LON/00BK/LBC/2005/0011 & 0016

DECISION OF THE LEASEHOLD VALUATION TRIBUNAL ON AN APPLICATIONS UNDER SECTION 168(4) OF THE COMMONHOLD AND LEASEHOLD REFORM ACT 2002 (AS AMENDED

Applicant: Morshead Mansions Ltd

Respondent: Mactra Properties Ltd

Re: Flats 1, 46, 54 and 97 Morhead Mansions, Morshead Road, London, W9

Applications received on 20 July and 1 September 2005

Hearing date: 27 September 2005

Appearances: Mr G Healey of Counsel
Mr C Wismayer, Wismayers Solicitors
Mr D Wismayer

For the Applicant

Mr D Nicholls of Counsel
Mr K Steele, Mishcon de Reya Solicitors
Mr B O'Boyle, Mactra Properties Limited

For the Respondent

Members of the Leasehold Valuation Tribunal:

Mrs J S L Goulden JP
Mr D D Banfield FRICS
Mrs L Walter MA (Hons)

LON/00BK/LBS/2005/0011 AND 16

PROPERTY: FLATS 1, 46, 54 AND 97 MORSHEAD MANSIONS, MORSHEAD ROAD, LONDON, W9 1LG

BACKGROUND

1. The Tribunal was dealing with applications on behalf of the landlord company, Morshead Mansions Ltd dated 18 July and 31 August 2005 under S 168(4) of The Commonhold and Leasehold Reform Act 2002 (hereinafter referred to as "the Act") for a determination that a breach of covenant or condition had occurred.

2. By Directions of the Leasehold Valuation Tribunal dated 7 September 2005, it was directed that the applications would be heard together.

3. All the relevant leases are made between the Applicant, Morshead Mansions Ltd (1) (hereinafter referred to as "Morshead") and the Respondent, Mactra Properties Ltd (2) (hereinafter referred to as "Mactra"), are dated 28 May 1993 and are for a term of 999 years from 1 January 1993 at the rents and subject to the terms and conditions therein contained. The Tribunal was advised that all the relevant leases were in the same form.

4. Neither the Tribunal nor the parties considered that an inspection of Morshead Mansions would be of assistance to the Tribunal in its Determination, but the Tribunal was advised that Morshead Mansions was a purpose built mansion block c 1900 of five floors including a basement separated into 13 blocks of eight flats (104 units), each of which is accessed by a separate entrance and staircase.

5. Of the 104 units which comprise Morshead Mansions, Mactra hold 23 units (which include the flats which are the subject of these applications) on long leases. All of Mactra's 23 units have been sublet.

6. The Applicant alleges that the Respondent is in breach of Clause 4.4 of the leases in that the Respondent has refused to allow access to Flats 1, 46, 54 and 97 Morshead Mansions, and such refusal amounts to a breach of covenant or condition under S168(4) of the Act.

HEARING

7. The Hearing took place on 27 September 2005.

8. The Applicant, Morshead Mansions Ltd, was represented by Mr G Healey of Counsel and Mr C Wismayer, Solicitor, of Wismayers Solicitors. Oral evidence on behalf of the Applicant was given by Mr D Wismayer.

9. The Respondent, Mactra Properties Ltd, was represented by Mr D Nicholls of Counsel and Mr K Steele, Solicitor, of Mishcon de Reya, Solicitors. Mr S O'Boyle, a Director of the Respondent company, attended the Hearing but did not give evidence. Oral evidence on behalf of the Respondent was given by Mr Steele.

10. Simply put, the Applicant required access to the Respondent's flats for the following reasons:-

Flat 1 – to investigate the causes of water leaks into other parts of the buildings;
Flat 97 – to investigate possible unauthorised alterations;
Flats 46 and 54 – to survey in order that a specification of major works may be drawn up.

11. Mr D Wismayer, who is a lessee of Flat 12 Morshead Mansions, provided two witness statements, one dated 6 September 2005 (relating to Flats 1 and 97) and the other dated 11 September 2005 (relating to Flats 46 and 54), in which he explained the need for access to each of the four flats. He also gave oral evidence. In both witness statements, Mr Wismayer was described as *"a consultant in relation to the management of its* (the Applicant's) *estate"*.

12. Mr Wismayer's statements were full and set out clearly the Applicant's position.

The Applicant's case in relation to Flat 1

13. Mr Wismayer, in his witness statement dated 6 September 2005, said:-

On 9 May 2005 I had occasion to inspect the corridor and block 1 (containing flats 1 to 8 Morshead Mansions). As I passed the basement storeroom situated immediately beneath the bathroom of flat 1, I heard the sound of running water. On entering that storeroom, I found that there was a heavy, persistent leak from the flat above. The basement ceiling and its contents were saturated. The water was coming through the floorboards in the vicinity of the bath located in the flat above.

I then went upstairs in order to investigate the source of the leak. I was admitted to flat 1 by its occupants who allowed me to inspect their bathroom. It was apparent that the leak was to be found behind the bath panel. This was duly removed and I then saw that an old lead pipe feeding hot water to the bath had sprung a leak. A needle sharp jet of water was emanating from the pipe. It was also apparent that the said pipe was exclusively serving flat 1.
I returned to my office and settled a letter on behalf of the Applicant (dated 9 May 2005) addressed to the Respondent, which was faxed to Mr Brian O'Boyle ..... who also deals with the day to day administration of the Respondent's flats in Morshead Mansions. The letter alerted the Respondent to the existence of the leak, that it was located in a pipe belonging to the Respondent and to its obligation under the lease to affect the necessary repairs.

Insofar the Applicant's property is concerned, the leak had initially saturated both the joists separating the bathroom of flat 1 from the storeroom located beneath it and the plasterboard sheeting which covered them. On my

instructions, the Applicant's contractors have taken down and removed the sodden plasterboard.

*From my subsequent conversations with (*the tenants*), I understand that shortly following the Applicant's letter of 9 May, the Respondent's contractor attended the premises and effected a temporary repair to the leaking pipe. On my subsequent regular inspections of the basement storeroom concerned, the original leak appears to have been stemmed and the joists affected thereby are now substantially dried out.*

By a letter dated and received by fax on 16 May 2005, without referring to or acknowledging the Applicant's letter dated 9 May, the Respondent wrote to the Applicant advising that it had been informed of the leak by its tenant, and asserting that the leak was the Applicant's responsibility and was a consequence of allegedly defective workmanship undertaken at some earlier date by the Applicant's contractors.

The Applicant replied by fax on 16 May 2005 pointing out to the Respondent that the defective pipe was its property and that the obligation to repair any defect in it lay with the Respondent.

However, by its location, perhaps for a time obscured by the effects of the leak that I first noticed on 9 May, it appears that another separate water leak had developed in the bathroom of flat 1 and that a different section of the joists in the ceiling of the basement storeroom beneath it had been saturated as a consequence. This section of the joists remains saturated and this apparently separate leak persists today.

On or about 4 July 2005, the Respondent faxed to the Applicant a Report (dated 4 July) produced by the Respondent's consultant surveyors, Messrs. Springett Gould & Keel ("SGK"), relating to the works undertaken by the Applicant's contractors in the service riser passing through flat 1. Undertaken in 2003, these works had included the installation within the riser (a vertical shaft not forming part of the property demised to the Respondent through

which the Applicant was routing new mains services, ie gas supplies, water supplies, communal TV aerial cables etc) of an unvented hot water cylinder.

SGK's Report of 4 July 2005 was highly critical of the works effected by the Applicant's contractors. However, without the opportunity to inspect the flat, it is not practicable to comment on the contents of the said Report.

Subsequently, under cover of the Respondent's letter dated 29 July 2005, a specification and scope of works necessary to remedy defects alleged to exist in the Respondent's flats numbered 1 and 3 Morshead Mansions prepared by SGK was faxed to the Applicant. Again, without the opportunity to inspect the interior of flat 1, it is not practicable to comment on the works specified as they relate to the installation of the unvented hot water cylinder and related pipework.

However, with respect to the works specified in the Applicant's basement storeroom, I note the grossly excessive scope, eg SGK's stipulation that the storeroom's ceiling be plastered and that both it and the bare brick walls then be painted with 3 coats of emulsion. There is no apparent benefit arising from the expenditure that would be incurred were this aspect of SGK's specification to be implemented."

The Applicant's case in relation to Flat 97

14. Mr Wismayer, in his witness statement dated 6 September 2005, said:-

"At or about the same time, ie mid-June 2005, I became aware that the Respondent had commenced works of refurbishment on its flat numbered 97 Morshead Mansions which had recently become vacant.

The works in flat 97 included the apparent re-location of the lavatory pan thereby requiring the construction of a new waste pipe. This was routed to the Applicant's externally mounted soil pipe via a new opening made in the external brickwork of the building. At the same time, I observed several

further new openings recently made by the Respondent's contractors in the external brickwork of flat 97 the apparent purpose of which was to accommodate new pipework and ventilation ducts serving fittings of various kinds located in the kitchen and bathroom of flat 97.

The openings made by the Respondent in the building's external brickwork may have structural implications. Without an internal inspection, it is not possible to establish whether, had the Applicant's permission been sought, it would have been granted.

The fittings mounted externally to the building by the Respondent include pipework, a boiler flue and vents which are white in colour rather than the standard black. Had permission been sought by the Respondent with respect to these fittings, it would have been refused.

I duly reported these observations to the Applicant's solicitor whose advice was again sought as to the appropriate steps.

The solicitor advised that the Applicant should employ the services of a qualified building surveyor with a view to inspecting the Respondent's flats 1 and 97.

Inspection of flats 1 and 97

A Mr Christopher Whitehead, chartered surveyor, of Messrs. Stiles Harold Williams was duly instructed to carry out the necessary inspections and to advise with respect thereto.

By a letter dated 20 June 2005 from the Applicant's solicitors, Messrs Wismayers, addressed to the Respondent, notice of the Applicant's intention to inspect flats 1 and 97 was duly given, the date for inspection being 6 July 2005.

On that date, at the appointed time (10.00 am), I attended flat 1 in the company of Mr Whitehead. We were met by the tenants *who produced a letter addressed to them by the Respondent instructing them to refuse entry to me and Mr Whitehead. Entry having been refused, Mr Whitehead and I left the premises and made our way to flat 97.*

At the appointed time (10.30 am), Mr Whitehead and I knocked on the door of flat 97 but there was no response. After waiting for 15 minutes, having concluded that it was unlikely that anybody from the Respondent would attend in order to afford access we duly departed.....".

15. Mr Wismayer provided photographs of the exterior of the buildings in support of his allegations in respect of the works carried out at flat 97.

The Applicant's case in relation to Flats 46 and 54

16. Mr Wismayer, in his witness statement dated 11 September 2005, said:-

"The Applicant is desirous of re-commencing a programme of major works in Morshead Mansions the purpose of which is to restore the building to a state of repair. Inter alia, the works of repair which remain outstanding include the replacement in some of the 13 blocks ..... of the Applicant's mains services. This involves the replacement of old lead water pipes with copper, the provision of new gas supplies, the distribution of a new communal TV aerial system.

In each of the 13 blocks of 8 flats, these are arranged vertically in pairs around a single staircase. The new mains services are to be fixed in a brick-built shaft (the original function of which (the delivery by a "dumb waiter" of coal then stored the cellars beneath the flats and the removal of ash from fires lit to heat the flats) long since having become redundant, which runs from the basement and up through all of the flats and into the roof void above them. There are two such shafts in every block, each passing through 4 flats. These

brick-built shafts do not form part of the property demised to the individual tenants under the leases but are instead retained by the Applicant in the common parts.

Due to their very small dimension (on plan), access to the new service riser (ie the old brick coal shaft), is only possible from within the demised property of each tenant. Apart from fixing the new mains services within the service risers, the Applicant's obligation to observe and comply with the current building regulations regarding fire separation requires the construction at each floor level within the riser of fire rated floors, ceilings and covers. This work also cannot be undertaken without access from within each flat.

The blocks in which the relevant works remain to be completed and for which access is required are 3 (ie containing flats 17 to 24), 4 (containing flats 25 to 32), 6 (containing flats 41 to 48) and 7 (containing flats 49 to 56).

In order to minimise the risk of contractual claims arising during the course of construction works and so as to facilitate as accurate and complete a specification and scope of works as the circumstances permit, the first step to be undertaken in anticipation of re-commencement is the taking of a survey of the arrangement in each flat of the existing services. The Applicant requires access to each flat in order to undertake such a survey".

17. Mr Healey, on behalf of the Applicant, said that the questions for the Tribunal was simple, namely, had Morshead requested access to the flats and had access been denied. He said that this had been admitted by the Respondent in its Defence. He said *"the principle factual burden on the Tribunal had been removed by the Respondent's helpful Defence".*

18. Mr Healey then said that the further questions for the Tribunal were whether Morshead had the right to seek access to the flats and did the refusal to allow access amount to a breach of covenant or condition under the Act. Mr Healey referred to the relevant parts of the leases on which he relied. He said it was clear that the Applicant had a right of access in order to carry out its

obligations under the leases, and had not been unreasonable in requesting access.

19. Mr Healey accepted that there was an *"acrimonious history"* to this matter between the parties. This had resulted in the Respondent's reluctance to allow Mr Wismayer, on behalf of Morshead, to have any access to the flats. However he argued that there is *"no reasonableness constraint on an access right"* in this case. Reasonable notice had been given of the requirement for access. He suggested that it would be an extraordinary proposition for the Respondent to say that there would be no access if Mr Wismayer, an employee of the landlord, wished to gain access. Mr Healey said *"a non conditional right is tantamount to terminating it if there is no limit to the conditions imposed"*. Mr Healey pointed out that in the Respondent's Defence, Mr Wismayer's conduct had not been set out as a reason for refusal. Mr Healey considered this to be *"revealing"*.

20. Mr Nicholls, Counsel for the Respondent, submitted that a right of access had not been made out under the terms of the relevant leases, and the past conduct of Mr Wismayer and the landlord company had made the request for access unreasonable. He also questioned why the application had been brought.

21. With regard to Flat 1, Mr Nicholls said that Mactra accepted that the leak had come from the pipe forming part of the Respondent's property, but it was clear that the pipe exclusively served Flat 1 and the obligation to repair it lay with Mactra. There was no need for the Applicant to have access into the flat to examine a leak. There was no right of inspection for the purposes of investigation under the terms of the lease.

22. Mr Nicholls said that with regard to Flat 97, it was clear from the Applicant's letters to the Respondent that the Applicant did not know what works had or had not been carried out and *"the lease does not give the landlord permission to go on fishing expeditions. Landlords cannot go from flat to flat inspecting to see whether there has been a breach of convenant or not"*. As in the case of

Flat 1, Mr Nicholls said that there was no right of inspection for the purpose of investigation under the terms of the lease.

23. Mr Nicholls accepted that the position with regard to Flats 46 and 54 was somewhat different in that the landlord was seeking to inspect his own properties, and this could fall within the terms of the Fifth Schedule to the lease, but there was still no express right to inspect.

24. In addition, Mr Nicholls maintained that the question of reasonableness must be considered by the Tribunal in this case. He said that both the conduct of the Applicant and in particular the conduct of Mr Wismayer had been such over a number of years so as to engender *"a feeling of distrust"* in the occupants of the flats. Although the sole Director of the Applicant company was a Mr M Crowther, Mr Wismayer had a *"mysterious"* relationship with him. 99.9% of letters appear to have been written by Mr Wismayer on behalf of Mr Crowther. Mr Crowther had never attended any proceedings in connection with the building and therefore had never given evidence. There had been a series of abusive and violent incidents involving Mr Wismayer over a number of years (which were disputed by Mr Wismayer) and it was unlikely that any normal or responsible landlord would not respond to such serious allegations. He said *"there are serious concerns behind this"* and the Respondent's refusal to allow access was both reasonable and comprehensible.

25. Mr Nicholls said that the element of mistrust between the parties could be partly cured by the removal of Mr Wismayer. He accepted that the landlord could employ whoever he wanted, but the conduct of the landlord indicated a spirit of uncooperation and by its reliance on its legal rights made the Applicant's conduct unreasonable.

26. Mr Nicholls was of the view that the application achieved nothing. The section under which the applications had been brought was designed to prevent the landlord serving a S146 Notice. If the applications were successful, the Respondent would be almost certain of obtaining relief against forfeiture. He

said that the applications were *"indicative of the behaviour of the landlord company and its alter ego, Mr Wismayer"*.

27. Mr K Steele, Solicitor, and a partner in Mishcon de Reya, provided a witness statement on which he was questioned. This, in the main, dealt with the conduct of Mr Wismayer in the past, which was referred to as *"intimidatory and bullying"*. In his witness statement it was said of Mr Wismayer *"he prowls round the blocks at Morshead Mansions at all times of the day and night. He arrives unannounced at the flats and gains entry, usually without notice, usually by making threats"*. He said that the Respondent was reluctant to countenance further disturbance of its tenants. His witness statement ended *"my client had already told the landlord that if suitable people (by which my client means not Mr Wismayer) wish to exercise a right of inspection then they may do so. My client has made this offer with a view to having these proceedings made redundant and therefore discontinued by the landlord. However the landlord has simply carried on the proceedings regardless. This is another example of the landlord's cynical waste of money"*.

THE TRIBUNAL'S DETERMINATION

28. The questions for the Tribunal to determine were

(1) Did the lease provisions provide for access to be obtained by the Applicant?
(2) Was access denied?
(3) Was it reasonable to deny access?

29. Although a further question was put by Mr Nicholls, namely, what was the purpose of the present applications before this Tribunal, and although the Tribunal comments on this aspect, the purpose behind the present applications is not for the Tribunal. The Tribunal has conduct of live applications before it and makes a determination on those applications.

30. In the view of the Tribunal, Mr Steele's witness statement did not contain any matters of which he had any personal knowledge and therefore little weight has been attached thereto. Mr O'Boyle did not give evidence. The Tribunal therefore relied on the witness statements of Mr Wismayer, his oral evidence and all of the documentary evidence placed before the Tribunal.

Did the lease provisions provide for access to be obtained by the Applicant?

31. Mr Healey said that the landlord's obligations under the lease are contained in clauses 4.4, 4.6, 4.8 1(b) of the Fourth Schedule and the Fifth Schedule. These Clauses are as follows:-

4.4 SUBJECT to and conditional upon payment being made by the Tenant of the interim charge and the service charge referred to in the 4th Schedule at the times and in the manner provided in this lease to provide the services listed in the 5th schedule for all the occupiers of the building, and in doing so

(i) the Landlord may engage the services of whatever employees, agents, contractors, consultants and advisers as the Landlord considers necessary

(ii) the Landlord shall not be liable for any failure or delay caused by industrial disputes, shortage of supplies, inclement weather, and other causes beyond the control of the Landlord.

4.6 At the Tenant's request, and on the following terms, to enforce the obligations under taken in their respective leases by tenants of other parts of the building. The Tenant must:

(i) meet all expenses and

(ii) **comply in advance with the Landlord's reasonable requirements as to payments on account and/or giving security for payment**

4.8 **THAT every lease granted hereafter over any flat in the Building will be expressed in the same terms as this lease mutatis mutandis.**

Fourth Schedule

1(b) **"the Expenses" means in respect of each Accounting Year the cost to the Landlord of the items set out in the 5th schedule and shall be deemed to include not only those expenses and outgoings which have actually been paid or incurred by the Landlord during the year in question but also such reasonable proportion of the expenses and outgoings of a periodically recurring nature (whether recurring regularly or irregularly) whenever paid or incurred (whether prior to the commencement of the lease period or otherwise) including a sum or sums by way of reasonable provision for anticipated expenditure as the Landlord or his accountants or managing agents (as the case may be) may in their discretion allocate to the year in question as being fair and reasonable in the circumstances.**

5th SCHEDULE

Services to be provided

1 **Repairing the roof, outside, main structure and foundations of the building**

2 **The cost of insuring and keeping insured throughout the lease period against the insurable risks mentioned in clause 4.2 the Building and all parts of it, the Landlord's fixtures and fittings in the Building and all the appurtenances apparatus and other things belonging to it**

3 **Contributing a fair proportion of the cost of repairing, maintaining and cleaning any building, property or sewers, drains, pipes, wires and cables of which the benefit is shared by occupiers of the building and occupiers of other property**

4 **Decorating the outside of the building whenever necessary**

5 **repairing and whenever necessary decorating and furnishing the common parts**

6 **Lighting and cleaning the common parts**

7 **Repairing and maintaining those services in the buildings and its grounds which serve both the property and other parts of the building**

8 **Maintaining the grounds of the building, including planting and tending the gardens**

9 **Providing within the building reasonable facilities and arrangements for:**

(a) security

(b) rubbish disposal

10 **Insuring against liability to anyone entering the common parts or the grounds of the building and to those using the lifts and insuring against employer's liability to anyone employed to provide any of these services**

11 **Paying all rates and taxes assessed on or payable in respect of the common parts**

12 **Obtaining insurance valuations of the buildings from time to time**

13 **If the proceeds of any insurance claim are not enough to pay for repairing the building after damage by an insured risk, contributing the extra sum needed to pay for the work**

14 **The cost of employing maintaining and providing accommodation in the Building for a porter or porters if any (including the provision of uniforms and boiler suits)**

15 **The cost of carpeting or re-carpeting cleaning decorating and lighting the passages landings and staircases and other parts of the Building used or enjoyed by the tenant in common with others and of keeping the other parts of the Building used or enjoyed by the Tenant in common with others and not specifically referred to in this schedule in good repair and condition**

16 **The fees of the Landlord's managing agents for the collection of the rents of the flats in the Building and for the general management of the Building**

17 **The cost of providing and maintaining a door entry system to the entrances to the Building**

18 **The cost of providing and maintaining a communal system for the reception of televisual broadcasts provided that the Landlord shall be under no obligation to make such provision**

19 **The cost of preparing and supplying the account of the Expenses and Service Charge including the charges and expenses of a qualified accountant employed to prepare audit and provide copies the same**

20 **The cost of taking all steps deemed desirable or expedient by the Landlord for making representations against or otherwise contesting the incidence of or complying with the provision of any legislation or orders or statutory requirements under any legislation concerning town and**

country planning public health highways streets drainage or other matters relating or alleged to relate to the Building for which the Tenant is not directly liable under this lease

21 The cost of preparing and supplying copies of all rules and regulations made from time to time by the Landlord

22 The cost of enforcing or attempting to enforce any covenant against any Tenant

32. From a careful consideration of the lease terms the Tribunal determines that the lease provisions provide for access to be obtained by the Applicant in order to carry out its obligations.

Was access denied?

33. The Tribunal accepts Mr Healey's view that the conditions imposed on access, namely that Mr Wismayer should not be allowed access at all, *"is tantamount to determining it if there is no limit to the conditions imposed"*.

34. The Tribunal does not consider that there was any real doubt that the access was denied, and indeed the Respondent made admissions in this respect.

Was it reasonable to deny access?

35. This was the question which caused most difficulty to the Tribunal.

36. It is clear from the evidence that there is one reason, and one reason alone, why Mactra has denied access to Morshead, and this is because of the presence of Mr Wismayer. A letter written by Mactra's solicitors to Morshead solicitors of 12 September 2005 is revealing and states:-

"We and our client are at a complete loss as to where your client thinks the LVT proceedings are going and, more importantly, what your client hopes to achieve from bringing those proceedings.

Your client is maintaining that it requires access in order to carry out its duties under the lease. Yet, as you shall shortly see we have photographic evidence of Mr Wismayer of your client assaulting one tenant and we have credible evidence of the threats and bullying he has used in order to gain unauthorised access to the flats at Morshead Mansion on other occasions. We wonder what "duties" Mr Wismayer is performing on behalf of your client in threatening those that will not allow him access with jail sentences? Quite frankly the manner in which he conducts himself and the language he uses makes the abusive and hectoring tone of which you complain seem completely innocuous and temperate by comparison.

The fact is that Mr Wismayer of your client continues to regard Morshead Mansions as, to quote from the LVT, "his personal fiefdom". That does not entitle him to act as a feudal lord and that is what our client is trying to stop. There is absolutely no point in Mr Wismayer attending at any of these inspections: he is not a property developer, as he likes to pretend, but a chartered accountant. Matters of inspecting flats for alleged disrepairs should solely be a matter for those experienced and competent in identifying disrepairs, namely surveyors.

There is a perfectly sensible modus vivendi which can be adopted and that is as follow:

1. *Your client gives as much prior notice as possible. We are aware of the exact provisions of the lease but we are also aware that these works have not been carried out for many years. A few extra days will not matter.*

2. *Your client writes only to our client and not our client's tenants (as happened in the case of flats 46 and 54).*

3. *Your client indicates, briefly, the purpose of the inspection and who will be attending.*

4. *Your client agrees that Mr Wismayer will not attend.*

5. *Your client withdraws the present proceedings".*

37. Mr Wismayer, for some reason, finds it necessary to inspect the property, in his words *"every few days"*. His constant presence is unwelcomed by Mactra.

38. The sole Director of Morshead appears to have little or no input in the running of Morshead Mansions, leaving commercial matters (including writing almost all letters for Mr Crowther to sign) almost entirely to Mr Wismayer as consultant. Mr Wismayer, who had described himself as a consultant, leaseholder and shareholder, said *"I coordinate and integrate all of the resources and performance of consultants employed in achieving the building in a state of repair"*. Mr Crowther has never attended any of the LVT Hearings and therefore has never given evidence or been cross examined. Mr Wismayer denied that he, rather than Mr Crowther, made all the decisions. He said "*consultants advise and the client decides"*.

39. However, the suggestions by the Respondent's solicitors in their letter of 12 September 2005 referred to above seem to disregard and/or to redraw the terms of leases which were entered into in 1993. Further, it is doubted whether Mactra could insist that an employee of the landlord company could not attend (in any capacity). On the other hand, Mr Wismayer's presence is provocative and perhaps intended to be so. The Tribunal feels that with cooperation from both sides, these applications need not have come before the Tribunal. It is clear however that there would be no cooperation from either side.

40. The Tribunal has looked carefully at the reasons for access and whether Mr Wismayer's presence was reasonable in each particular circumstance.

41. Flat 1. Mr Wismayer inspected Flat 1 for the purpose of ascertaining the source of a leak in the basement. In the view of the Tribunal, it was reasonable for an employee of Morshead to locate the source of a leak which had saturated the basement ceiling. Mr Wismayer was an employee of Morshead, and his inspection was reasonable in the circumstances. A further inspection by prior appointment and by a chartered surveyor (accompanied by Mr Wismayer) had not been permitted. Mr Wismayer said that the reason for his presence with the surveyor was that he had never met the surveyor before, and wanted to give him a briefing, an introduction to the building and provide access to the basement and the rear. Mr Wismayer said that he had not intended to enter Flat 1. In the view of the Tribunal, and due to the obvious animosity between the Applicant and the Respondent, it would have been desirable in the circumstances for the surveyor to have inspected Flat 1 unaccompanied by Mr Wismayer. However, there was a denial of a proper right of access, which is unreasonable.

42. Flat 97. From the photographs provided, it is clear that openings had been made in the structure of the building. The Applicant was entitled to inspect. An inspection by prior appointment and by a chartered surveyor (accompanied by Mr Wismayer) was unsuccessful in that there was no response from that flat. The reason for Mr Wismayer's presence with the surveyor was as for Flat 1. The Tribunal's views are as for Flat 1. Since there was no response from Flat 97, there was a denial of a proper right of access, which is unreasonable.

43. Flats 45 and 54. Access to these flats was required in order to undertake a survey in order to prepare a specification for major works. Letters sent to Mactra as to this were dated 8 August 2005, and were marked *"by hand"*. These letters set out the times each flat was due to be inspected by a chartered civil engineer on 12 August 2005 under paragraph 6 of the Third Schedule to the leases. It was stated *"the inspection of each flat is expected to take between 45 minutes and 1 hour"*. Mr Wismayer, an employee of Morshead, said that the civil engineer had been instructed a few days before 8 August 2005. He accepted that he could have instructed the civil engineer to inspect at a later date but relied on Morshead's rights under the lease. In evidence he

said that he did not attend any of the inspections. Paragraph 6 of the Third Schedule to the leases states:-

> **"Full right and liberty for the Landlord and its duly authorised surveyors or agents with or without workmen and others upon giving three days' prior notice in writing at all reasonable times (or in case of emergency at any time without notice) to enter the Property for the purpose of carrying out any of the obligations contained in Clause 4.4 of this lease".**

44. The Applicant was entitled to inspect Flats 45 and 54. Notice in accordance with the lease terms was given. There was a denial of a proper right of access, which is unreasonable.

45. Whilst the Tribunal has determined that the request for access in respect of the applications before it was not unreasonable, it should be clearly noted that this Determination is in respect of the specific facts as presented to the Tribunal relating to these four flats alone, and the circumstances surrounding the reasons for such access. This should not be considered a blanket Determination that any access by Morshead to Mactra's flats would be deemed to be reasonable. The Tribunal's Determination is based on the merits of these applications alone.

CHAIRMAN .....

DATE.....2 November 2005.....