SOUTHERN RENT ASSESSMENT PANEL AND LEASEHOLD VALUATION TRIBUNAL

LEASEHOLD VALUATION TRIBUNAL **CASE No: CHI/45UD/LDC/2005/0013**

B E T W E E N :-

MISS K N TRICKER
(ACTING SECRETARY OF RESIDENTS ASSOCIATION)

APPLICANT

AND

GRANGE MANAGEMENT LIMITED

RESPONDENT

PREMISES: **SPRING MEADOWS NEW ROAD MIDHURST WEST SUSSEX GU29 9HW**
TRIBUNAL: **MR D AGNEW LLB, LLM**
MR M HORTON FRICS
MR R A WILKEY JP FRICS FICPD

REASONS

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1. The application:-

1.1 On 13th September 2005 the Applicant applied to the Tribunal for an Order under Section 27A of the Landlord and Tenant Act 1985 seeking a determination as to the reasonableness of services charges which have not yet been levied but were about to be levied in respect of premises known as Spring Meadows, New Road, Midhurst, West Sussex, GU29 9HW ("the Premises").

1.2 A hearing of the application had been fixed for the 12th December 2005 but at that time the landlord was still undecided as to which scheme of works it was going to adopt and hence the likely costs were unknown. The application was therefore adjourned to a later date.

1.3 The application was listed for hearing again on 27th June 2006. At that hearing the application was presented by Miss Tricker of number 8 Spring Meadows (acting secretary of the Residents' Association) assisted by Mr Lee Mariner of number 23 Spring Meadows. Also in attendance for

the Applicants were Mrs Horton, Mr and Mrs Miles and Mr Weston. Mr Clifford Darton of Counsel represented the Respondent. Also present for the Respondent was Mr Emerson, Solicitor, Miss Joanna Gilson and Mr Martin. Evidence for the Respondent was given by Mr Twinley the Respondent's Technical Services Director and Mr Steven Brewster, the Respondent's expert witness who is a consultant engineer with the firm of Rushby Brewster Associates. The Tribunal had previously received written submissions from Mr Darton.

2. The Premises

2.1 Spring Meadows is a development of 22, 2-bedroom apartments in four blocks. They were developed in two phases: the first phase of 18 units and second phase of 4 units. Originally it was intended that there would be a residents' lounge and accommodation for a resident warden but this was never it fact built and instead the Second Phase apartments were constructed on the part of the site where these buildings were originally intended to be.

2.2 The Tribunal inspected the premises in September 2005 when the Respondent made an application under Section 20 ZA of Landlord and Tenant Act 1985. The Tribunal's attention was directed by the parties then to areas of the communal parts of the estate which have been eroded away by the activity of the stream flowing to the east and north of the site. The Tribunal also noticed that some parts of the communal roadways and paths were very uneven indicating movement of the ground underneath and also that porches and patios were being pulled away from the buildings to which they had originally been attached. The down pipes to guttering had been pulled out of vertical alignment in some of the properties indicating that the land underneath was moving.

3. The Applicant's case

3.1 It was the Applicant's case that problems with erosion of the land due to the activities of the stream particularly on the east boundary of the development had been notified to the landlord as early as 1998. They pointed to a letter dated 12th May 1998 from the then landlord Downland Retirement Homes Limited to Mrs Miles the then secretary of the Residents' Association which stated that "the proposed course of action for the river bank by the new

development is to lay a bio-degradable geo tech style matting with a binding root matter planting. This will allow the bank to be restrained and protected from surface water erosion for the time that it takes for the binding grasses and plants to grow." They said that despite this advice nothing had been done other than for the situation to be monitored and several experts brought in at a cost to make recommendations, but nothing had been done over the years to cure the problem. They felt that had that work been done in 1998 they would not be faced with a large bill of the order of £175,000.00 now. The Applicants did not however produce any expert evidence to that effect although they were able to cross-examine the Respondent's expert witness on this point to which reference will be made below.

3.2 The Applicants also questioned whether they were liable for the cost of such works under the terms of their leases.

3.3 The Respondent had now come forward with three possible solutions to the problem. The Applicants were generally of the view that the cheapest option namely the Cain Bio-Engineering soft engineering option at a cost of £175,000.00 was the most favoured provided that it would actually work and would succeed in halting the erosion of the land and would not cost the residents more money in the future.

4. The Respondent's Case

4.1 Mr Twinley gave evidence that the Respondent became the freeholder of the development in 1993. At this time the first phase had been completed and the second phase was not constructed until 1998. The Respondent had been monitoring the ground movement at the estate since 1998. It had been hoped that ground loss would slow down or stop. Major works were not now thought to be necessary to the bank of the Northern stream but expert reports commissioned by the Respondent over the years showed that some serious work needed to be done to prevent further erosion of the land by the stream on the Eastern boundary. Various proposals had been received and costed and Mr Twinley gave details of the three schemes.

4.2 Mr Steven Brewster who is a Consulting Engineer gave evidence that he had been requested by the Respondent to evaluate the three schemes proposed to remedy the soil erosion problem. His report was contained in the Tribunal's bundle. His recommendation was that the Cain Bio-Engineering soft engineering option was to be preferred because the impact of the soft engineering on the environment was preferable to the hard engineering option and was likely to be more acceptable to the local authority who owned one half of the stream away from the development and on whose land the diverted stream would have to be re-routed. He had had preliminary discussions with the local authority and had gained the distinct impression that they would be amenable to the stream being re-routed although some arrangement might have to be made for future maintenance of the bank if the local authority became the owner of both banks of the stream.

4.3 When asked by the Tribunal as to whether the contemplated works would not have been necessary if smaller scale works had been done from time to time over the years, or if the scheme proposed in 1998 had been put into effect, Mr Brewster said that the likelihood was that these major works would still be required. They were needed to deal with the root cause of the problem which would not have been tackled by small-scale repairs or if the 1998 proposals had been carried out. Other than an increase in costs due to inflation over the years it is likely that the result would have been much the same.

4.4 As far as the figure of £175,000.00 is concerned Mr Brewster thought that was about right for the length of the stream and the work that would need to be carried out. He thought that if the works were carried out the on-going cost would be minimal.

4.5 Mr Brewster confirmed that the next stage would be for a company such as his to be asked to provide a performance specification and for specialist contractors to be asked to tender for the work. An approach would also have to be made to the local authority to obtain confirmation of their agreement to the scheme.

5. Respondent's Submissions

5.1 Counsel for the Respondents, Mr Darton, identified four issues as follows:-

1. "The Lease issue";
2. "The dilapidations argument";
3. What are the costs and are the costs reasonable?
4. Whether there has been delay in the past attributable to landlord which has caused the costs to rise.

5.2 **The lease issue.**

Mr Darton accepted that the two lease types (one for each phase of the development) had not been very cleverly drafted. They were slightly different in their wording.

5.2.1 One aspect of the lease issue was whether the bank to the east of the site falls within the part of the site which the Respondent is obliged to repair and has the right to recover the cost thereof from the lessees. Doubt had been raised by virtue of the fact that the plan of the site contained within the leases for the first phase showed the site boundary as a dotted line which appeared to run along the top of the bank or perhaps even nearer to the houses back from the top of the bank. This dotted line was described as "site boundary" on the plan. This plan also bore the name of "Oldfield King" who are architects.

5.2.2 However, by paragraph 2 of the Fifth Schedule to the Phase 1 leases, the Respondent covenanted "from time to time as often as occasion shall require well and substantially to renew repair uphold support maintain cleanse amend and keep in good and substantial repair and condition all parts of the Amenity Premises. "Amenity Premises" is defined in the Eighth Schedule to the Phase 1 leases as "All those pieces of land and the buildings thereon or on part thereof being within the Estate .... which after the granting of all leases of the dwellings shall not be comprised in one or more of the said dwellings ..." The recitals to the Phase 1 leases refer to the whole of the Respondent's two registered freehold titles as being "the Estate" whereas, in the Eighth Schedule "the Estate" is defined as meaning "the property of the Company [the Respondent's predecessor in title] as delineated on the plan annexed hereto." As the Respondent's freehold title appears from the Land Registry plans of this title to extend

beyond the dotted line on the plan at least to the bank of the stream on the Spring Meadows side and possibly as far as the mid point of the stream, there is evidently a contradiction in this lease as to where the boundary of the site for which the Respondent is under a duty to maintain and repair and for which re-imbursement can be sought from the lessees.

5.2.3 Mr Darton's submission was that notwithstanding this contradiction the intention of the Phase 1 leases was clear. The Respondent was responsible for the repair and maintenance of the whole of the land contained within the registered freehold titles which had not been demised to the lessees (the "Amenity Premises") and that the lessees were obliged under clause 2 of the Fifth Schedule to re-imburse the Respondent for expenditure thus incurred. By those provisions the lessees covenant "to pay a percentage of the Maintenance Cost in accordance with the Sixth Schedule." The Sixth Schedule sates that those costs include "the costs expended by the Respondent in complying with the Company's covenants contained in clauses 3 and 4 of this lease and in the Fifth and Ninth Schedules hereto."

5.2.4 Mr Darton contended that the plans were secondary to the words used in the deed as a matter of construction of this particular lease and he invited the Tribunal to construe the Phase 1 lease as set out above.

5.2.5 As far as the Phase 2 leases were concerned, Mr Darton contended that there were fewer difficulties. This lease made it clear that when leases of all dwellings had been completed the Phase 2 freehold title would be transferred into the same ownership as the freehold title of Phase 1 and that "the Association" (i.e. the Respondent then known as Downland Retirement Homes Limited) would maintain and manage them together. In the case of the Phase 2 leases "the Estate" is defined as meaning "the land in title numbers WSX 101602 (the Phase 2 freehold title) and WSX 127878 (the Phase 1 freehold title) shown edged red on the plan called the Estate Plan annexed to this lease." In this case the lease plan marked "Estate Plan" clearly incorporates the bank of the stream.

5.2.6 The Respondent's obligation to repair and maintain the "Amenity Premises" (i.e. the Respondent's Estate after the demise of all the dwellings) is contained in Paragraph 2 to the Fifth Schedule of the Phase 2 lease and the Respondent's obligation to re-imburse the Respondent therefor is set out in clause 3 and the Fourth Schedule. It states that the lessees covenant to pay "a 1/22 share of the "Maintenance Costs", which are defined in the Sixth Schedule as including "the Respondent's costs of discharging its obligations under the Fifth Schedule."

5.3 Mr Darton's second issue was whether the Respondent could charge the lessees with the cost of works intended to prevent future damage from occurring as opposed to repairing existing damage. He submitted that once it had been established that some damage had occurred to the "Amenity Premises" it is entitled to carry out all necessary works to ensure that future damage is prevented. He relied on the case of Holding & Management Limited v Property Holding & Investment Trust PLC (1989) 1WLR 1315. He submitted that the Respondent did not have to wait until the apartments start to fall down before it takes action to prevent their erosion by the stream.

5.4 Mr Darton's third issue was as to whether the estimated cost of the works was reasonable. He submitted that the evidence of Mr Brewster showed that the proposed works were necessary and reasonable, as was the cost.

5.5 Mr Darton's fourth issue was as to whether any delay on the part of the Respondent had caused an increase in the cost of the work now contemplated by the Respondent such that it would be unreasonable for the lessees to bear such increased costs. He pointed out that the lessees had not produced any evidence of their own that there had been any such causative link and the evidence of Mr Brewster was to the contrary.

5.6.1 The Tribunal explored with Mr Darton two further possible issues. The first was as to whether it was within the contemplation of the parties to the lease when it was being executed that within eight years in the case of Phase 1 and within a very short time in the case of Phase 2 the

lessees were to be made responsible for the cost of extensive works to prevent the erosion of the very ground upon which the properties were built. The Tribunal had in mind the case of Brew Brothers Limited v Snax (Ross) Limited [1970 1 QB 612] where Philimore LJ had said:

"In my judgment, the work which these tenants were required to perform and to pay for went far beyond what any reasonable person would have contemplated under the word "repair". Suppose somebody had said to those parties when signing the contract: 'You realise, of course, that it might be necessary within 18 months to spend between £8,000 and £9,000 to render this building safe.' If that had happened, would you both regard that as repair? I suspect that even a landlord (unless utterly unreasonable) would have replied: 'of course not.' "

5.6.2 Mr Darton's response was that this was a fact sensitive matter. In this case there was nothing to suggest when the leases were granted that this unforeseen problem would arise. The buildings themselves are sound as they have been piled and are not threatened, but the surrounding gardens and driveways are. He submitted that there was no reason to suggest that the parties would not have contemplated such a liability resting with the lessees at the time the leases were entered into.

5.6.3 The second additional issue with which the Tribunal was concerned was whether, if it construed the bank to be outside the area of land described in the leases as being the Respondent's responsibility to maintain and be re-imbursed the cost thereof by the lessees, it could be argued that at common law the Respondent owed a duty to the lessees as freehold owner of the adjoining bank to maintain support to the lessees' properties. Mr Darton referred to the case of Leakey v National Trust 1980 QB 485. His response was that the common law rule was that the adjoining owner was not responsible for naturally occurring damage. Leakey extended the concept of liability in certain circumstances but only where it was reasonable for the adjoining owner to take steps to prevent damage due to natural causes occurring to neighbouring land and the cost of taking such action had to be taken into account. Here, he submitted, it would be unreasonable to expect an adjoining owner to expend £175,000 in taking steps to prevent a natural occurrence to the lessees' properties.

6. The law relating to applications under Section 27A Landlord & Tenant Act 1985

6.1 Subsection 3 of Section 27A states that:-

"An application may be made to a Leasehold Valuation Tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to –

a) the person by whom it would be payable,

b) the person to whom it would be payable,

c) the amount which would be payable,

d) the date at or by which it would be payable, and

e) the manner in which it would be payable.

7. The determination

7.1 With regard to the construction of the leases the Tribunal found that they did impose upon the Respondent the obligation to "repair uphold support maintain cleanse amend and keep in good and substantial repair" the whole of the land within the two freehold titles insofar as the land was not contained within any of the demised premises. It was clear from the wording of the Phase 2 leases and the plans referred to therein that this was the case. It was not so clear in the case of the Phase 1 leases but the Tribunal construed those leases to have the same effect as the Phase 2 leases. It would be inequitable if the Phase 1 leases were construed in such a way that the Respondent would not have such a liability and be able to recover the cost from the lessees whereas it would be so liable and able to recover under the Phase 2 leases. It was clearly the intention of the parties as expressed in both leases that all the properties within both Phase 1 and Phase 2 should have identical responsibilities. The Tribunal considered that the wording used in the Phase 1 leases should take precedence over the lease plan. Where the wording was contradictory or ambiguous the Tribunal found that the likely intention of the parties was that the "Amenity Premises" referred to the whole of the landlord's freehold title remaining after the leases of the individual properties had been granted. Thus the bank is included in the "Amenity Premises." The Respondent has an obligation to maintain and repair it and the lessees have an obligation to re-imburse the Respondent for such expenditure

(subject to that expenditure being reasonable and the consultation requirements having been gone through).

7.2 It is clear that some damage has already been occasioned to the "Amenity Premises" and in repairing that damage it is permissible, the Tribunal found, for the Respondent to carry out necessary works to prevent the problem from persisting or recurring. If such works are not undertaken now the evidence was that it was likely that other parts of the "Amenity Premises" would be affected by the erosion caused by the stream.

7.3 The Tribunal was satisfied on the evidence that the soft engineering option suggested by Cain Bio-Engineering Limited was a reasonable option for the Respondent to take although further negotiations with the local authority would be necessary to make the diversion of the stream a viable option.

7.4 The Tribunal also accepted, on the evidence, that the cost of £175,000 for the works required to be carried out was a reasonable cost and if the proposed works were carried out and this cost sought to be recovered under the service charge then this would be a reasonable charge, subject to the work being carried out to a reasonable standard. The leases provide that this cost shall be shared equally between all 22 lessees.

7.5 The Tribunal considered that there was no evidence that if small-scale works had been carried out periodically, or that the recommendation contained in the letter of 12th May 1998 had been implemented, that the expensive works being proposed now would not be necessary. In fact Mr Brewster's evidence which the Tribunal accepted was that this work would still be necessary and that (apart from inflation over the period) the cost of remedying the situation would be much the same as is proposed now.

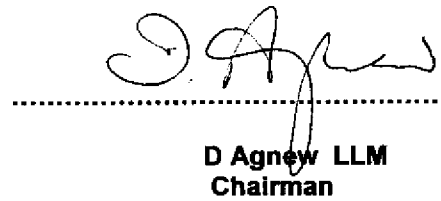
7.6 With regard to the issues raised by the Tribunal as the Tribunal has construed the leases as including the bank and that responsibility for maintenance and repair lies with the Respondent

for which the lessees must re-imburse the Respondent, the second of the Tribunal's issues does not fall to be decided.

7.7 As far as the Tribunal's first issue was concerned, namely whether the proposed works came within the ambit of the repairing obligations at all, first the Tribunal considered that it was necessary to bear in mind that the covenant in this case was expressed to go beyond that of "repair". It includes upholding and supporting all parts of the "Amenity Premises." Secondly, it is relevant that the leases in question are long leases of 99 years from 1990 in the case of the Phase 1 leases and 99 years from 17th July 1998 in the case of the Phase 2 leases. In Brew Brothers Limited v Snax (Ross) Limited the term was only for 14 years. Liability in the case of a repairing covenant is always a matter of fact and degree. The Tribunal in this case decided that the proposed works did come within the ambit of the Respondent's obligation as expressed in the leases for which the lessees were liable to re-imburse the cost. This is likely to be in the region of £8,000 to £10,000 per lease.

7.8 The Tribunal recognises that this is a significant cost for each lessee to bear but having considered carefully the issues raised by the Applicant on behalf of the lessees and other questions raised by the Tribunal itself, the Tribunal concluded that the terms of the leases do render the lessees liable to re-imburse the landlord the reasonable cost of works necessary to stop the erosion of the land caused by the activity of the stream and that the scheme now favoured by the landlord and the cost thereof is, in all the circumstances, reasonable. It will still be necessary for the Respondent to invite tenders for the work and to undergo the consultation procedure set out in Section 20ZA of the Landlord & Tenant Act 1985 before the work can be undertaken. Further, if having gone out to tender, the cost should turn out to be more than the £175,000 currently estimated then unless the cost is agreed by the lessees the Respondent will either have to make a further application to the Tribunal to consider the reasonableness of the new cost or carry out the work and take the risk of the Tribunal finding that the cost was unreasonable should it subsequently be challenged by any of the lessees. Further, if the stream is diverted and there is any responsibility to be placed on the lessees to maintain one of the banks which would then be on the local authority's land there may need to be variations to the leases which all lessees are going to have to agree.

Dated this 11th day of July 2006



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D Agnew LLM
Chairman

SOUTHERN RENT ASSESSMENT PANEL AND LEASEHOLD VALUATION TRIBUNAL

LEASEHOLD VALUATION TRIBUNAL **CASE NUMBER CHI/45UD/LDC/2005/0013**

IN THE MATTER OF SPRING MEADOWS, NEW ROAD, MIDHURST, WEST SUSSEX (the Premises) AND IN THE MATTER OF SECTION 27A OF THE LANDLORD AND TENANT ACT 1985

BETWEEN

MISS K N TRICKER
(ACTING SECRETARY OF RESIDENT'S ASSOCIATION)

APPLICANT

AND

GRANGE MANAGEMENT LIMITED

RESPONDENT

ORDER

UPON hearing the Applicant in person and Counsel for the Respondent

IT IS ORDERED as follows:-

1. That if the Respondent incurs costs of £175,000.00 in implementing the recommendation contained in the report of Rushby Brewster dated 20th February 2006 for the diversion of the stream on the Eastern boundary of the Premises and the Respondent then seeks to recover such costs from the lessees of the Premises by way of service charge then the said service charge shall be reasonable and shall be borne equally by the twenty-two leaseholders.

2. There shall be no order under Section 20 C of the Landlord and Tenant Act 1985.

Dated this 17th day of July 2006

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D Agnew LLM

Chairman