DECISION OF THE LEASEHOLD VALUATION TRIBUNAL

CASE NO: LON/00AG/LAC/2004/2

In the matter of Schedule 11, Paragraph 5 of the Commonhold and Leasehold Reform Act 2002

Address of the Premises: 9B Bracknell Gardens, London, NW3 7EE

Applicants: (1) Richard Clive Morgan

(2) Ceinwen Ann Morgan

Respondent: Ted Egoh

Appearances: Richard Clive Morgan, the first Applicant, represented by Mr J Kennedy of Messrs. J E Kennedy & Co., Solicitors.

The Respondent did not appear and was not represented.

Date of Application: 5th May 2004

Date of Hearing: 23rd September 2004

Members of the Leasehold Valuation Tribunal:

Miss A Seifert FCIArb
Mr M A Mathews DMS FRICS MIMgt
Mrs S S Friend MBE JP

Date of Decision: 22 October 2004

DECISION OF THE LEASEHOLD VALUATION TRIBUNAL

LON/00AG/LAC/2004/0002

Re: 9B Bracknell Gardens, London NW3 7EE

1. By an Application dated 5th May 2004, the Applicants applied to the Leasehold Valuation Tribunal for a determination whether an administration charge of £6,375 is payable under paragraph 5 of Schedule 11 to the Commonhold and Leasehold Reform Act 2002. At the pre-trial review held on16th June 2004, the Tribunal identified the following issues to be determined:
   (a) whether there has been a breach of covenant or condition of the lease.
   (b) whether the administration charge is recoverable under the terms of the lease
   (c) the reasonableness of the administration charge.
   At the hearing the Applicants requested that there also be a determination as to the date that the administration charge is payable.

2. A hearing was held on 23rd September 2004. The Applicants were represented by Mr J Kennedy of Messrs. Kennedy & Co, Solicitors. Mr Morgan, who is also a Solicitor, provided a witness statement dated 8th September 2004, and gave additional oral evidence. Mr Egoh, the Respondent, did not attend the hearing and was not represented.

3. On the morning of the hearing the Tribunal inspected 9 Bracknell Gardens, externally. The Tribunal also inspected Flat 9B Bracknell Gardens and the ground floor flat internally. The building is a detached house and is situated in a very good residential area. It is three stories high and was built the early 1900's. It has part brick and part tile hung facing and a tiled pitched roof. There is a front and rear garden and parking spaces for two cars at the front for the occupants of the ground floor flat. At the rear is a part single storey extension, on top of which is a terrace. This terrace is included in the demise of Flat 9B, and is accessed through French windows in the living room of that flat and from the kitchen/diner. The terrace has a low brick parapet wall with metal fencing. The surface of the terrace is paved with tiles. There are lead flashings to the wall of the house and a water outlet to the centre of the terrace. It was noted that the rear windows are in poor repair. On the inspection of the ground floor flat, it was pointed out where water leaks had occurred in the kitchen and the bathroom. This area is immediately below the terrace of Flat 9B. Work had been carried out to the terrace during February or March 2004 by a firm called Henley Roofing. The main items of work were asphalting, lead work and patio tiles. The finished work was seen at the inspection.

4. Flat 9B is subject to a lease dated 16th November 1993 made between Laurence Anthony Wheeler, Alan Oke Dart and the first Applicant as lessors and Andrew Pennington Havard Hunter and Michele Hunter as lessees. Mr Wheeler and Mr Dart were trustees and were later replaced by the second Applicant. The interest of the lessees under the lease was assigned to the Respondent by a transfer dated 29th October 1999. The term of the lease is 125 years from 24th March 1983. The lease of Flat 9B is registered at Her Majesty's Land Registry under title number NGL713672. The Respondent is shown as the registered proprietor and his address is shown as 9B Bracknell Gardens.

5. The property demised by the lease is described in Part 1 of the Schedule to the lease as the flat and terrace and as including the floors and substructure and joists supporting the floors including those of the terrace and the walls of the terrace.

6. Clause 3(a) of the lease contains a covenant by the lessees to "keep the said Flat throughout the term hereby granted.....and all interior walls and sewers drains pipes sanitary fittings cables and wires exclusively serving the said Flat timbers floors and ceilings and appurtenances thereto belonging and the terrace and the walls thereof in good and tenantable repair and condition and particular so as to support shelter and protect the parts off the Building other than the said Flat".

7. Clause 3(g) of the lease contains a covenant by the lessees "to permit the Lessors and their surveyors with or without workmen at all reasonable times during the said term by prior appointment in writing to enter upon and examine the condition of the said Flat and thereupon the Lessors may serve upon the Lessee notice in writing specifying any repairs necessary to be done and requiring the Lessee forthwith to execute the same and if the Lessee shall not within twenty eight days after the service of such notice commence and proceed diligently with the execution of such repairs then to permit the landlords and their agents to enter upon the said Flat and exercise such repairs and the cost thereof shall be a debt immediately due from the Lessee to the Lessors and be forthwith recoverable by action". Clause 3(h) of the lease contained a lessee's covenant to permit inspections.

8. Mr Morgan said that on about 10th January 2004 he was informed by the tenants of the ground floor flat, Dr Solomon and her husband, that water was coming into the ground floor flat from the flat above, that is Flat 9B. That flat was at that time and still is, occupied by the Respondent's tenants. Mr Morgan wrote to Mr Egoh by a letter dated 10th January 2004 asking him to remedy the problem as a matter of urgency. No response was received. The leaks continued and worsened. Dr Solomon in conjunction with the Respondent's own tenants obtained estimates for works to remedy the problem. At least

one of these was in writing. By a letter dated 5th February 2004, Mr Morgan wrote to Mr Egoh enclosing an estimate for the remedial work and drew his attention to clauses 3(g) and 3(h) of the lease. The estimate enclosed with that letter was produced to the Tribunal. It is from Henley Roofing and is dated 31st January 2004. It sets out the chief items of work that were later undertaken by that firm to the terrace of Flat 9B apart from replacement patio tiles.

9. Mr Morgan also wrote on 6th February 2004 to the Respondent's mortgagees, Barclay's Mortgages, enclosing the correspondence to Mr Egoh and to inform them of the position. By a letter dated 9th February 2004, the Mortgagees replied that they had sent a copy of this letter to Mr Egoh and had requested him to resolve the matter within 28 days.

10. Mr Morgan explained to the Tribunal that Barclay's Mortgagees paid the ground rent and insurance due under the lease on behalf of Mr Egoh, and that he regarded Barclay's Mortgagees as Mr Egoh's agents in respect of payments and communications in respect of matters arising in connection with the lease.

11. The contractor's invoice dated 25th March showed that works costing £6,375 had been undertaken. Mr Morgan paid this sum by cheque on 13th April 2004, and this payment was evidenced entries on his bank account.

12. Mr Morgan wrote to Mr Egoh on 5th April 2004 enclosing the contractor's invoice and demanding the sum of £6,375. A copy of this letter was sent to the Mortgagees under cover of a letter also dated 5th April 2004.

13. Mr Morgan then instructed J.E. Kennedy & Co. That firm wrote to Mr Egoh on 14th April 2004 repeating the demand made by Mr Morgan in his letter dated 5th April 2004. That letter also enclosed a summary of the rights and obligations of tenants of dwellings in relation to administration charges in accordance with the requirements of paragraph 4 of Schedule 11 of the Commonhold and Leasehold Reform Act 2002. The letter concluded that if no payment was received by 26th April then proceedings would be commenced. A further copy of that letter was sent to Mr Egoh under cover of a letter sent by recorded delivery dated 5th May 2004. No response was received.

14. An administration charge is defined in paragraph 1 of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 as ".....an amount payable by a tenant of a dwelling as part of or in addition to the rent which is payable, directly or indirectly –
(a) .....
(b) .....

(c) in respect of a failure by the tenant to make a payment by the due date to the landlord or a person who is party to his lease otherwise than as landlord or tenant, or
(d) in connection with a breach (or alleged breach) of a covenant or condition in his lease."

A "variable administration charge" means an administration charge payable by the tenant which is neither –
(a) specified in the lease, nor
(b) calculated in accordance with a formula specified in the lease.

Paragraph 2 of Schedule 11 is concerned with the reasonableness of administration charges. A variable administration charge is payable only to the extent that the amount of the charge is reasonable.

Under paragraph 4 of Schedule 11 the requirements for contents of notices in connection with demands for administration charges are set out. Under paragraph 4(1) a demand for the payment of an administration charge must be accompanied by a summary of the rights and obligations of tenants of dwellings in relation to administration charges. There is provision in paragraph 4(2) for the appropriate national authority to make regulations prescribing requirements as to the form and content of such summaries of rights and obligations.

Under paragraph 5 of Schedule 11 an application may be made to the Tribunal for a determination whether an administration charge is payable and if it is, as to amongst other things the date at which it is payable.

15. In respect of the first issue, whether there had been a breach of covenant or condition under the lease, Mr Kennedy submitted that there had been such a breach. He referred to the demise including the terrace. He also referred to the lessee's repairing obligation under clause 3(a). There was evidence before the Tribunal of disrepair to the terrace and damage caused by water penetrating from the terrace into a number of rooms in the ground floor flat below. The Tribunal is satisfied that there was a breach of the lessee's repairing covenant.

16. In respect of the second issue, whether the administration charge is recoverable under the terms of the lease, Mr Kennedy submitted that the Applicants had incurred the cost of £6,375 in carrying out the lessee's repairing obligations under the lease, which was recoverable as a debt under the terns of clause 3(g) from Mr Egoh rather than as damages for breach of covenant. The Tribunal accepts Mr Kennedy's submissions that the notice required to be served under clause 3(g) was sufficiently served by being sent to Mr Egoh at Flat 9B, the address stated on his title documents, and that the estimate setting out generally the remedial works to be undertaken gave sufficient information as to the works necessary. The Tribunal finds that the

administration charge is recoverable under the terms of the lease. Further, the Tribunal considers that the requirements of paragraph 4 of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 were complied with by the inclusion of the summary of rights and obligations enclosed in the letters of demand dated 14th April and 5th May 2004 from Messrs. Kennedy & Co to the Respondent. No regulations under paragraph 4(2) of Schedule 11 prescribing the form and content of such summaries had been made at the date of those letters.

17. The third issue is the reasonableness of the administration charge. Only one written estimate was produced to the Tribunal. This was from Henley Roofing and was dated 31st January 2004. There was a invoice from that firm dated 25th March 2004 in the sum of £6,375. Other estimates were obtained orally and the Tribunal was told that these exceeded the written estimate. Having regard to the written estimate and invoice and using its knowledge and experience, the Tribunal finds that the administration charge was reasonable in amount.

18. The fourth issue is the date that the administration charge became due. Mr Kennedy submitted that the charge became due on 26th April 2004 in accordance with the terms of his firms' letter dated 14th April 2004. The Tribunal accepts this submission and finds the charge was payable on 26th April 2004.

19. The remaining matters in this application relate to fees and costs on relation to the application. In his witness statement Mr Morgan submitted that the Respondent's failure to respond to the Application equated to an admission of the Applicant's claim. He submitted that had the claim been admitted prior to the issue of the Application the issue fee would have been avoided. The Tribunal has jurisdiction under paragraph 9 of the Leasehold Valuation Tribunals (Fees) (England) Regulations 2003 to require any party to the proceedings to reimburse the other party to the proceedings for the whole or part of any fees paid by him in respect of the proceedings.

20. In this particular case the Tribunal do not consider that it would be appropriate to make an order that the Respondent reimburse the Applicants' fees. The Tribunal considers that merely paying no part in the proceedings is an insufficient ground for ordering reimbursement of fees by one party to the other.

21. The Applicants also applied for an order of costs against the Respondent. The jurisdiction of the Tribunal to make an order for costs is contained in paragraph 12 of Schedule 12 to the Leasehold and Commonhold Reform Act 2002. This provides that the Tribunal may determine that a party to proceedings shall pay the costs incurred by another party in connection with the proceedings falling within sub-section (2)

(2) The circumstances are where –

(a) he has made an application to the LVT which is dismissed in accordance with regulations made by virtue of paragraph 7, or
(b) he has, in the opinion of the LVT, acted frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with the proceedings.

22. The Tribunal considers that failure by the Respondent to answer the correspondence or respond to the claim is an insufficient ground for an order for costs under this paragraph in the circumstances of this case.

Chairman..... Anne Seifert

Date..... 22nd October 2004

Members of the Leasehold Valuation Tribunal:

Miss A Seifert FCIArb
Mr M A Mathews DMS FRICS MIMgt
Mrs S S Friend MBE JP