diminish the value of the Retained Property whilst securing a commercial advantage for the Applicants.

### **Submissions - Reciprocal Covenants**

47. Within its Further Directions the Tribunal invited submissions on the specific issue of whether any covenants should be reciprocal in nature.
48. In response to the Tribunal's Further Directions the Applicants reiterate their request, forming part of their Application, that any covenants imposed should be reciprocal in nature. The Applicants contend also that if any covenants are to be imposed upon them, then the grounds that would justify these for the protection of the Respondent would justify reciprocal covenants for the protection of the Applicants.
49. The Respondent's submissions on the issue refer to subsection 10(4)(b)(ii) of the Act and in particular the words '*restrictions arising by virtue of the tenancy*'. The Respondent submits that the subsection provides for the continuance of an existing restriction contained in the Lease, but not otherwise.
50. The Respondent goes on to cite the case of *Loder Dyer v Cadogan* [2001] 3 *EGLR* 149 in which it was held that the only power vested in the tribunal to impose covenants required by the tenant was contained in section 10(4)(b) of the Act and that any such covenants must be required to secure the continuance of restrictions arising from the tenancy.

51. In reply to the Respondent's submission the Applicants refer to a covenant by the Respondent within the Lease to enforce covenants entered into by other tenants in the same terms as the covenants on the part of the tenant contained within the Lease. The Applicants submit that this covenant by the Respondent therefore encompasses the restrictions that the Tribunal proposes to impose on the Applicants within the transfer document and that these restrictions should be carried across to the transfer as reciprocal covenants binding the Respondent. The Applicants further contend that it is fair and equitable for the covenants to be reciprocal in order to afford protection to both parties.

### **Deliberations and Findings**

52. The Tribunal recognises that in seeking to acquire the freehold interest in their home the Applicants are motivated by a desire for independence from the leasehold management arrangements that apply to the Potto Hall site. Since they purchased the Property they have sought to separate the Property from the Retained Property in a number of practical ways. It is their desire for independence that has given rise to the Application with the objective of minimising the degree of control the Respondent will retain over the Property in the future.

53. The Tribunal is required to determine whether any restrictive covenants should be imposed by the Respondent within the transfer document and whether any such covenants should be reciprocal in nature, together with the related applications concerning costs (addressed later). In doing so the Tribunal is required to apply the law to the particular circumstances of this case taking into consideration only the salient facts. Whilst we recognise that the Application is set in the context of past disputes and occurrences, it is not our remit to reach findings on facts that are not specifically relevant to our decision.

54. Looking first at the law, the Tribunal accepts the Applicants' submission that the relevant statutory provisions are to be found at Subsections 21(2), 10(4) and 10(5) of the Act. With reference to subsection 10(4) the Tribunal accepts that subsection 10(4)(a) is irrelevant to the present case since it relates to restrictive covenants which have been imposed otherwise than through the existing lease.

55. Subsection 10(4)(b), which we shall return to, relates to restrictions imposed within the existing lease. Subsection 10(4)(c) makes provision for the inclusion of 'such further provisions (if any) as the landlord may require' and as such is relevant only to the extent that any proposed provisions do not fall within either (a) or (b). Having compared the schedule of covenants sought by the Respondent with the provisions of the Lease we consider that none of the restrictions sought by the Respondent are materially different to the equivalent provisions of the Lease. Therefore, to the extent that the restrictions sought by the Respondent comply with the requirements set out in subsection 10(4)(b), subsection 10(4)(c) will not be applicable.

56. Returning then to the requirements of subsection 10(4)(b), the transfer document is to include such provisions (if any) as may be required by either party to secure the continuance (with suitable adaptations) of restrictions within the Lease, subject to the tests set out in 10(4)(b)(i) and (ii). The test at (ii) relates to restrictions which benefit the property to be transferred and will be returned to later in the context of reciprocal covenants. The test at (i) relates to restrictions imposed upon the property to be transferred and requires that these must be capable of benefiting other property. There is then an additional requirement that the restrictions must be such as materially to enhance the value of the other property.
57. This additional requirement concerning material enhancement of value applies only if the current restrictions are enforceable only by the landlord. The Applicant submits that this is the case and the Respondent does not dispute this. The Tribunal determines that the current restrictions are indeed only enforceable by the landlord and that therefore the requirement for material enhancement of value within subsection 10(4)(b)(i) applies in the present case.
58. We consider next the meaning of 'material enhancement of value'. The Applicants refer to the *Sloane* case as authority that "material enhancement" is a matter of general impression and that whilst it does not have to be quantified in exact monetary terms some form of evidence must be presented to establish that the restriction will materially enhance the freeholder's property. The Applicants emphasise the Upper Tribunal's reference to 'mere assertions by counsel'. Quoting from the Upper Tribunal's decision, 'mere assertions by counsel on behalf of the freeholder are not evidence and are not sufficient'.
59. The Respondent does not disagree with the Applicants' submission on the *Sloane* case but emphasises that the Tribunal is able to rely on its 'general impression' and that any evidence before the Tribunal can be taken into account. The Respondent also cites the *Pitt* case as authority that material enhancement can include maintaining a value that would otherwise deteriorate. We accept these submissions by the parties in relation to *Sloane* and *Pitt* and accept also Mr Kemp's contention that the two cases are not contradictory, they sit side by side.
60. We also consider that the reference to 'value' within subsection 10(4)(b)(i) requires the Tribunal to have regard to the price that a purchaser would be willing to pay in the open market. Therefore in considering whether there is material enhancement of value it is relevant to consider whether the relevant provision is one that might materially affect the price a purchaser would be willing to pay.
61. Continuing with our analysis of the relevant law, subsection 10(5) of the Act provides that a provision cannot be included if it is unreasonable in all the circumstances in view of the factors referred to in subsections (a) and (b). At subsection (a) the relevant factor is that changes since the date of



the tenancy affect the suitability of the provisions of the tenancy at the relevant time.

62. Finally in our analysis of the relevant law, with reference to the *Portman Estates* case, we accept the Applicants' contention that the Act does not make provision for the inclusion within the transfer document of covenants that are positive rather than restrictive in nature.
63. Applying these principles to the present case, the Respondent is entitled under subsection 10(4)(b)(i) of the Act to seek to include covenants that are restrictive in nature within the transfer document where these are capable of benefiting the Retained Property and where these will materially enhance (or maintain) the value of property within the Retained Property. There must however be some evidence of material enhancement of value. Quantified valuation evidence is not essential, it is a matter of 'general impression', however assertions by counsel do not in themselves suffice.
64. The Applicants submit that the valuation report prepared by GSC Grays of Stokesley is inadmissible under The Tribunal Procedure (first-tier Tribunal) (Property Chamber) Rules 2013. We agree with this submission. The requisite permission of the Tribunal was not sought and the report fails to comply with the requirements of Rule 19(5) sub-paragraphs (a), (b) and (c). As an observation, the report additionally fails to meet RICS requirements. We do not accept the Respondent's submission that the Tribunal has given permission for valuation evidence to be submitted. It may be that the Respondent is relying in this respect upon directions issued in error and superseded by the correct standard directions for an application under section 21(2) of the Act. In any event the valuation report amounts to expert evidence and is not admissible since it does not comply with the relevant requirements.
65. We agree with Mr Kemp's submission that if the valuation report is not accepted, this is not fatal to the Respondent's case. We are entitled to rely upon our general impression based on any evidence there may be. The Tribunal has inspected the Property and the Retained Property with the agreement of the parties. We determine that our observations at inspection, for example as to the proximity of the Property to parts of the Retained Property, its degree of separation and the view enjoyed from the parts of the Retained Property, can be taken into consideration. Had we determined otherwise then we would have been minded to reject the Respondent's proposed covenants in their entirety, there being no basis upon which we could be given a general impression that the restrictions would serve to enhance value.
66. The Applicants make numerous references within their submissions to alleged unreasonable conduct on the part of the Respondent. They contend that the Respondent has demonstrated an inability to meet the standard of reasonableness the Applicants are entitled to expect in their dealings with the Respondent and therefore the Applicants should not be placed at the Respondent's mercy post enfranchisement through the imposition of

covenants. They further argue that changes in the attitude and behaviour of the Respondents are relevant changes to be taken into consideration by the Tribunal in deciding whether under subsection 10(5) of the Act a covenant is reasonable.

67. We do not accept the Applicants' contention that the case reports they have submitted (*Sloane* and *Portman Estate*) support their argument that the reasonableness or otherwise of the Respondent's past actions should be taken into consideration by the Tribunal.
68. In the *Pitt* case, introduced by the Respondent, instances of illegal subletting are treated as constituting evidence bearing on the relevant stipulations. We find it conceivable that examples of past conduct or occurrences might be raised in support of an argument as to the value of a particular covenant. However no authority has been put forward whatsoever to support a view that the Tribunal should, in determining whether covenants should be imposed, take into account any risk that unmerited enforcement action might be taken in the future or that a permission or consent sought in compliance with a covenant might be unreasonably withheld.
69. Turning to the provisions of subsection 10(5), the Applicants contend that changes in the behaviour and attitude of the Respondent are of relevance. The relevant 'changes' must in the words of subsection 10(5)(a) be ones 'which affect the suitability at the relevant time of the provisions of the tenancy'. This requires consideration of whether the provisions currently contained in the lease have become less suitable as a consequence of any changes that have taken place. We do not accept that the attitude or behaviour of the Respondent is relevant to the 'suitability' of covenants the Respondent seeks to impose. The risk referred to previously that unmerited enforcement action might be taken, or requisite consents unreasonably withheld, is not relevant to the suitability of the covenants themselves.
70. Subsection 10(5) is also relied on by the Applicants to put forward an argument that the imposition of covenants is unreasonable because the Property is far more independent from the Retained Property than it was at the time the Lease was granted. We are therefore required to consider whether a covenant can be regarded as less 'suitable' as a consequence of physical or practical changes that have occurred.
71. We accept that a covenant might be considered to be less suitable if circumstances change and that such circumstances might include the increased separation of the relevant properties due to physical or practical changes. After all the concerns or risks the covenant was originally intended to meet or mitigate may become less material as a consequence of the changes. Put another way, if the potential benefit of a restriction is reduced by physical or practical changes, then this might affect the suitability of the restriction itself.

72. The Applicants' submissions in relation to the alleged failure on the part of the Respondent to allow quiet possession and enjoyment under the terms of the Lease, the alleged breach of duty of care, the alleged breach of contractual commitments and the Respondent's corporate responsibility are not directly relevant to the issues the Tribunal is required to determine.
73. The Applicants' contention that no restrictive covenants should be permitted because these would amount to an incumbrance (and the Applicants are entitled to take free from incumbrances) is not accepted: the Act makes provision for the inclusion of covenants in the circumstances set out in section 10.
74. None of our findings to this point cause us to reject in their entirety the covenants that the Respondent seeks to include within the transfer document. It is necessary therefore to go on to consider the wording of the particular covenants that are sought and the related submissions. We consider first the extent of the Tribunal's power to accept, reject or amend a restriction.
75. The Tribunal's jurisdiction under section 21(2) is *'to determine what provisions ought to be contained in a conveyance in accordance with section 10...'* Under subsection 10(4)(b) the relevant provisions to be included are such provisions (if any) as are required to secure the continuance (with suitable adaptations) of restrictions arising by virtue of the tenancy (or any collateral agreement), and meet the test in subsection (i) or (ii) of subsection 10(4)(b). The Tribunal does not have jurisdiction therefore to draft an alternative set of restrictions. Rather, in relation to each 'restriction', whether this is expressed as an entire clause or part of a clause, the Tribunal is required to determine whether the restriction (with suitable adaptations) should be carried into the transfer document.
76. Turning then to the covenants themselves, we find that one of the covenants sought by the Respondent ('to keep the garden area if any tidy and properly cultivated') is positive in nature. This is accepted by the Respondent. As such the Respondent is not entitled to carry forward this provision from the Lease to the transfer document.
77. We find that all of the remaining covenants sought by the Respondent are restrictive in nature and are capable of benefiting the Retained Property.
78. The next question to consider is whether these remaining covenants are 'such as materially to enhance the value' of the Retained Property. In applying this test we consider there to be a threshold of materiality which some, but not all of the Respondent's proposed covenants achieve.
79. To reach this threshold of materiality the covenant must be one that would be relevant, in the mind of a prospective purchaser of a home within the Retained Property, to the price the purchaser would be willing to pay. Recognising that the Property comprises the main part of the original Potto Hall, we consider that such a purchaser would be concerned to ensure that the overall appearance of the Property will not be changed so that it is no longer in keeping with the Potto Hall site as a whole, that the

use of the Property cannot be changed to one which might be of concern to the purchaser and that appropriate provisions are in place in relation to anything that is 'shared' between the Property and the home they propose to buy. We consider that these issues would be of sufficient concern to a potential purchaser of a home within the Retained Property as to potentially impact on price.

80. Applying these principles to the individual covenants sought by the Respondents we consider that the restriction concerning fences, gates or walls is not material to value, nor is the restriction concerning animals: the price a purchaser would be willing to pay for a home within the Retained Property is unlikely to be affected by the inclusion (or not) of these restrictions.

81. We find that the provision restricting structural or external alterations or any additions to the Property is material to value but that the provisions that follow within the same clause dealing with the issue of aerials and satellite dishes fall below the threshold of materiality.

82. Turning to the restriction limiting the use of the Property to that of a private residence in the occupation of one family only, we note that the Applicants would wish this to be relaxed to some degree if we do not reject it entirely. We recognise that this restriction in particular may significantly affect the value of the Property itself. Whilst we have considered the Applicants' arguments in support of some relaxation of the proposed restriction, the decision the Tribunal is required to make is whether or not there is justification for the current restriction in the Lease being carried forward into the transfer document. We find that this is justified: the inclusion (or not) of this provision may well affect the price a purchaser would be willing to pay for a home within the Retained Property.

83. The second part of the same clause relates to the construction of any building, shed or greenhouse within the garden. We consider that this specific requirement in relation to the garden falls below the threshold of materiality: we do not believe that the price a purchaser would be willing to pay for a home within the Retained Property would be affected whether or not the provision is included.

84. The prohibition on sales by auction, use for any trade, business, manufacture, profession or for any illegal or immoral acts sits, in our view, alongside the provision limiting the use of the Property to that of a private residence in the occupation of one family. It materially enhances the value of the Retained Property and should be carried forward into the transfer document.

85. Our view on the 'no nuisance' clause is more marginal. There is an argument that the existence of a clause preventing 'nuisance' is material to the value of adjoining property and might be of concern to a purchaser of such property. We are also mindful that issues of nuisance are unlikely to be addressed primarily through the enforcement of freehold covenants: there are other more immediate avenues that may be pursued.

86. We consider that the Applicants' submissions in relation to subsection 10(5) of the Act are of particular relevance to the 'no nuisance' clause. The Property has been re-orientated so that it is independent of the Retained Property in all practical respects and the boundaries and hedges have matured to increase the physical separation of the Property and the Retained Property. We find therefore that it would be unreasonable in all the circumstances to carry forward the 'no nuisance' clause into the transfer document in view of the changes that have occurred since the commencement of the Lease.
87. In relation to the remaining provisions, we find that the restrictions on signage and advertising and those relating to 'washing' are not sufficiently material as to potentially affect the price a purchaser would be willing to pay for a home within the Retained Property and do not therefore satisfy the requirements of subsection 10(4)(b)(i). Conversely, the restriction relating to sinks, banks, lavatories, cisterns, waste or soil pipes is relevant to value because the Respondent states (and it has not been disputed) that the drainage system is shared.
88. We have considered whether any restrictions we allow under subsection 10(4)(b)(i), should be rejected pursuant to subsection 10(5). We determine that only the restriction concerning 'nuisance' is rejected pursuant to subsection 10(5).
89. We have also considered whether subsection 10(4)(c) might operate so as to allow the inclusion of restrictions which do not meet the test at subsection 10(4)(b)(i). We determine that this cannot be the case since the requirement for material enhancement of value appears in both subsections.
90. Having issued Further Directions containing a schedule of draft covenants (in line with our findings above) we have reviewed the Applicants' additional submissions and the Respondent's response in relation to the schedule.
91. None of the Applicants' proposed alterations to the draft schedule are accepted. This is because the altered restrictions would differ from the corresponding restrictions contained in the Lease. The restrictions within the draft schedule correlated with the equivalent restrictions sought by the Respondent. Under subsection 10(4)(b)(i) the Respondent is entitled to secure the continuance of the restrictions within the Lease (subject to the other requirements of the subsection being met). Whilst suitable adaptation might be necessary in moving the restrictions from one document to another, the restrictions themselves must remain intact.
92. The Applicants' submissions pursuant to the Tribunal's Further Directions sought the removal of a restriction concerning the shared drainage system. This submission did not cause the Tribunal to alter its draft schedule of restrictions given that it is not disputed that the drainage system is indeed shared.

93. In accordance with our findings set out above we determine that the restrictions to be included in the transfer document are those set out in draft form within the schedule to our Further Directions. This schedule, now final, has been reproduced as the schedule to this decision document ('the Schedule').
94. We determine that the restrictions set out in the Schedule shall not be applied on a reciprocal basis, for the benefit of the Applicants. Notwithstanding the Applicants' argument that it would be fair and equitable to apply reciprocal restrictions, the Applicants' only entitlement in this respect arises under subsection 10(4)(b)(ii) of the Act. This subsection provides only for the continuance of existing restrictions arising by virtue of the Lease.
95. The Lease does not contain any restrictions on the part of the Respondent reciprocal to those set out in the Schedule. The existence of a positive covenant on the part of the Respondent to enforce restrictions against other tenants does not convince us that restrictions reciprocal to those set out in the Schedule arise by virtue of the Lease.

### **Costs**

96. The Respondent has applied for costs to be awarded pursuant to Rule 13(1)(b) of The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 and submits that the Applicants have acted unreasonably in conducting these proceedings. The Respondent refers to apparent confusion as to whether the Applicants would be represented or not, various allegations or aspersions raised by the Applicants concerning members of the Respondent company the valuer and the Respondent's solicitors and the additional cost consequentially incurred by the Respondent of its solicitor's attendance at the hearing.
97. In response the Applicants state that they have been unrepresented throughout the present proceedings. They identify specific statements they have made in the course of the proceedings, referred to by the Respondent in its application for costs, and submit that these are accurate.
98. The issue for the Tribunal to determine is whether the Applicants have indeed acted unreasonably in the course of the proceedings. The Tribunal has the authority to award only 'penal' costs. Unreasonable behaviour might include vexatious behaviour, or behaviour designed to harass the other party rather than advance the resolution of the case.
99. The Tribunal determines that the Applicants have not acted unreasonably in bringing or conducting the proceedings and the Tribunal does not therefore make an order for costs. In reaching this decision the Tribunal has had regard to the following, in addition to the points raised by the parties:
- The Applicants were entitled to be unrepresented at the hearing. Whilst some of the points they raised were of only marginal relevance, or were subsequently rejected by the Tribunal in the course of its deliberations,

they had clearly prepared thoroughly for the hearing and were entitled to a degree of leeway in presenting their case in person.

- The Application was partially successful.
- The Tribunal accepts that all of the points raised by the Applicants were intended to advance their case.

## **Schedule**

### **Restrictive Covenants**

12.6 The transferees jointly and severally covenant with the transferor and its successors in title the owners for the time being of the retained land as follows:-

12.6.1 Not to make any structural or external alterations or any additions to the Property without the prior written consent of the Transferor

12.6.2 To use the Property for the purposes of a private residence in the occupation of one family only

12.6.3 Not to use the Property for a sale by auction or for any trade or business manufacture or profession or for any illegal or immoral act or purpose

12.6.4 Not to throw any dirt rubbish rags or other refuse or permit any dirt rubbish rags or other refuse to be thrown into the sinks banks lavatories cisterns or waste or soil pipes in the Property