

LON/00AU/LSC/2006/0271

**DECISION OF THE LEASEHOLD VALUATION TRIBUNAL
ON APPLICATIONS UNDER SECTIONS 27A AND 20C OF THE
LANDLORD AND TENANT ACT 1985 as amended**

Premises: Flat B, 157 Southgate Road, London, N1 3LE

Applicant: Mr. Carson Millican

Respondents:

1. Hyde Housing Association
2. Partners for Improvement in Islington

Appearances:

For the applicant
Mr. Carson Millican

For the Respondent

1. Ms. Peggy Etiebet (Counsel) - Marsons Solicitors
- 2 Mrs. Clare Thorogood – Leasehold Manager
Mr. Michael Cahill – Project Director

Date of Hearing: 20 September 2006

Date of the Tribunal's Decision: 4 December 2006

Tribunal:

Mrs. F. R. Burton LLB LLM MA
Mr. C. Kane FRICS
Mrs. J. Clark JP

FLAT B,157 SOUTHGATE ROAD, LONDON N1 3LE

BACKGROUND

1. On 4 August 2006 the Lessee, Mr Carson Millican, applied to the Leasehold Valuation Tribunal pursuant to ss 27A and 20C for determination of his liability to pay service charges in respect of damp proofing works in respect of which his contribution was £1,874.85 demanded in July 2006.
2. An oral pre-trial review was held on 7 September 2006, at which the Applicant appeared in person and the Respondents were represented by Ms P Etiebet of Counsel. The Respondents, Hyde Housing Association and Partners for Improvement in Islington Ltd, ("Partners") are partners in a Private Finance Initiative which they have entered into with the London Borough of Islington. Following the pre-trial review the Tribunal issued its standard Directions and set the case down for hearing on 20 October 2006.

THE HEARING

3. At the hearing the Mr Millican again appeared in person and the Respondents were represented by Ms Etiebet.

THE CASE FOR THE APPLICANT

4. Mr Millican said that the subject property was a Victorian mid terrace house divided into three units: an upper maisonette, an upper ground floor studio flat (which was his) and a lower ground floor flat. The works in question had been carried out to the lower ground floor flat and recharged to him as structural works to the building in accordance with the terms of the Lease. In summary he based his application on the following questions: whether the works charged for were necessary or due to the Council's neglect to maintain the property properly; whether the works were appropriate to address the type of damp identified; whether they were structural; whether they were rechargeable to the Applicant under the terms of the Lease; why

the works had changed from those notified in the s 20 Consultation Notice of 3 August 2004; and whether the cost of the works was reasonably incurred.

5. Mr Millican submitted that the Respondents had not at first carried out any tests to establish what kind of damp needed to be treated, which they should have done according to the industry practice, but on his insistence they had done so, although they had restricted this to a moisture content test to one area of wall which showed that no treatment was necessary and that the wall in question was not affected by rising damp. They had not followed this with hygroscopic moisture content tests. These would have shown whether the damp was rising or penetrating damp, or condensation due to moisture from the air. The Respondents had refused to carry out these tests although they were simple tests of which Mr Millican had knowledge gained from his own experience in his employment by the London Borough of Hammersmith and Fulham. In this post he used his plastering and damp proofing background which required him to ensure that the private sector properties in the borough met the Housing Health and Safety Rating System and the administration of Renovation Grants. He said that three specialists had provided reports on the damp in the building (Mr RLaing, A. Ins, RTS, CRDS, CTS, Mr P Reddin, FRICS, FBEng, ACIH, Chartered Surveyor, and Mr Whalley, Disrepair Surveyor, London Borough of Islington) but none had established that there was rising damp, and each stated that the problem was condensation. As a result of not carrying out the tests suggested the Respondents had effected works to remedy rising and penetrating damp that were not necessary.

6. Mr Millican challenged 4 specific areas of the work: (1) The work to the rear lobby and bathroom where the 3 reports referred to had identified condensation and there was no evidence of rising or penetrating damp or that the structure of the building was in disrepair. This damp had, however, been treated with tanking, which was not a remedy for condensation. (2) Works in fact caused by the Council's failure to maintain the building. In this connection he said that on 6 February 2000 Deputy District Judge Hay at Clerkenwell County Court had found that Islington Council was negligent in maintaining the building and ordered that the works recommended by Mr R G Nuttall, DipBldCons, FRICS, of Nuttall Associates be carried out to remedy the disrepair. A schedule of works had been produced by Mr David Chambers of

Islington Council which required hacking off all the plaster along the party wall, applying a bituminous solution, re-rendering and skim finishing which was completed on 12 February 2002. It was these works which had failed after less than 5 years (as identified in 2 of the 3 reports already referred to). (3) Works not carried out to the common parts or the structure of the building but within another occupier's flat. In essence, he said, the tanking to the lower ground floor flat was only a species of "plastering" (since tanking consists of applying a cement based render that will withstand the force of ground water pressure) and not therefore structural. Moreover it had not been demonstrated that the Hey'di tanking system was necessary or appropriate to remedy any defect or disrepair in the structure and when carrying out the work no Party Wall Agreement Notice had been served (which suggested that the Partners knew that it was not structural work and that no such Notice was necessary). He conceded that there were no doubt small items of repair to the exterior of the building such as filling in holed masonry and poultice repairs to the asphalt of the entrance steps (though he noted that one of the 3 reports referred to noted no faults to that asphalt) but considered he was not responsible for repairs to the interior of another occupier's flat. (4) Unsatisfactory works to the bridged damp proof course on the front elevation. He said this had not been done properly so that the damp proof course was still bridged. He regretted having to take his case to the LVT but had got nowhere in attempting to negotiate with the Respondents who had disregarded all his concerns. His response to the Respondent's reply to his statement of case in support of his application to the LVT had set out in detail what he considered could have been done to address the various problems which he considered he had identified more accurately than their own attempts.

7. Cross examined by Ms Etiebet, Mr Millican conceded that, as the previous works had been done before the involvement of Partners, they could not be responsible for any defective result as they had inherited an old house with no physical damp proof course, but he considered that it was their responsibility to sort out the problem, whatever it was; he further conceded that there had not been any real agreement between the various experts (one instructed by the Lessee of the lower ground floor flat for litigation, one by the Council and one by Partners) although all agreed that some works needed to be done, however the costs of what was eventually effected had tripled. Ms Etiebet put to him that the report of Mr P Reddin FRICS,

FBEng, ACIH Chartered Surveyor (engaged by the occupier of the lower ground floor flat) was against partial works, and that Partners had taken the long term view, looking for a long term solution, so that more rather than less had been done, including tanking the bathroom to full height and there had been damp treatment to full height to two walls and a vertical damp proof course (by chemical injection to stop damp spreading) to the garden wall. Nevertheless Mr Millican remained unconvinced.

THE CASE FOR THE RESPONDENTS

8. Ms Etiebet submitted that the terms of the Lease permitted the recovery of the costs of the works since they constituted works of repair, maintenance, renewal and/or improvement to the fabric of the building within the Landlord's repairing obligation, they were necessary to keep the building in good and tenable repair and condition and/or they were an improvement reasonably necessary or desirable for the building. She said that the contractors Gil mac, who had undertaken the work, had conducted a Stock Condition Survey and had taken account in their pre-works plan and estimate the surveys, reports and plans already undertaken by the various experts and by the contractor Ward Limited (who had quoted for the work in 2004). She said that the Applicant, Mr Millican, had covenanted to pay for the works by clauses 3(1) and 5 and the Third Schedule of his Lease which defined those parts of the building for which the Lessee is not liable, including the plaster or other surface material of the walls and partitions lying within the demised premises and of the interior faces of the exterior walls and all the walls dividing the premises from any other dwellings in the building. She submitted that any works to walls for which the Lessees were not liable to keep the plaster in repair were rechargeable by the Landlord.

9. Ms Etiebet pointed to clauses 3(3) to 3(5), 5(2) and 7(5) and the Third Schedule and to the Gilmac Plan and Final Statement of Total Expenditure and to the various walls in the lower ground floor which qualified under the terms of the Lease: the area under the stairs, the left party wall (the corridor opposite the bedroom), the right party wall in the kitchen/lounge, the rear elevation wall in the kitchen/lounge, the wall between the bedroom and the kitchen/lounge and the walls of the bedroom, and submitted that these were qualifying walls and not, as submitted by Mr Millican,

failing to qualify as work to the structure of the building. Moreover, she submitted that Mr Millican did not appreciate that the works qualified as being works to the structure of the building, whereas it was not necessary under the terms of the Lease that they should be *structural* in themselves. She submitted that the Hey'di system specification made clear that their damp proofing process was not simply plastering, since their process is applied first, then allowed to dry, and finally replastering takes place over the top. Moreover as the process is underneath plaster, it would not fall within the Lessee's obligation to pay for the plastering within the terms of clause 3(3) of the Lease. She also submitted that there was evidence in the expert reports of earlier ineffective works which required addressing as an item of repair, and as the occupier of the lower ground floor was a secure tenant, the repairs fell within the Landlord's obligation. Finally she said that clause (a)(i) of the Third Schedule created a wide obligation not only to keep the building in a good and tenantable condition but also to *put* it into that condition so as to make it reasonably fit for occupation by a tenant likely to take the accommodation, without there first having to be disrepair, and relied on Credit Suisse v Beegas [1994] 4 All ER 803 in support of this contention: the expert reports showed that the building was not in such a condition, and in any case the works were necessary as the Respondents reasonably deemed them to be so for performance of the Landlord's obligations under clause 5(2) and clause (h) of the Third Schedule.

10. Ms Etiebet further submitted that the cost of the works was reasonably incurred as the reports on the rising, penetrating and condensation damp were duly addressed since the reports indicated the type and cause of the damp in each case and the necessary works were then done in a reasonable way. She said that Mr Millican had failed to recognise that the building was afflicted with a variety of types of damp in different places and due to different causes, e.g. in the bathroom where in addition to condensation there was penetrating damp as well as a leak from the flat above through the ceiling and two reports had referred to these problems, including to water ingress from holes in the exterior wall around new plumbing. She submitted that there was no evidence that the 2002 works had failed (although the lack of a link between the damp proof course and the damp proof membrane had not been addressed in 2002 which had been addressed in the recent works by Hey'di tanking, up to 1.2m only). She said that the reports all showed that the walls were dry indicating that the

Synthaprufe bituminous emulsion used in 2002 had not failed. She said there was no evidence that the works in 2002 had in any way increased disrepair and that the cost of the works done in response to the Clerkenwell County Court order had not been recharged to the Applicant. She continued that there was no ongoing disrepair litigation, as the tenant of the lower ground floor flat had invoked the Disrepair Pre-Action Protocol, the Respondents had accepted that there was damp and moved immediately to remedy the matter. Finally she added that there was no evidence that there was damp on the front elevation nor that the DPC was bridged there, but if any rectification was necessary this would be addressed and no recharge made.

11. Questioned on her submissions by Mr Millican, Ms Etiebet said that there had been no need for any Party Wall Notices because no notifiable work had been done. In response to Mr Millican's claim that the bathroom damp had started again in recent weeks, and that the tanking had been ineffective, she said that this was probably caused by the damp manifesting itself in a different way, such as through holes in the wall or the metal windows which were not watertight. She called Mr Michael Cahill, Partners' Project Director, to explain the use of tanking in addressing a variety of damp problems, which he said was better than more radical works which required decanting of the residents. He also said that any work found not to have been properly done was always addressed and not recharged. He said that the Hey'di system as provided by Sovereign (a reputable company since 1965, whose parent company was Elf) included the usual signing off certificate and "snagging" plus a defect period of 12 months and a 20 year guarantee. The work had been done by Gilmac, an approved specialist contractor, but that there had not been any alternative estimates as there was a long term contract in place. There had been a s 20 Notice and an estimate of total expenditure.

12. In answer to questions from the Tribunal as to whether the methods used were (1) cost effective and (2) reasonable in cost, Ms Claire Thorogood, Partners' Leasehold Manager, gave evidence that although there had been an increase in the costs of works since the s 20 Notice, there was no requirement to serve a new Notice, although their good management practice was that Lessees were sent a letter with any revised estimate: such a letter had been sent on 14 November.

13. It was agreed that an inspection would not be of assistance.

FINAL SUBMISSIONS

14. For Partners, Ms Etiebet said that the Landlord's obligation was to restore a Tenant to a safe environment and to seek a long term solution, addressing the Landlord's obligation to bring the property up to standard. Basically the methods chosen had addressed a wide range of problems, the damp proof course being only one of a range. The works had been part of a large project: most Islington houses had tanking because the internal and external ground levels were mostly the same. She submitted that the works had been reasonable and reasonably charged.

15. Mr Millican submitted that there had been no great consensus of the experts and that tanking was inappropriate. The one issue on which the experts had agreed was that the bathroom suffered from condensation. He repeated that the previous works had failed and that he was unhappy to pay for negligence on the part of the Council.

COSTS

16. With regard to s 20C, Ms Etiebet said that the Council did not resist the application as they would not be recharging any costs to the service charge.

17. Ms Etiebet did, however, seek the costs of their response to his application to the LVT from Mr Millican in the event that the application was dismissed, since they had been corresponding with him since August 2004, endeavouring to explain to him why the costs of the works were rechargeable. She cited 4 recent letters to this effect between June and August 2006. She submitted that owing to his employment he should have had a better understanding of the issues than a lay member of the public, but despite this he had failed to grasp the scope of the repairing obligations in a Lease as opposed to a tenancy agreement and that works in this respect did not have to be limited to a narrow category, and he had ignored this issue despite his attention having been drawn to it.

DECISION

18. Following the hearing Ms Etiebet sent in further submissions supporting the contention that no further s 20 Notice was required despite the increase in the estimated costs, which was copied to the Applicant, Mr Millican. She submitted that as there was a Qualifying Long Term Agreement in place there was no requirement to put the works out to tender. First, the general terms of the Notice of Intention had not changed. Secondly, under this system the Landlord is to have regard to the observations of the Lessee but there is no requirement to reissue the Notice of Intention if there is some change in the proposed works and the estimated expenditure. Thirdly, change in this respect is a matter of fact and degree, and the only change in the present case had been use of a different proprietary brand, although it was accepted that if some more fundamental change, e.g. new windows, had been proposed a new Notice would have been necessary. Fourthly, there was no mischief to remedy which would have been addressed by a new s 20 Notice as the Lessee has no right to nominate a contractor and there are no competitive tenders since the original QLTA process front loads consultation. She added that should such a new Notice be required by the LVT application would be made pursuant to s 20ZA of the Landlord and Tenant Act 1985 to dispense with such a Notice since the Applicant, Mr Millican, had encountered no prejudice and had been kept extensively informed in correspondence.

19. The Tribunal considers that no further s 20 Notice was required. Works were necessary of some description and Partners took advice from various experts and then did what the contractor suggested so that the process was in fact finally contractor led. The work done appears to the Tribunal to have been reasonable and there appear to be processes in place for snagging and remedial work if necessary. There was contact with the Lessee about the proposals over a period of over two years. Nor is the sum involved particularly large in relation to the bundle of problems which appear to have affected the building. The Tribunal is also satisfied that the Lease permits the recharge. The Tribunal therefore determines the cost of the works to have been reasonably incurred and the costs to be reasonable and duly payable by the Lessee.

THE COSTS APPLICATIONS

20. **The s 20C Order.** With regard to the s 20C order sought by Mr Millican, and the concession by Ms Etiebet that no costs would be applied to any service charge, the Tribunal will not therefore make any s 20C order since none is necessary.

21. **Costs under the Commonhold and Leasehold Reform Act 2002.** With regard to Ms Etiebet's application for costs of the hearing to be ordered against the Applicant, Mr Millican, the Tribunal does not consider that an award up to the statutory maximum of £500 should be made. While it is true that Mr Millican has superior technical knowledge to the average lay person who may be a Lessee of the Borough, this does not absolve the Borough, or Partners on their behalf, of the obligation to communicate with Lessees in relation to queries about works on the buildings in respect of which Lessees are obliged to pay service charges. At no stage has the Council warned Mr Millican that it would seek costs at the LVT. Moreover, in order to award costs the Tribunal must be satisfied that there has been an abuse of process or other unsatisfactory behaviour on the part of an Applicant (which is always difficult to find in an unrepresented party) and the Tribunal cannot see in a mere referral of the matter to the LVT for determination of the reasonableness of the works or the charges for them an abuse of process, since that is the rationale for the existence of the Tribunal. It was the Borough's decision (whether their own or Partners') to instruct outside Solicitors and Counsel, whereas having the benefit of a legal department the majority if not all of this work could have been done in house by the London Borough of Islington. In the opinion of the Tribunal, which exists to enable ordinary people to bring their service charge issues for determination without the aid of lawyers, incurring large costs was not necessary. No costs order will therefore be made.

Chairman..... *F.R. Burt*

Date..... *4. 12. 06*