**LON/00ML/LSC/2007/0217**

# DECISION OF THE LEASEHOLD VALUATION TRIBUNAL ON AN APPLICATION UNDER SECTION 27A OF THE LANDLORD AND TENANT ACT 1985 as amended

**Premises:** 18, Chesham Road, Brighton, BN2 1NB

**Applicant:** 18 Chesham Road Limited

**Respondent:** Mr Christopher Thornton

**Appearances:** **For the applicant**
Ms Jemma Hale

**For the Respondent**
Did not attend

**Date of Hearing:** 10 July 2007

**Date of the Tribunal' s Decision:** 26 July 2007

**Tribunal:** Ms E Samupfonda LLB Hons
Mr J Avery BSc FRICS

Leasehold Valuation Tribunal
Ref: CH/00ML/LSC/2007/0026

In the matter of section 27A of the Landlord and Tenant Act 1985 (as amended)

And

In the matter of 18 Chesham Road, Brighton, BN2 1NB ("the property")

BETWEEN

18 Chesham Road Limited Applicant

And

Christopher Thornton Respondent

Tribunal
Ms E Samupfonda (LLB Hons)
Mr J Avery

1. This is an application under section 27A Landlord and Tenant Act 1985 (the Act) (as amended) for the determination of whether a service charge is payable in respect of the property for the year 2005 to 2006 and, if it is, the amount that is payable. No dispute has been raised concerning the identity of the person by whom such a service charge would be payable, the person to whom it is payable or when or in what manner it is payable. The Applicant Company is the freehold owner of the property, a five storey building comprising 5 flats built circa 1860's. The leaseholders of the five flats are shareholders and Company Directors. The Respondent as the leasehold owner of the second floor flat is also a shareholder and company Director.

2. A pre trial review was held and directions for the future conduct of the case dated 18 May 2007 issued. The Tribunal identified that the issue to be determined was "the extent to which the damp proofing works at the property, both already undertaken and those intended to be undertaken, are either the responsibility of the landlord whose cost is recoverable as part of the service charge, or are the responsibility of the occupier of the basement flat affected by the damp penetration."

3. The Tribunal inspected the basement flat on the morning of the hearing. 18 Chesham Road is an inner terrace Victorian house converted into five flats of which the ground, first, second and third floors are accessible from the original front entrance door and the basement from its own door via the front "area" with steps down from the pavement.
The floors of the basement flat are, at the front and back, about level with the ground –the area at the front and a small terrace at the back. The other two walls adjoin the houses on either side.

3.1 The exterior of the walls of the building are rendered and painted. It is understood that the upper flats do not suffer from damp, suggesting that the vertical surfaces of the walls, although probably built without a cavity, do not allow moisture to penetrate.

3.2 However, the walls of the basement have evidence of damp, some of which has been retarded by vertical damp proofing. This was, until recently, a bituminous layer between the surface of the wall and the plaster finish. The Tribunal saw the two small holes that had been made to identify the bitumen layer beneath the plaster. On discovering that this had broken down (as expected after some 20 years or more) the owner of the basement had treated two areas- the living room/kitchen (the front room) and the main bedroom (the back bedroom) with a "high density membrane system"

3.3 This was described as a sheet material that was fixed over any bitumen that remained, and over which new plaster was then applied. The walls would remain damp behind the membrane but the decorations would not be affected.

4. The hearing of this case took place on 10th July 2007. Ms Gemma Hale, leasehold owner of the basement flat attended and represented the Applicant. The Respondent was neither present nor represented. Ms Hale explained the historical background to the dispute. In summary, she said that previously at a meeting that took place in 2004, it was agreed all leaseholders including the Respondent that works should be carried out to eliminate the damp in her flat. Pursuant to that agreement works were carried out to the rear bedroom in July 2005. At the meeting in October 2005, the Respondent objected to the cost of those works being borne by the service charge account on the basis that the cost should be borne by Ms Hale as the lessee. He has since refused to contribute to the cost of the work already undertaken and has said that he will not contribute to the outstanding work until the issue of responsibility has been determined by this Tribunal. Ms Hale said that he has however made an offer the terms of which she does not fully understand.

4.1 She explained that in her view the cost should be borne by the service charge because the source of the damp is external. The fact that the repair work is to the internal wall is a matter of convenience and the cheapest option. She acknowledged that under the terms of the lease she would liable for maintaining the interior wall but she limited this to redecorating after the remedial work has been carried out.

5. In this application the Tribunal has to decide the extent of the repairing obligations imposed on the Applicant and the lessee of the basement flat by the repairing covenants of the lease. The issue is whether the identified works fall within the lessee's or the lessor's repairing covenant. The lessee's repairing covenants include:

5.1 Clause 2 (5) " From time to time as often as occasion shall require during the term at the lessee's expense well and substantially to renew repair uphold support maintain cleanse amend and keep in good and substantial repair and condition the flat"

5.2 The demised premises are defined to include:

"ALL THAT residential flat known as 18A Chesham Road Brighton.....situated on the lower ground floor of the Building .....including (a) all walls enclosing the flat (but in the case of any external wall of the Building only the interior face of such a wall)

EXCEPTING AND RESERVING from the demise the main structural parts of the building the roof roof timbers foundations external walls boundary walls....."

5.3 The Fourth Schedule contains the lessor's obligations and by clause 3 the lessor covenants

"to keep the main structural parts of the Building (not comprised in the flat) including the roof roof timbers balconies..... main walls and external parts thereof and the foundations thereunder.... In the Building in good and tenantable repair and condition throughout the term hereby granted....."

6. It is common ground that the basement flat is affected by damp. The Applicant instructed chartered building surveyors and produced their report dated 19th July 2006. The surveyor reported that dampness still affected the "party" wall of the hall and the store, and the "party" alcove and the external wall in the second bedroom. Dampness was also found in the ceiling of the entrance lobby but it was intended to move the front entrance door so that the damp area (under the steps to the main hall of the house ) was outside the flat and make no effort to stop the water coming through into what would then be an outside area.

7. A further report was obtained dated 26th January 2007 and the surveyor's findings and recommendations of remedial work are fully set out therein.

8. From the correspondence, it appears that the Respondent contends that the cost of the remedial work should be borne by the lessee of the basement flat on the basis that "the bitumen liner will have been applied by previous occupants of the basement flat.....if there is some evidence that the freeholders paid for the bitumen damp proofing then Jemma would have case for asking for funds to have that proofing repaired or to have more advanced work works subsidised to an equivalent level."

9. It is not disputed that the lessees are under an obligation to contribute by way of service charge to the costs incurred by the lessor in fulfilling its obligations as set out under the lease.

The service charge obligations are set out in clause 1 (3) (2) (i) whereby the lessee covenants to "Contribute and pay to the lessor as a maintenance and service charge (hereinafter called "the service charge") twenty per centum of the annual costs expenses and outgoings incurred by the lessor in

complying with the obligations contained in the Fourth Schedule.....and.....in the Fifth Schedule"

The material provisions of the fifth schedule are as follows:

The Fifth Schedule before referred to
"Expenses and matters in respect of which the lessee is to contribute the proportion of twenty per centum

1. The expenses of maintaining repairing and redecorating and renewing (but so as not to include any expense incurred in modernising or refurbishing any flats in the Building):-

(a) The main structure of the Building and in particular the foundations external walls roof balconies....."

10. In determining the application we have had regard to the evidence, the relevant law and the terms of the lease. Whilst useful to consider the plethora of decided cases with similar covenants we are mindful that they serve well for illustrative purposes but ultimately we must construe the covenants of the lease before us by giving the full meaning to each word and the proper and full effect to the context. We have also borne in mind the words of caution from the Court of Appeal in the recent case of **Marlborough Park Services Ltd v Rowe [2006] EWCA Civ 436** in which the court re-emphasised that ultimately the meaning of words must be construed in the context of the particular lease as a whole and in the light of the surrounding circumstances and that previous case law should not be followed slavishly. In **Irvine v Moran [1991] 1 EGLR 261** Mr Recorder Thayne Forbes provided a definition of "structure" in that the structure consists of those elements that give a building "its essential appearance, stability and shape....." and that the construction of the word structure should not have a limited meaning and one of the considerations is whether an element is material or significant in the overall construction. Clearly in this case, the walls to the basement flat form part of the structure. It is apparent from clause 3 of the Fourth schedule that the lessor is responsible for maintaining the structural parts of the Building in good and tenantable repair. However this clause makes specific reference to the main walls and external parts. Whereas clause 1 places an obligation upon the lessee to keep in good and substantial repair and condition the flat and all walls enclosing the flats. However this clause makes specific reference to the lessee's obligations being limited to the interior face of the walls enclosing the flat and the lessor's obligations limited to the structural walls excluding the interior face.

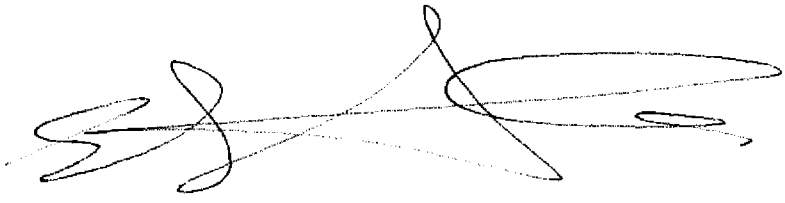
11. In considering the surrounding circumstances, the Tribunal formed the view and it was agreed by Ms Hale at the hearing that the basement when built would have had no damp proofing. From the Tribunal's experience the rooms would have been intended for use by domestic staff and the wall surface was likely to have been lime plaster that was designed to "breath" and the dampness evaporate. The surveyor surmised that the

bitumen was applied when the house was converted. Judging by today's standards, damp proofing is a material and significant consideration as the primary function of the structure of any building, particularly walls is to ensure that the internal face is protected from external elements and to prevent damp and water penetration. A further significant consideration is the fact that the damp proof course that is now breaking down was in position at the time of execution of the lease. It is reasonable to surmise that this was carried out at the behest of or indeed by the landlord when the property was converted as it would have come to light then that damp proofing had not been previously applied. The Tribunal has not been provided with any contra evidence.

12. From the surveyor's report and its own inspection the Tribunal finds that the dampness (other than to the ceiling of the hall) emanates from the ground below the walls of the basement and rises up, without the obstacle of a horizontal damp proof course of the type that has been installed as matter of course for the last 70 years or more. The dampness manifests itself on the inner surface of the walls at room level.

13. Although the lessor's repairing covenants as a whole were confined to the exterior and the structure of the Building, after the conversion when the bitumen membrane was applied to the internal wall for the purpose of protecting the wall and preventing damp from spreading internally, it is the Tribunal's view that the membrane behind the internal plaster became part of the structure so that the lessor's obligation "to keep the main structural parts of the Building.....in good and tenantable repair and condition" extended to taking whatever measures were necessary to prevent dampness affecting the habitability of the accommodation. The surveyor considered that "the dampness in the store room and the rear bedroom is in both cases, the result of a breakdown of the damp-proof membrane behind the internal plaster." Furthermore, the bitumen was applied 20 or more years ago and was in place at the time of the execution of this lease.

14. Accordingly, the Tribunal determines that the costs of the remedial work (both undertaken and proposed) are recoverable as part of the service charge towards which all lessees are liable to contribute. In arriving at this conclusion the Tribunal has construed the meaning of "structure" by reference to its context in the lease and in the light of all the facts and circumstances of the case.

Chairman 

Dated 26 · 7 · 07