1994

IN THE LEASEHOLD VALUATION TRIBUNAL

LON/00AW/LSC/2005/0232

IN THE MATTER OF FLATS 1 & 2, 11 BRAMHAM GARDENS, LONDON, SW5 0JQ

BETWEEN:

DAVID COLLINS

Applicant

-and-

11 BRAMHAM GARDENS LIMITED

Respondent

THE TRIBUNAL'S DECISION

Background

1. Unless stated otherwise, the page references in bold in this Decision are to the pages in the agreed trial bundle.

2. The Applicant makes two applications in this matter. The first application is made pursuant to s.27A of the Landlord and Tenant Act 1985 (as amended) ("the Act") for a determination of his liability to pay and/or the reasonableness of service charges for the years 2000-2007. The second application is made pursuant to s.20C of the Act for an order disentitling the Respondent from recovering, through the service charge account, any costs it has incurred in these proceedings.

3. The Applicant is the lessee of Flats 1 and 2, which now form a single dwelling in the subject property. He occupies the premises by virtue of two leases dated 7 February 1980 granted by Lillyheath Properties Limited to A J D Wilkinson and A C Alexander respectively for a term of 99 years from 25 March 1978 ("the leases"). The Applicant took an assignment of the leases in 1984 and 1999 respectively. Under the terms of the leases, the Applicant is required to contribute 20% for each flat of the total service charge expenditure. It is not necessary to set out the service charge provisions in the leases because the Applicant's liability to pay service charges generally under the terms of the leases is not in issue. The Applicant contention is that the level of his contribution should be varied so that there is a more equitable contribution as between the leaseholders. This point is dealt with below.

4. The Respondent acquired the freehold interest from Lillyheath Properties Limited in 1980.

5. The lessee of the lower ground floor flat, known as Flats 1A/B, is a Mr Woollven. It is not disputed that, under the terms of his lease, his contribution towards the overall service charge costs is placed at 10%.

6. It is common ground between the parties that the rear kitchen area of Mr Woollven's premises suffered from water ingress and damp as long ago as August 1999. This was confirmed by the Respondent's architect, Mr Wilcher, on 19 May 2000. A report commissioned by the Respondent and prepared by Hutton & Rostron, a leading firm of damp consultants, dated June 2001 also

confirmed the presence of damp **[p. 276]**. Subsequently, the Respondent instructed a Mr Chan, a structural engineer, who in a letter dated 6 December 2002 stated that as a result of the water ingress from above, the steel joist in the "concrete filler joist slab" above the suspended ceiling of the kitchen had suffered significant corrosion **[p. 84]**.

7. On 27 January 2004, the Respondent instructed Mr Paice, a building surveyor and it's expert in this matter, to carry out further investigation as to the possible causes of the damp present in the kitchen area of Mr Woollven's premises. He inspected the premises on 27 January 2004 and on 2 March 2004. His conclusions are set out in his initial report dated 9 February 2004 **[p. 76]** and his supplemental report dated 11 March 2004 **[p.79]**.

8. On 16 July 2004, Mr Paice prepared a specification of work to remedy the damp problem. He carried out a further inspection on 5 August 2004 and concluded that the steel joist identified earlier by Mr Chan needed to be replaced. The tendering process for the proposed work commenced on 7 October 2004 and was completed by the end of January 2005. Of the 3 firms of contractors who tendered for the work, the lowest tender of £18,581 submitted by Corniche Builders was accepted in the Statement of Estimates dated 4 March 2005 **[p.185]**. However, the proposed work was not commenced because discussions between the managing agent, Mr Wightman on behalf of the Respondent, the Applicant and Mr Woollven ensued as to the causes for the presence of damp in the latter's premises. Those discussions

proved ultimately unsuccessful and gave rise to this application being issued by the Applicant.

9. In relation to the s.27A application, the Applicant's pleaded case was:

(a) that the apportionment of the service charge as between the 6 flats in the property was unfair

(b) that proposed structural work and decorating costs to the lower ground floor flat (Flat 1A/B) in the sum of £18,581 was as a result of the failure of the lessee, Mr Woollven, to perform or observe the covenants contained in his lease and/or a failure on the part of the Respondent to properly enforce any such covenants against that lessee Consequently, the work was not reasonably incurred.

At the commencement of the hearing, the Tribunal ruled that it did not have jurisdiction under s.27A of the Act to make a determination about the apportionment of the service charge liability as between the flats in the property. The Tribunal's jurisdiction was application specific. It would only have jurisdiction to do so if an application had been brought by the Applicant pursuant to s.35 of the Landlord and Tenant Act 1987 (as amended) and the Tribunal was satisfied that no such application was properly before it. Unless and until such an application was properly brought and an order made varying the terms of the leases, the leaseholders liability to pay the service charge would remain at the contractual rate in the respective leases

10. The Tribunal's determination is, therefore, limited solely to the issue of the structural and decorating costs as set out above, which form part of the estimated service charge budget for the year ending 31 March 2006. It was, helpfully, conceded on behalf of the Applicant that no point was being taken about the validity of the s.20 consultation process in relation to the proposed works nor was it being disputed that the works fell within the landlord's repairing obligations under the terms of the leases. It was also conceded on behalf of the Applicant that the estimated cost of the proposed works, save for the decorating costs, was not unreasonable. The order originally sought by the Applicant was that all of the estimated costs should be borne by either the Respondent or Mr Woollven or by both of them in such proportion as the Tribunal found to be reasonable. However, having regard to the Tribunal's ruling above and the limit on its jurisdiction as to what order it could make in relation to the apportionment of the service charge, the determination of the s.27A application was confined to the issue of whether or not the proposed works had reasonably been incurred. For the Tribunal to do so, it was necessary for it to make findings as to the causes of the damp and if these were a direct consequence of any breach of repairing obligations by the Respondent and/or Mr Woollven.

Inspection

11. The subject building is in a terrace of similar substantial brick built properties, converted into flats, on 5 floors and with a slated mansard c.1886. It is situated on the south side of and backs onto a large and pleasant communal garden, it is to the east of the Earls Court Road. There is a basement level (Flat1 A/B)

and a raised ground floor (Flat 1); there is a full width balcony with iron railings across the front and a roof terrace to the rear at first floor level Windows are timber double hung sashes; the property appears well maintained to the front elevation and with decorations to the rear in fair condition. Some water staining of brickwork was noted below the first floor rear terrace and was apparent on neighbouring blocks. A recently installed lead flashing to the edge of this terrace appeared sound; it had been fitted by Mr Collins when he had the terrace re-asphalted. The small access terrace at ground floor level was covered in tessellated tiling with some open joints, there is a low parapet upstand on the party wall line to no.12 next door and a small rainwater outlet (blocked at the time of inspection) adjacent to the rear garden. Internally the Tribunal inspected Flats 1 and 2, and the penthouse Flat 5 as well as the rear back addition area to the basement Flat 1 A/B. This was now unused but had been a small kitchen; there were dirt stained worktops and a sink in place The large sash window to the rear lightwell was fitted with a spinner vent. Evidence of damp ingress was noted: water staining at high level to the north and west (party) walls, mould growth at low level to the west wall, wet rot to suspended ceiling framing on west wall, rusting and corroding to steelwork flanges to underside of concrete slab over, defective plaster to walls.

Decision

12. The hearing in this matter commenced on 14 December 2005. The Applicant was represented by Mr Selby-Bennett, a solicitor. The Respondent was represented by Mr Coney of Counsel.

13. In the Tribunal's opinion, the issues in this matter turned on the expert evidence. Both Mr Newman, the Applicant's Chartered Surveyor, and Mr Paice concluded in their reports **[pp. 48 & 80]** that there were a number of causes for the presence of damp in the kitchen area of Mr Woollven's premises. These were:

(a) water penetration through the rear terraced area or balcony of the Applicant's premises because of cracking to the surface. It was suggested by Mr Newman that the water penetration had been exacerbated as a result of insufficient protection to the base of a scaffolding pole erected when the Respondent constructed a penthouse flat in or about 2000.

(b) water penetration to the inside face of the west facing party wall.

(c) rising and penetrating damp to the rear section of the party wall on the north side and north facing wall

(d) condensation in the kitchen area of the lower ground floor flat.

14. The Applicant's pleaded case was that, in his lease, Mr Woollven had covenanted to maintain and keep the basement flat in good and tenantable repair and condition. The Respondent had an obligation under the leases granted in respect of the property to enforce covenants generally, including the covenant given by Mr Woollven to repair and maintain his premises. It was specifically contended by the Applicant at paragraph 14(b)(iii) of his statement of case that the Respondent had breached its obligation by failing to take any steps to enforce the covenant against Mr Woolllven to repair and maintain his

premises. In particular, it was alleged that by failing to decorate and ventilate the kitchen area of his flat, Mr Woollven had contributed significantly to the presence of damp as a result of the condensation produced from cooking activity. Had the Respondent enforced the repairing and maintaining covenant against Mr Woollven, the cost, if any, of remedial work to eradicate the damp would not have been as great as it now was It was submitted that the cost of the remedial work should be apportioned 45% and 55% between Mr Woollven and the Respondent respectively. However, the apportionment point has already been dealt with at paragraph 9 above.

15. It was accepted by the Applicant, in paragraph 23 of his witness statement **[p. 42]** that the presence of damp in basement flats of properties of this age is normal. The issue to be decided by the Tribunal is to what extent, if any, Mr Woollven's failure to decorate and ventilate his kitchen had contributed to the presence of damp.

16 The Applicant sought to rely to a great extent on a letter written by Mr Wightman on behalf of the Respondent to Mr Woollven dated 20 December 2002 **p. 369]**. In that letter Mr Wightman informed Mr Woollven in Mr Chan's opinion the cause of 'the leak' was as a result of a combination of condensation from cooking and water penetration from the Applicant's balcony above. This was expressed, as a matter of causation, as 45% and 55% respectively, which perhaps coincidentally are the exact figures adopted by Mr Newman to apportion liability for the cost of the remedial work as between the Respondent and Mr Woollven. In his evidence to the Tribunal, Mr Wightman

qualified his remarks in the letter by saying that Mr Chan had informed him that the main cause of the presence of damp in the kitchen area of Mr Woolven's flat was because of water penetration generally and that was mainly from above rather than below. That evidence appeared to be consistent with the conclusion reached by Mr Chan in paragraph 3 of his report dated 6 December 2002 **[p.85]**.

17. In their evidence to the Tribunal, both experts accepted that, whilst it was a contributory factor, the condensation produced from cooking activity in the kitchen was not the main cause of the damp to the plasterwork generally and in particular to the internal suspended ceiling in the kitchen and the void above. In cross-examination, Mr Newman accepted that even if Mr Woollven had painted the walls and ceiling of the kitchen, the plaster would in any event have become hydroscopic because of water penetration from both above and below. In re-examination, Mr Newman also conceded that ventilation of the kitchen would not have solved the presence of damp. It only got rid of condensation and moisture.

18. At paragraph 7 of his witness statement **[p.71]**, Mr Paice stated that he specifically considered the matter of condensation and the extent to which it contributed to the presence of damp in the kitchen of Mr Woollven's flat when he re-inspected the property on 2 March 2004. He concluded that condensation played little or no part in contributing to the damp. In cross-examination, Mr Paice maintained this position. In his professional opinion, the main causes of the damp in the kitchen generally were those set out at

paragraph 13(a)-(c) above and appeared to be unavoidable because of the inherent design defect of the basement area of properties of this age This is also one conclusion accepted by Mr Newman at paragraph 13 of his report **[p. 49]**

19 Although, it was not strictly pleaded and therefore not part of the Applicant's case, Mr Newman raised the possibility that cracking to the tiles on the Applicant's balcony immediately above the affected area was caused by insufficient protection to the base of a scaffolding pole in or about 2000 and had contributed to the water penetration from above The Tribunal was referred to relevant photographs in the bundle **[pp. 397-399]** Mr Wightman's evidence was that the scaffolding had been erected only on the balcony of the first floor of the Applicant's premises (Flat 2) and that appears to be consistent with the photographs shown to the Tribunal. The Tribunal also had regard to the letter written by the Applicant to the managing agents dated 23 December 2002 **[p. 370]** where he confirms that the scaffolding had indeed been erected on his first floor balcony and was in fact causing water ingress into his apartment only. The Tribunal, therefore, found that the erection of scaffolding to the first floor rear balcony played no part in this matter

20 Taking the evidence of both experts, Mr Chan and Hutton & Rostron together, the Tribunal found that the main causes for the presence of damp generally to the kitchen area of Mr Woollven's flat were water penetration from above, rising and penetrating damp or water ingress and that this was an inevitable consequence of the inherent design defect of the basement area of the

property. It follows that the Respondent's failure, if any, to enforce the repairing or maintaining covenant against Mr Woollven is irrelevant because even if redecoration or repairs had taken place, it would not have prevented the continued incursion of damp to the kitchen area of the flat. Mr Newman accepted in evidence that redecoration in those circumstances would have been pointless. The Tribunal also accepted Mr Coney's submission that a failure to ventilate the kitchen did not amount to a breach of the repairing covenant by Mr Woollven. Accordingly, the Tribunal found the proposed remedial work to have been reasonably incurred. The extent of those works was not disputed by the Applicant.

21. As to the quantum of the proposed work, it was contended by the Applicant that delay on the part of the Respondent in effecting the necessary repairs had increased the cost. At paragraph 22 of his report **[p. 51]**, Mr Newman argued that the delay had amounted to an overall increase of 10%. The Tribunal did not accept this argument. It had regard generally to the totality of the Memoranda prepared by the Respondent **[pp. 300-343]**, which provided a detailed record of the steps taken by it in relation to the historic maintenance generally of the property and also in relation to this matter. The Tribunal was satisfied that the Respondent was a competent and proactive landlord. The Tribunal also accepted the evidence of Mr Paice that there had been no significant deterioration in the extent of the damp in the kitchen of Mr Woollven's flat since it had been identified and, therefore, the Applicant and other leaseholders had not been prejudiced in costs.

22. Again, although not specifically pleaded by the Applicant, the issue that some of the proposed work to Mr Woollven's flat amounted to an improvement was raised by Mr Newman when giving his evidence in chief. He contended that the items of internal and external decoration set out at 27-31 in the specification of works **[p. 117]** in the sum of £1,650 amounted to an improvement to Mr Woollven's flat and should be met by him and not recovered through the service charge account.

23. Mr Coney, correctly, submitted that this point had not been taken before and that, consequently, he was not in a position to lead any evidence in this regard. However, this did not matter because the Tribunal saw no merit in the Applicant's argument. It took the view that, in a property of this age, any repairs will amount to an improvement to a greater or lesser degree. The making good to Mr Woollven's premises formed part of the Respondent's repairing obligations and this was accepted by Mr Newman.

24. Accordingly, for the reasons stated above, the Tribunal also found the estimated cost of the proposed work to be reasonable.

Section 20C & Reimbursement of Fee

25. Mr Coney submitted that clause 5(1)(e) of the leases **[p. 227]** allowed the Respondent to recover the costs it had incurred in these proceedings. The Tribunal agreed with that submission as it found that clause 5(1)(e) was sufficiently generic and widely drafted to encompass the Respondent's costs in

these proceedings. As the Respondent had succeeded on all of the issues before the Tribunal, costs should follow the event, and it would be inequitable to deprive the Respondent of its costs in the circumstances. Accordingly, the Tribunal makes no order under s.20C of the Act. For the same reasons, the Tribunal also makes no order under Regulation 9 of the Leasehold Valuation Tribunals (Fees) (England) Regulations 2003 requiring the Respondent to reimburse the Applicant the fees incurred by him in bringing this application.

Dated the 15 day of February 2006

CHAIRMAN ..... I. Mohabir .....

Mr I Mohabir LLB (Hons)