LVT/AOM/023/013/02

DECISION OF THE LEASEHOLD VALUATION TRIBUNAL ON APPLICATIONS UNDER SECTION 24(1) OF THE LANDLORD AND TENANT ACT 1987 (AS AMENDED)

Applicant: Annie Cunningham (Flat 1)
Michael Blank (Flat 2)

Respondent: Mrs Trupti Joshi

Re: 9 Mapesbury Road, Willesden, London NW2

Application date: 7 June 2002

Hearing date: 11 & 12 November 2002

Appearances:
Annie Cunningham
Michael Blank
Tanya Roberts (joined party)
Bruce Maunder Taylor (Proposed manager)
For Applicants

Mr B Joshi
For Respondent

Tribunal members:
Mr N K Nicol LLB(Lond)
Mrs J McGrandle BSc(EstMan) MRICS MRTPI
Mr S E Carrott LLB

IN THE LEASEHOLD VALUATION TRIBUNAL Ref: LVT/AOM/023/013/02

DECISION

re: 9 Mapesbury Road, Willesden, London NW2

Applicants/Tenants	:	Annie Bridget Cunningham Michael Adrian Blank
Respondent/Landlord	:	Trupti Joshi
Added party	:	Tanya Roberts

Tribunal: Mr NK Nicol - Chairman
Mrs J McGrandle BSc (EstMan) MRICS MRTPI
Mr SE Carrott LLB

1. The leaseholders of two of the six flats, Ms Cunningham at no.1 and Mr Blank at no.2, at 9 Mapesbury Road, Willesden, London NW2 applied on 14th May 2002 to the Leasehold Valuation Tribunal for a manager to be appointed to manage the subject property in place of the appointee of the lessor, Mrs Joshi. The Tribunal ordered on 31st October 2002 that the leaseholder of Flat 6, Ms Roberts, be joined as a party.

2. A hearing was held on 11th and 12th November 2002. It was attended by Ms Cunningham and Mr Blank, who were represented by Mr BR Maunder Taylor FRICS, and Mr Bilesh Joshi, the Respondent's husband, who also acts as her managing agent for the subject property. On the second day, Mr Roberts, the husband of the added party, attended. Although notice of the hearing had been properly served on him and his wife, he had not realised the hearing had started the day before. He applied to be heard and, there being no objection from either party, he made brief representations.

3. An inspection of the property by the Tribunal had been arranged for the morning of 11th November 2002. Mr Carrott missed the inspection when he misunderstood the time it was due to take place. At the hearing, the Tribunal canvassed with the parties whether the Tribunal should determine the case with or without Mr Carrott's input. In particular, the Tribunal stated that if either party had any objection to Mr Carrott's participation, then the Tribunal would continue as a two-member Tribunal or the matter would be adjourned to another date. All parties made clear that they had no objection to Mr Carrott's participation.

The Law

4. The appointment of a manager is provided for in s.24 of the Landlord and Tenant Act 1987, the relevant parts of which state:-

> (1) A leasehold valuation tribunal may, on application for an order under this section, by order ... appoint a manager to carry out in relation to any premises to which this Part applies—
>
> (a) such functions in connection with the management of the premises, or
>
> (b) such functions of a receiver,
>
> or both, as the tribunal thinks fit.
>
> (2) A leasehold valuation tribunal may only make an order under this section in the following circumstances, namely—
>
> (a) where the tribunal is satisfied–
>
> (i) that the landlord either is in breach of any obligation owed by him to the tenant under his tenancy and relating to the management of the premises in question or any part of them ...

(ii) ...

(iii) that it is just and convenient to make the order in all the circumstances of the case;

(ab) where the tribunal is satisfied–

(i) that unreasonable service charges have been made, or are proposed or likely to be made, and

(ii) that it is just and convenient to make the order in all the circumstances of the case;

(ac) where the tribunal is satisfied–

(i) that the landlord has failed to comply with any relevant provision of a code of practice approved by the Secretary of State under section 87 of the Leasehold Reform, Housing and Urban Development Act 1993 (codes of management practice), and

(ii) that it is just and convenient to make the order in all the circumstances of the case; or

(b) where the tribunal is satisfied that other circumstances exist which make it just and convenient for the order to be made.

The Property

5. The property is a large detached double-fronted house, originally built around 90 years ago and now converted into six flats. Four of the flats (nos.1-4) are in the main four-storey part of the building and two (nos.5 and 6) in the side two-storey former coach house. Mr Joshi himself holds the leases, from his wife, of the ground floor flat, no.3, and the basement flat, no.4. Mr Blank's flat, no.2, is on the first floor and Ms Cunningham's, no.1, is on the top floor. Ms Roberts has the lease of the

first floor flat, no.6, in the side annex.

6. The building is of solid red brick construction with a pitched tiled roof. At the time of inspection, there was scaffolding erected to the front and rear of the main building as decoration and repair works to the exterior were close to completion. Flat 1 is in the roof area and has a number of dormer windows. The roof at the front of the main building and on the annex appeared to have been replaced at some time in the past. Some slipped or missing tiles to the roof of the main building could be seen from the ground - Ms Cunningham pointed to signs of recent water penetration into the bedroom and bathroom in her flat which Mr Maunder Taylor believes will continue unless the tiles were repaired. The decorated parts of the building, having been newly painted, appeared to be in good condition but Mr Maunder Taylor pointed to areas of one rear window cill which he said showed poor standards of decoration - the surface was extremely uneven which he said showed that the contractors had not prepared the surface correctly before applying paint. He also pointed to an area of wooden eaves that had been painted which he said showed signs of the paint having been applied to rotten wood which should have been replaced first. Mr Blank also pointed to areas on top of two windows to Flat 2 which had been left unpainted.

7. The door to the building is up a short flight of steps and leads to Flats 1 to 3, Flat 4 having its own separate basement entrance. There is a common staircase which is carpeted. On the ground floor, there is an area of skirting which shows signs of rot. Mr Joshi showed the Tribunal the bathroom of Flat 3 which was the other side of that wall. He said that water had penetrated from the shower cubicle to

that wall which had caused the rot but that he had now fixed the problem. In Flat 1, the cill areas of the bathroom and separate WC were exposed with some of the bricks displaced. Fungus could be seen growing in the exposed area. Also some of the wood showed signs of rot. Ms Cunningham said that she had had works carried out to refurbish her bathroom and WC but had not been able to deal with the rot in the cill because it was outside her demise. Mr Maunder Taylor said that the entire area had to be exposed so that the extent of the rot could be discovered. Mr Blank showed the Tribunal the ceiling to his bathroom downstairs which he said would have to be exposed for the same reason. There was a large garden which was in good order.

8. The Tribunal was provided with the leases to Flats 1, 2, 5 and 6. They are all for 125 years commencing on 24th June 1983. They are each written in different typefaces but have the same terms, save in respect of the proportions each has to pay for certain parts of the service charges. The clauses in the leases for Flats 1 and 2 which are relevant to the issues in dispute read as follows:-

1. ... the Lessor HEREBY DEMISES unto the Lessee ALL THAT the property described in the Schedule hereto ... PAYING by way of further or additional rent a proportion based on the rateable value which the demised premises bears to the rateable value of the building of which the demised premises form part of the cost incurred by the Landlord in insuring the whole of the building of which the demised premises form part in its full reinstatement value ...

2. THE Lessees ... HEREBY JOINTLY AND SEVERALLY COVENANT with the Lessor as follows:- ...

(9) to pay or contribute one sixth of the expense of re-surfacing renewing repairing cleansing and maintaining the garden dustbin areas and the surface of the land coloured brown or orange on the plan attached hereto and a proportion based on the rateable value which the demised premises bear to the whole of the rateable value of the building of which the demised premises form part the cost of repairing maintaining rebuilding decorating and replacing the roof foundations main walls and main structure of the building as well as the gutters and in addition one third of the cost of maintaining the common entrance lighting cleaning repairing rebuilding and redecorating the staircase in the building.

5. THE Lessor HEREBY COVENANTS with the Lessee as follows:-

(4) To insure and keep insured the whole of the building of which the demised premises form part in the full reinstatement cost thereof ...

(5) Subject to prior payment by the Lessee of their due contribution towards the cost thereof to repair cleanse maintain resurface and renew the roofs structure walls foundations and main structure of the building of which the demised premises form part and the chimney stacks gutters and rainwater pipes service pipes and other cables and drains not comprised within this demise and any other walls used or to be used in common by the occupiers of the demised premises and the occupiers of the remainder of the building of which the demised premises form

part and to maintain repair and decorate all entrance halls passageways and staircases

(6) Subject to prior payment of their due contribution towards the cost thereof as aforesaid in every third year of the said term to paint all the external wood and iron and other parts usually painted of the building of which the demised premises form part with two coats of good quality paint and in a good and workmanlike manner in such colours as shall be agreed between the Lessee and the Lessor or in such colour or colours as shall previously have been used.

9. The service charge provisions in the leases for Flats 5 and 6 provide for payment of different proportions of the relevant costs:-

2. THE Lessees ... HEREBY JOINTLY AND SEVERALLY COVENANT with the Lessor as follows:-

(9) To pay or contribute one half of the expense of re-surfacing renewing repairing cleansing and maintaining the roof structure walls foundations main structure and chimney stacks of the building of which the demised premises form part and in addition a proportion based on the rateable value which the demised premises bears to the building of repairing replacing and decorating as required all gutters rainwater pipes service pipes wires cables sewers drains and roads and comprised within this demise but used or to be used in common by the occupiers of the demised premises and the occupiers of the

building either with one half of the cost of painting the exterior of the building of which the demised premises form part and to pay or contribute a rateable share with the owner of adjoining or neighbouring properties of the expense of constructing repairing cleansing building and maintaining all party walls or party roads fences pathways passages sewers drains pipes watercourses and other easements used or to be used in common by the occupiers of the building of which the demised premises form part and the occupiers of any adjoining or neighbouring properties.

The Issues

10. The Applicants identified five issues which they said showed that the Respondent is in breach of her obligations under the leases and in breach of the provisions of the RICS Service Charge Residential Management Code and on the basis of which it could be said that it would be just and convenient to appoint a manager. Each is dealt with in turn below.

Issue 1: Rot beneath dormer window to Flat 1

11. While having improvement works carried out to her toilet and bathroom, the first Applicant, Ms Cunningham, discovered rot to areas of timber immediately outside her demise (see paragraph 7 above for a description of the current observable situation). On 13th November 2001 she phoned Mr Joshi and told him about this. She got the impression that Mr Joshi was not interested in taking his own action and appointed her own surveyor, a Mr Dyan, who inspected on 20th

November 2001 and reported on 26th November 2001. He also arranged for specialist contractors, Kenwoods, to inspect on 22nd November 2001. He said there was genuine concern that the rot was still active in adjacent parts of the building and recommended works to expose and eradicate it. Ms Cunningham wrote on 27 November 2001 to Mr Joshi and to her neighbour, the second Applicant, Mr Blank, informing them of what had been recommended. Mr Dyan also wrote to Mr Joshi on 30th November 2001 and Ms Cunningham's solicitors wrote advising him of their view of the legal situation on 7th December 2001.

12. Mr Joshi has yet to arrange for any work to be done in respect of the rot. His position has changed over the course of proceedings:-

a. Mr Joshi did not obtain independent advice, legal or expert, until he asked a surveyor, Mr Hyman, to inspect in October 2002. Mr Hyman's report, dated 17th October 2002, was provided on the second day of the Tribunal hearing. Mr Joshi said variously that he thought Mr Dyan was acting for all parties and that he relied on Kenwoods to tell him what needed to be done. Although he has no relevant expertise of his own, being a property investor rather than a professional property manager, he decided that such arrangements would be sufficient for him to be able to discharge the lessor's obligations under the leases. The Tribunal notes that Mr Hyman's strong recommendation to have the rot dealt with was similar to that of Mr Dyan, 11 months previously.

b. Mr Joshi initially refused to take any action until the question of liability had been determined. He pointed out that Mr Dyan had located two possible causes of the rot, one of which was leaking pipework within the demise. He seemed to be unaware of the need for any kind of urgency when dealing with

an outbreak of dry rot.

c. Mr Joshi then said that he did not want to take action because he was not clear on whether the dormer window would have to be replaced and he wanted to wait until the position in respect of that had been confirmed.

d. When pushed at the Tribunal hearing, Mr Joshi changed his position again to sa hat he would do whatever Mr Hyman advised, assuming that he maintained his recommendation after discussing the position with him. Mr Maunder Taylor on behalf of the Applicants submitted that he, Mr Hyman and Mr Dyan all had the same opinion as to how to tackle the rot and that Mr Joshi's change of position was late and still conditional.

13. The Tribunal is extremely concerned that Mr Joshi has little or no appreciation of the importance of dealing promptly with rot. His approach has been reluctant and slow (this is to be contrasted with his hasty approach to damp problems in the basement which are referred to further below). Similarly, there has been an outbreak of rot in the common hallway due to a leaking shower unit within Flat 3 but Mr Joshi has done nothing other than to fix the internal condition of his own shower room. The skirting in the hall retains the appearance of still being affected by rot and no attempt has been made to expose the area to determine the full extent of the rot. Mr Joshi appears to justify his approach by relying on his own common sense to guide his actions, but, in the Tribunal's opinion, he is taking decisions in accordance with a level of expertise which he, on his own admission, does not have. He said that his approach to property management is to take professional advice when it is needed in order to supplement his knowledge but this is precisely what he did not do until 11 months after the event and when under pressure from proceedings

brought by the lessees.

Issue 2: Failure to carry out external decoration works

14. Mr Maunder Taylor pointed out that clause 5(6) of the leases require external decoration works every third year of the term. These works were actually near completion at the time of inspection, although there were complaints as to the standard of work (see paragraph 6 above). Mr Joshi's answer was that the complaints were unfounded and that the Applicants themselves were in breach of covenant:-

a. Mr Blank's floor was not carpeted.

b. A light switch had been installed in the common parts.

c. The Applicants had installed an entryphone system.

The Tribunal themselves observed that the decoration works appeared not to have been adequately prepared, but this was a minor matter in the context of this case. The Tribunal could not see the relevance of the Applicants' alleged breaches of covenant, particularly given that Mr Joshi had not pursued these issues at any other time. Mr Maunder Taylor put to him that any breaches had been waived by his failure to take action and this may well be correct, although it is not necessary for the Tribunal to determine this for the purposes of this application.

15. The Applicants also complained that the works were being carried out by a company called Mayfield Estates which Mr Joshi has used for other works at the building but which they had discovered only the previous week was Mr Joshi's company. Mr Joshi had corresponded with Mayfield Estates as if it were a separate entity - he said this was to create an audit trail rather than to mislead. However, he

conceded that he had been charging too much in imposing a 15% supervision fee and a 10% management fee for works done by Mayfield Estates. He also conceded that Mayfield Estates had no health and safety policy or insurance.

Issue 3: Work to basement flat in 1999

16. As mentioned above, Mr Joshi is the lessee of Flat 4 in the basement. By letter dated 16 August 1999, Mr Joshi informed the Applicants that there had been water penetration into Flat 4 and that, while the insurers would cover remedial costs, works to prevent future occurrences were excluded. Those works were tanking, i.e. the provision of a vertical damp proofing membrane. Mr Joshi charged each of the Applicants one quarter of the cost, around £1,600, which they paid in due course. He did not serve a notice in accordance with s.20 of the Landlord and Tenant Act 1985, despite the fact that the works cost more than the relevant limit of £1,000.

17. The Applicants protested that the tanking works constituted an improvement, not a repair. Mr Joshi replied that there must have been a damp proofing system there before because water had not penetrated previously. Mr Maunder Taylor suggested that the water may have penetrated only recently due to a recent rise in the local water table. In any event, Mr Joshi had no evidence to prove his point and conceded that he did not actually know whether or not there had been a vertical damp proof course previously. He also conceded at the Tribunal hearing that the sump which he installed as part of the works constituted an improvement as it had not been there before. As to the failure to comply with s.20, he conceded that he had not complied with its technical requirements but submitted that he had complied with the spirit of it.

18. The Tribunal's conclusion is that, even on Mr Joshi's case, he has been guilty of poor management in failing to comply with s.20 and including works that are improvements. The Tribunal is not in a position to determine, because the evidence is inconclusive, whether or not the tanking works constitute an improvement or a repair but is concerned that Mr Joshi as manager is completely unable to provide any evidence which would assist, despite imposing a service charge in respect of the works on the Applicant. He should not be imposing charges for works which principally benefit himself unless he can back up their validity in full.

Issue 4: Dry rot and water penetration to basement flat in 2001

19. On 23rd October 2001 Mr Joshi wrote to the Applicants to inform them of an outbreak of dry rot in Flat 4 due to past water penetration. Unlike his approach to the outbreak affecting Flat 1, Mr Joshi stated that he saw the danger of the rot spreading to other parts of the building and that from estimates already received it was clear that the works would be substantial. He had obtained these estimates from Protim and Rentokil but then instructed Kenwood on 14th January 2002 to go ahead with works which bore little relation to those first estimates. The Applicants complain that the works were almost completed by the time Mr Joshi attempted to serve a s.20 notice and they rejected it because it was so late, unsigned and referred again to works which included improvements rather than just repairs. Mr Joshi again sought one quarter of the cost from each of the Applicants.

20. Again, the Tribunal is concerned about Mr Joshi's inability to comply with the s.20 procedure. It is not for the Tribunal to enforce the financial limit contained

within s.20 but the Tribunal can regard costs as not having been reasonably incurred if there is a lack of consultation and proper procedure. Mr Joshi says that he relied on advice from LEASE (the Leasehold Advisory Service). While useful, LEASE cannot be regarded as a suitable replacement for full legal and expert advice from appropriate professionals and Mr Joshi's reliance on them again suggests that his approach itself falls short of the standards required of a property manager generally and in the light of the RICS Residential Management Code. Mr Joshi also says that the lack of a s.20 notice was waived on behalf of the Applicants in a phone conversation he had with one of the secretarial staff at Mr Dyan's office. It is dubious whether it could be said that this was sufficient, even if what he says is accepted in full, and the Tribunal regards it as typical of his inadequate approach that he did not think to confirm in writing something so important.

Issue 5: Incorrect service charge proportions

21. As referred to above, Mr Joshi purported to apportion costs within the service charges equally between the leaseholders affected, which meant one quarter in respect of works in the main building. This bears no relation to the terms of the leases (see paragraph 8 above). Mr Joshi justified this on the basis that rateable values no longer existed, the rating system for residential property having been replaced by the council tax, so that this was a fairer method of apportionment. The Tribunal rejects this contention. The use of rateable values is a method of calculation and is not dependent on current rating practice. This is another example of Mr Joshi's amateur approach, ignoring the terms of the lease and just using his "common sense". It might be excusable if he showed full use of appropriate expert advice to assist him in other parts of his property management. However, in the

light of other problems it merely exemplifies the inadequate way he deals with the lessor's obligations to the lessees.

Appointment of Manager

22. The test for the appointment of a manager contained in s.24 of the Landlord and Tenant Act 1987 is already set out in paragraph 4 above. The Tribunal has already set out above a number of instances where it has found breaches of obligations to the Applicants by Mr Joshi on behalf of the Respondent and service charges which have been unreasonably incurred. Therefore, the question for the Tribunal is whether it is just and convenient to appoint a manager in all the circumstances of the case.

23. Mr Joshi conceded by the end of the Tribunal hearing that he was guilty of not having done everything in the way he should but he submitted that either his failures were minor or that, in the light of his having heard the Applicants' case in detail at the hearing, he should be given a further chance to demonstrate that he could manage the property adequately. In respect of some of Mr Joshi's actions, this might well be an acceptable proposition. However, the Tribunal does not appoint managers to punish existing managers for their failures but on the basis of whether it is just and convenient in all the circumstances. By far the most significant problem facing the subject property is the existence of rot which has yet to be dealt with adequately or at all. Mr Joshi been aware of the problem since November 2001 but at the time of the hearing in November 2002 he had barely started the necessary procedures. The dry rot is simply too important a problem to be left in the hands of someone whose approach has been found wanting on so many issues.

24. As part of considering whether it is just and convenient to appoint a manager, the Tribunal must look at the suitability of the manager proposed by the Applicants. Mr Maunder Taylor is well-known to this Tribunal and, under further questioning, he set out what he would intend to do if appointed as manager. He stated that his particular priority would be to deal with the dry rot. He presented a draft order, although he conceded certain amendments to it. In particular, he was only looking for an appointment for two years or, if earlier, until the lessees successfully enfranchised as he expected them to do in due course. The Tribunal is satisfied that Mr Maunder Taylor is a suitable manager for the subject property.

Conclusion and Order

25. On the Applicants' application for the appointment of a manager of the property at 9 Mapesbury Road, Willesden, London NW2 ("the Building") under s.24 of the Landlord and Tenant Act 1985 ("the Act"), the Tribunal being satisfied that the Respondent has been in breach of her obligations and that it is just and convenient to make the following order, it is ordered that:-

1) Bruce Roderick Maunder Taylor of Maunder Taylor, chartered surveyors, of 1320 High Road, Whetstone, London N20 9HP ("the Manager") is hereby appointed for a period of two years from the date of this order as manager of the Building and is given for the duration of his appointment all such powers and rights as may be necessary and convenient and in accordance with the leases of the flats within the Building ("the Leases") to carry out the management functions of the Respondent in relation to the Building.
2) The Respondent shall forthwith deliver to the Manager all such books,

papers, memoranda, records, computer records, minutes, correspondence and other documents as are necessary for the management of the Building as are within her custody or control or the custody or control of any agent, including her husband.

3) The Respondent shall forthwith give details to the Manager of all sums of money she or any agent on her behalf holds in the service charge fund or on account of services in relation to the Building, including copies of all relevant bank statements and shall forthwith pay such sums to the Manager. If the Respondent or any agent on her behalf shall hereafter receive any sums under any of the Leases, they shall forthwith pay such sums to the Manager.

4) The Manager shall provide to the Respondent such information relating to the management of the Building as the Respondent shall reasonably require at not less than six monthly intervals.

5) In accordance with s.24(5)(c) of the Act, the Manager is entitled to reasonable remuneration in respect of all work done under this Order as Manager of the Building and to be reimbursed any reasonable costs and expenses, to be paid by the lessees in accordance with the proportion the rateable values of each of the demised premises have to the aggregate rateable value of the Building, namely:-

Flat	Value	Contribution
1	£211	12.74%
2	£347	20.96%
3	£355	21.44%
4	£266	16.06%
5	£245	14.79%

6	£232	14.01%

6) The Respondent shall pay the Applicants' fees of this application in the sum of £400.

7) The Manager and any of the parties may apply to the Tribunal to vary the order or for any further or other directions, including as to the manner in which the Manager is discharging his duties.

N.K. Nicol

.....

N.K. Nicol
Chairman
22 January 2003