MWML Board, September 2021
Agenda item 7: Covenants between owners, MWML and Danesdale Land

Purpose of paper

1. This paper sets out the factual position on the covenants that bind all owners of dwellings on the MW private Estate. It examines: whether the Estate Regulations accurately reflect the covenants: whether the covenants are binding; and how far they impact differently on enfranchised houses. It does not make recommendations.

Summary

2. The paper finds as follows:
   2.1. MW is a single private Estate governed by a set of binding covenants. This is entirely normal - there are thousands of such private estates across the country, mostly bound by similar covenants, also with a mix of freehold and leasehold.
   2.2. The 66 houses are responsible for their own maintenance, whereas the flats must refund maintenance costs of works carried out by the Manager. This distinction has no impact on the key set of tripartite covenants (paras 7-13 below) which are equally binding on all MW dwellings, whether maisonettes or flats, and whether currently held as freehold, extended leasehold or original leasehold titles.
   2.3. However there is a key distinction in terms of alterations. Leaseholders need **consent** of Manager and Lessor (Danesdale) to carry out wholly internal structural works but enfranchised houses do not - they only need to **notify** the Manager, given the mutual covenant for avoidance of "annoyance".
   2.4. It is accurate to describe Danesdale as "Estate owner", even though most houses within the Estate are freehold (and even though most flats/maisonettes are held as peppercorn long leases). The Estate remains one single estate. This is made explicit not only in the original leases but in a key clause of MWML's Articles which binds every shareholder ie current owner whether freeholder or leaseholder.
3. The paper explores the covenant relationship between owners, Danesdale and MWML, and finds that it is dynamic. The covenants **do not prevent change**, whether structural or of exterior appearance, from happening on the Estate. While in theory Danesdale as Estate freeholder has a right to veto any changes, it is highly likely that if a specific change is agreed by the majority of MWML members, Danesdale would also agree to it.
4. Thus the **extent of acceptable alterations** in MW is for democratic decision by current owners of the 222 dwellings. It cannot be sensible to reject **all** change, for all time. MWML, directed by the majority of its 222 "A" shareholders, could apply a policy of **minimal, maximal or regulated change**. Every change brings winners and losers. As with Council planning processes, we need transparent consistent regulatory mechanisms, balancing individual and collective interests. The paper concludes with a suggested consultative approach for the Board to set and apply criteria rationally, consistently and sensibly via a Consent to Alter process, and referring back annually to the AGM to ensure that the process has strong majority support.

History

5. This is the historical sequence of events concerning the MW and Carew estates.

9 Jan 1983	MWML is incorporated. Under its Articles, MWML's Objects are: "to regulate, control the use of and maintain certain lands [within title SGL342062]…". Clause 6 binds every owner of an "A" share to perform all the covenants of the original leases.
1984-85	MWML and MWL draft a standard lease for each MW dwelling (flat or maisonette/house), **all containing identical lasting, binding covenants**. Each lease is tripartite (MWL, MWML and lessee). All leases are for 125 years, with reversion to the Lessor ie freeholder (at that time MWL).
23 Jan 1985	Carew Mgt Ltd incorporated. Its Objects, and cost recovery arrangements, mirror those of MWML. First Carew lease Jan 1986 contains same covenants as MW.
20 Dec 1989	Danesdale Land Ltd incorporated
31 Jan 1995	First enfranchisement of an MW maisonette/house lease. (2021: 58 out of 66 houses enfranchised)
2 Feb 1995	First extension (under 1993 Leasehold Reform Act) of an MW flat lease to 2198, adding 90 years. (2021: 146 out of 156 flats have been extended in this way, on peppercorn rent)
27 Nov 1995	First extensions/enfranchisements of Carew leases. (2021: all but two Carew properties are extended or enfranchised)
July 2021	As Lessor, Danesdale now derives minimal income from the entire MW estate (ground rent on 19 dwellings, compared with 222 in 1990). They get no income at all from owning the Amenity Lands (MW owners have shared use of them without anyone paying ground rent for their use). But they are still one of three parties to the covenants, and are still in law correctly named "Estate freeholder/ owner". In practice, Danesdale likely to consent to a simple Licence to Alter procedure, going along with MWML recommendations to changes to exterior appearance.

What is "the MW Estate?" and who owns it?

6. In law the Morgan's Walk Estate comprises everything within Title Plan SGL342062: the Main Structures (being the 40 blocks comprising 156 flats); the 66 houses and maisonettes ("the premises"); and the Amenity Lands. There are **three parties** with a direct interest in this private Estate:

   6.1. The Lessor, Danesdale Land Ltd, owns "the Estate". This statement can properly be made, even though since 1995 (passage of new legislation) some 200 properties within the estate are either enfranchised or held on extended 215-year leases. This arrangement is entirely normal - there are thousands of such private estates across the country, bound by similar covenants, many with a mix of freehold and leasehold. See the Association of Residential Managing Agents (ARMA)-published advice note for freeholders in this position: Freehold houses on private estates.

   Comment: earlier in 2021 an MW owner wrote to the MW email group concerning the Welcome Pack that "it is astonishing for any MWML Director to believe that Danesdale is the Estate freeholder - there is no Estate freeholder, because Danesdale do not own the freehold houses". This is a little like saying that Network Rail don't own the freehold of Victoria Station because a pub inside the main entrance owns its own freehold.

   This owner's position is contradicted by the very title, as well as all contents, of ARMA's guidance note cited above. It is also disproved by the Government's declared intent to legislate in this Parliament to give freeholders on private estates the right to establish a Residents' Management Company. MW house owners (freehold and leasehold) have had that right ever since 1983, through MWML in which they own an equal share.

   6.2. The Manager, MWML, owns no property and receives no benefit from the Estate but has a triple role: it is a direct party to the covenants; manages the estate; and is also the collectivity of MW owners, each of whom owns one share.

   6.3. Each Owner owns (a) a flat or house **and** (b) one "A" share in MWML. Both forms of ownership bind them by covenant directly to the Manager and to the Lessor. This bond applies whatever the tenure of the dwelling (freehold or leasehold).

7. **What do the covenants say?**

   7.1. The covenants are set out in Schedules to the original leases. They are also repeated, in identical terms, in (a) each extended flat lease and (b) the "Transfer of Part" deed whereby each house was enfranchised. They are also referred to in the Charges Register for each property. The key provisions are as follows:

   7.2. The Manager covenants to maintain the Amenity Lands (paid by all owners) and the Main Structures (paid by flat owners alone). The Amenity Lands are defined:

   7.2.1. graphically: on the Plan they are shown shaded grey;

   7.2.2. verbally: by the Fourth Schedule, Clause 3 they are defined as:

   - the garden grounds
   - the roads and footpaths [etc]
   - the garages, forecourts and private car parking areas [etc]
   - the sewers and drains [etc]
   - the gardener's store [etc]
   - the boundary walls of the Estate.

7.3. The Main Structures are defined as the blocks of flats. The Main Structures and the houses/maisonettes are all included within the term "premises".

8. The Lessor Danesdale Land Ltd covenants to maintain the basic scheme of the Estate as shown on the Plan, and not to alter the character of the Estate by (for example) erecting additional buildings on amenity land, or changing the appearance of the Main Structures. It promises to impose identical covenants on each Lessee, and to enforce these covenants against individual owners in the collective interest.

9. The Manager MWML covenants both to the Lessor and to the Lessees jointly and severally to perform the covenants in the Fourth Schedule (see below). Broadly the Manager covenants to maintain the entire Estate (including the Amenity Lands, the Main Structures, but also the "appearance" of premises which are not Main Structures (ie the enfranchised houses), broadly but not precisely as in the original Plan.

10. The Original Lessees (of 1984-6) in many cases no longer exist and those leases may no longer be in operation, but the covenants which these original lessees gave are binding on all subsequent owners of the land, whatever the type of title under which they are or might in future be held, both because of the 'transfer of part' deeds signed at the moment of enfranchisement, but most particularly through clause 6 of the Articles of Association of MWML, which binds every owner by reason of being a shareholder:

    6. Every holder of an "A" share shall at all times observe and perform the covenants and conditions relating to the maintenance repair and use of the property in respect of which he is an owner and of the communal parts of the Estate of which the property forms part contained in the Lease under which the property was originally sold and shall be bound to the Company to perform such covenants and conditions as if (if such be not already the case) the covenants had been entered into directly between the Company and himself.

11. This clause 6 of the Articles needs to be read alongside the definitional clause preceding it, which defines the word "Owner" as: *"any person who is the owner of the freehold interest in a house on the Estate or, where the freehold is subject to a Headlease granted for a term exceeding twenty-one years, the holder of such Headlease of a house flat or maisonette or a garage or block of garages on the Estate."*

12. In other words, the Articles of Association of MWML in Feb 1983 had already taken into account the likelihood that some owners would enfranchise, and the need, in order to bind the Estate into a single coherent entity, to define 'owners' in a way which would encompass **all** owners of dwellings on the Estate, regardless of tenure, for all time.

13. The key covenants that each owner enters into, on every transfer, are the following:

    13.1. to pay the Manager the various service charges (including reserves) specified

    13.2. to observe the Estate Regulations made by the Manager

    13.3. to have the benefit of like restrictions imposed on all other owners

    13.4. to "*covenant with the Vendor* (ie Danesdale Land Ltd) *and all purchasers of any part of the land comprised in the title* (SGL342062) *and with the object and intention of binding the land hereby transferred, into whosesoever hands the land may come, that he the Purchaser and his successors in title will at all times*

hereafter observe and perform the restrictions conditions and stipulations set out in the [numbered] Schedule hereto".

14. The Schedule in question has been reproduced in identical terms in all the various leases, extensions **and deeds of Transfer of Part (enfranchisements)** over the years, namely:

1. *Nothing shall be done or suffered on the premises which shall be or grow to be an annoyance to the owner of the Estate freehold (Danesdale Land) or the owner or occupier of any adjoining or neighbouring hereditaments*

2. *Unless the consent in writing of the Manager shall first be obtained: -*

2.1. *the exterior appearance of the buildings walls fences and other erections now on the premises shall not hereafter be altered*

2.2. *no building on the premises shall be used for any purpose save that of a private residence and the garage for the garaging of a private motor vehicle*

2.3. *no additional walls fences or other erections shall hereafter be constructed or maintained on the premises*

Provided that as a condition for the giving of any such consent the Manager may require payment of the reasonable fees of its Solicitors and Surveyors in connection therewith.

There then follow some covenants of lesser significance (constraints on satellite aerials, hanging out washing, use of standpipe water, rights of way etc – clauses 2.4 – 2.8) before we come to the broadest constraint of all, and the one which over the years has been most contentious:

2.9 *Nothing shall be done on the premises which will be an alteration to or departure from the overall landscaping scheme for the Estate as a whole.*

Do the covenants require a <u>leaseholder</u> (house or flat) to seek consent to alter?

15. Yes. Flat owners, and the owners of unenfranchised houses (still 7 in number), must seek consent even to alterations which **do not alter the exterior appearance**. This is because their building would revert to Danesdale at the end of the 125 or 215 year lease. Two **extra covenants** bind every leaseholder:

> *Not to cut or maim or alter or injure any of the principal walls timbers iron or stucco work on the premises.*
>
> *To co-operate at all times… with the Manager and with the persons interested in other dwellings or garages below or beside the premises in all measures necessary for repairing maintaining and upholding the building of which such dwelling forms part and forthwith to comply with any directions given by the directions Surveyor to the Lessor or the Manager specifying works which are in his opinion necessary for the purposes mentioned in this sub-clause.*

16. Taken together, these make it **mandatory for MW leaseholders to apply for a Licence to Alter**, to demonstrate that their proposed works will <u>not</u> alter or cut any principal walls, timber or iron work, and that they <u>are</u> cooperating with the Manager on measures necessary for upholding the [rest of] their building. If both conditions are met, then for the Manager to issue a Licence to Alter will be largely a formality - but

the Manager is fully entitled to insist on seeing the application in advance, and charging back its costs.

Do the covenants require the owner of an <u>enfranchised house</u> to seek consent to alter?

17. No. The covenants binding on an owner who has enfranchised their house depend on the contents of the Transfer of Part deed registered at Land Registry. These deeds are tripartite: they are between Danesdale Land Ltd and the enfranchiser but they refer directly to, and reinforce, the covenants already in existence between the enfranchiser and MWML. The Transfer of Part deed **always** includes all the covenants shown in para 9 above. But in most cases (*NB in writing this paper we have not checked every one of the 59 out of 66*) this deed **EXCLUDES** the two covenants shown at para 15 above.

18. Therefore enfranchised houses do not need to apply for a Licence to Alter for work that is purely internal and has no impact on (a) neighbours or (b) exterior landscaping scheme for the estate as a whole.

Do the covenants require the owner of an <u>enfranchised house</u> to notify the Manager of intended major works?

19. Not as such, but MWML has had bad experience with works to enfranchised houses which have breached the other crucial covenant mentioned at para 13 above: "annoyance". Enfranchisement does not remove a property from the bond of this covenant. The easiest way to ensure that a house freeholder does not cause "annoyance" through the way that major structural works are carried out is to require notification of any works which will exceed certain thresholds (especially, any works requiring a skip).

20. See discussion below (and separate agenda paper) on proposed new trial procedures for (a) simple notification of works which **do not** require consent, and (b) handling applications for a Licence to Alter for works which **do** require consent because they will impact on the "exterior appearance" covenant.

Could the covenants be changed?

21. No current owner can escape the covenants at para 14 because they are contained in every current tenure at Land Registry. They cannot be varied, not even by all 222 owners acting in concert through MWML, because the consent would also be required both of Danesdale and of Wates Built Homes ("Wates"). Wates own 230 "B" shares, a number which exceeds the 222 "A" shares in existence or creatable under MWML's Articles of Association. If MWML were to put forward a resolution to amend the Articles of Association such that particular owners – or all owners – were no longer bound by the covenants, Wates Built Homes, who are entitled under the Articles to receive advance notification of such a resolution, would be entitled to use their built-in majority (in person or by proxy) to vote down any resolution that would weaken or set aside the covenants or make other major changes in the relationships set out above.

22. Wates Built Homes have never attended a General Meeting of MWML in the past 30 years. But they must receive advance notice of, and would be bound to use their powers to oppose, any resolution which either weakened their own powers, or changed the basis on which the Estate was originally set up. <u>In sum, these covenants are effectively immutable.</u>

If the covenants are fixed, how can any change or development on the Estate occur?

23. The existence of the covenants does not mean that no alterations can take place to buildings or the Estate. Alterations of various kinds have taken place in every year of MW's existence since 1984. The crucial point is that, given the explicit wording of the covenants, **alterations which vary the exterior even to a small degree** have to be notified to the Manager and agreed in advance. The current route for submission is: from Quadrant to the Board, with a recommendation as to whether the owner's proposals for alteration would breach any fundamental principle, and whether any precedent exists for a similar alteration.

24. The Board is empowered under the Companies Act to make decisions for MWML, but the Board's decisions can be reviewed and either endorsed or reversed by MWML shareholders - whose opinion can be tested annually at the AGM, or at any other General Meeting called in accordance with the Articles and Companies Act.

25. There is a clear implication that the Manager's decision must always be reasonable – whether that decision is taken by the Board or by an AGM – and must anyway be legal.

What alterations have been permitted to date, and by what process?

26. Many structural alterations have been expressly permitted, both in flats and houses.

27. Example: in 1998 a Thorney Crescent flat owner obtained consent from Danesdale and MWML to remove an internal load bearing wall, installing an RSJ. The managing agent required the applicant to use their appointed surveyors and structural engineers to oversee the plans, which were attached and signed. The whole Form of Consent comprises three pages and the process was simple, quick (3 weeks) and cheap (£180).

28. This was a flats example, but likewise many alterations have occurred in houses, both before the major enfranchisement of the mid 1990s (with consent, as was then required since they were leasehold) and subsequently (when no consent was required for purely internal works). Since 2014 structural works have been carried out in the following houses (this list is not exhaustive):

    28.1. 8 Paveley – major works over an extended period, involving skips, many contractor vehicles and other annoyances to neighbours (solicitors' letters)

    28.2. 31 Whistlers – major internal works, issues of Building regulations; expensive works poorly planned; poor communication

    28.3. 1 Whistlers – very long history going back ten years of extensive works, some in breach of Building regulations, some in breach of a limited MWML consent, and other issues.

29. However, in many houses alterations have been carried out for which **no consent was sought or required** because they have no structural impact on neighbours (no party wall implications); no visual impact (works did not change line of sight significantly for any fellow resident, from any viewing angle); and were planned to minimise noise and inconvenience to the whole MW resident community.

30. In these cases, the current owner will almost certainly be able to transfer the property, with alterations, to a willing purchaser without any problem. But in other cases, prospective purchasers may be put off by the possibility that alterations carried out by the vendor (or a predecessor) did not have consent for an obvious alteration to which the Manager and or the Estate Owner could legitimately object, EVEN IN RETROSPECT.

31. Where alterations are known to be in breach of Building Regulations this puts MWML into difficulty given its duty of covenant to all other owners: either we should sanction the alteration, or take action against the owner to reinstate as the property was.

32. Thus it could serve the interest of owners (leasehold and freehold) and MWML to establish simple transparent procedures enabling **retrospective** permission to be given to acceptable alterations. An administrative fee would be payable. See separate paper.

33. Where the alteration is unacceptable (eg the leaseholder has breached or incorporated common parts) MWML should seriously consider insisting on reinstatement.

What do the Estate Regulations say on this matter?

34. The current (2016) estate regulations say that:

    Structural alterations are not permitted without the consent of the freeholder and management company. Any other works or alterations must be notified to the managing agents and be carried out in accordance with Standard Terms and Conditions, which will be provided to you by the managing agents, and comply with the current Building Regulations. A deposit against damages to the common parts or other flats may be required. No works of any kind may be carried out at week-ends or bank holidays.

35. These words are wrong and inappropriate for the Regulations for two reasons:

    35.1. they could not apply to 99% of residents including all tenants, therefore they are simply inappropriate in Regulations aimed at all MW residents;

    35.2. they are about the covenants, not about the lesser matters on which the Board is empowered to make Regulations. (The covenants can be regarded as **primary** legislation, the regulations as **secondary** legislation.)

36. In any case, the words in these 2016 regulations are plainly wrong. Structural alterations having no visual impact ARE permitted in freehold houses without consent of the covenanters (MWML and Danesdale Land Ltd). The only **consents** needed in these cases are: (a) Building Regs/Planning consent where required; (b) party wall agreement (in the rare cases where relevant).

37. However it is reasonable to expect those undertaking significant works to **notify** the Manager through Quadrant, given the Manager's responsibility for the interests of all residents for what can happen whenever such works are undertaken: noise, disturbance, skips, parking, hours of operation etc. MWML is entitled to place conditions on these, so that they do not, in the words of the covenants:

    grow to be an annoyance to … the owner or occupier of any adjoining or neighbouring hereditaments. See separate Board paper on "Consent to Alter" / "Consent to Works".

Responses to points made by owners

38. This concludes the main part of this paper but it may be useful to the Board to see some claims made in writing, to assess which if any have substance.

39. "*The houses that are freehold have no direct relationship with Danesdale who are freeholders of the amenity lands, flats and any houses that are still leasehold."* Not true: the houses **do** have a relationship with Danesdale. Danesdale are not **just** freeholders of a residual estate after 57 properties (out of 222) have been enfranchised. Danesdale is also a party to the covenants that **all** the flats and **all** the houses inherit, whether or not enfranchised. The houses do not escape this covenantor/covenantee relationship with Danesdale merely by enfranchising and no longer having to pay them ground rent. Most MW flats don't pay ground rent either. Houses and flats are identical in this respect. Either both relationships are direct, or neither is direct – there is no distinction at all, so the word 'direct' has no force here. The one point of difference is that enfranchised houses do not need to seek Danesdale consent to "cut or maim timbers" – but if in doing so they would alter the exterior appearance of the premises, then Danesdale consent is required and needs to be sought (even if MWML acts as the agent for Danesdale under a delegated authority).

40. *"Any consents that are required can only be granted by MWML as managers of the development.*" There is a certain force in this statement, because MWML clearly is the driving partner for consent under the covenants listed at para 14 above: these state that certain things cannot be done "unless the consent in writing of the Manager shall first be obtained". But in practice, if major changes to exterior appearance were to be made, MWML **cannot** approve this alone. MWML would have to carry Danesdale's consent, because they are a separate party to those covenants, and could enforce them against MWML **and against any particular owner, whether leaseholder or freeholder** if they really wished to.

41. The other point to make is that MWML is not just the "managers of the development", it is also the collectivity of all owners. Houses and flats all own one share each. We are bound, both individually and collectively, by the same covenants (with the exception of the two listed at para 15). All the covenants within the leases and Transfers of Part are reinforced by the Company's Articles of Association, which greatly strengthen them – see paras 12-13 above. MWML has structures (ultimately, majority shareholders' votes) through which we can interpret what those covenants actually mean, and whether and how they should be enforced.

Michael Stark
31 August 2021