

THE RESIDENTIAL PROPERTY TRIBUNAL SERVICE

**DECISION OF THE MIDLAND LEASEHOLD VALUATION TRIBUNAL ON
APPLICATIONS UNDER S27A AND 20ZA OF THE LANDLORD AND
TENANT ACT 1985**

**Property: Kensington House, 53 Graham Road, Great Malvern,
Worcestershire WR14 2HU**

Applicants: Ms Sophie Harris (Flat 1)
Mr Christopher Dyer (Flat 2)
Mrs Agnes Witton (Flat 3)
Mr Christopher Benson (Flat 4)
Mr Paul Bundy (Flat 5)
Ms Helen Wootton (Flat 6)

Respondent: Covent Garden Investments Limited and Fell Estates

Date heard: 26 October 2006 at Great Malvern

Appearances: Ms Sophie Harris
Mrs Agnes Witton
Mr Paul Bundy
Ms Helen Wootton (applicants)

Mr David Shamash (Covent Garden Investments Limited and Fell
Estates
Mr Roger Young (Bright Willis Property Management) for the landlord

Members of the leasehold valuation tribunal:

Lady Wilson
Mr J C Avery BSc FRICS
Mr D Underhill

Date of the tribunal's decision: 20 NOV 2006

Background

1. This is an application by the six leaseholders (“the tenants”) of Kensington House under section 27A of the Landlord and Tenant Act 1985 (“the Act”). The landlord has also asked us to determine an application under section 20ZA of the Act for dispensation from the statutory consultation requirements in respect of the major works which are the main subject of the tenants’ application, and this we have done.
2. Kensington House is a substantial Victorian detached house which has been converted into six flats, all held on long leases. The service charge provisions are contained in the fourth schedule and require each of the tenants to pay one sixth of the costs there listed, which include, at (1), *the expenses of maintaining repairing redecorating and renewing (a) the main structure and in particular the roof chimney stacks gutters and rainwater pipes and foundations of the building*. There is no provision for the payment of service charges on account or for the accumulation of a reserve fund.
3. The tenants’ application principally relates to their liability to pay the cost of works carried out in 2004 on the instructions of the landlord to eradicate dry rot from Flat 6, the basement flat. The tenants also seek a determination that additional costs of replacing rainwater gutters in 2004, which the tenants say were greater than they would have been if the gutters had been replaced earlier, are not recoverable from them. In addition, the application disputes their liability to pay the landlord’s cost of borrowing to fund the major works, and of the accountancy and management charges associated with the major works, but Mr Shamash of Covent Garden Investments Limited and Fell Estates, the freeholder, conceded at the hearing that the leases did not permit recovery of the costs of these items. The issues which require determination are, therefore, first, whether the tenants are liable to pay the cost of eradicating dry rot, second, whether the consultation requirements in relation to these works should be dispensed with, and, third, whether the tenants are liable to pay alleged unnecessary additional costs occasioned by delay in replacing the gutters.

4. We inspected the property, including the interior of Flat 6, in the morning of 26 October 2006 in the presence of Ms Wootton, the leaseholder of Flat 6, Mr Bundy, the leaseholder of Flat 5, Mr Shamash of the freeholder and Mr Young of Bright Willis Property Management which was the landlord's managing agent at the time when the works which are the subject of the dispute were carried out. The hearing began at 11.30 am and lasted the rest of the day. Ms Wootton, Mr Bundy, Mrs Witton and Ms Harris, four of the applicants, and Mr Shamash and Mr Young, attended the hearing and gave evidence.

The issues

i. Dry rot

5. From the documents, the evidence and our inspection we found the following relevant facts:
 - i. The freeholder purchased the property in 1995. At that time it was managed by Bigwoods, chartered surveyors, but Bright Willis were appointed managing agent with effect from about September 2000. There appear to have been problems with the payment of service charges, the landlord maintaining that the tenants were reluctant to pay, the tenants considering that they were receiving inadequate information and service from the managing agent. It appears that the rainwater gutters to one elevation of the building overflowed from time to time and that they were cleared on more than one occasion by the window cleaners on the instructions of Mr Young. A letter from two of the then leaseholders to Bright Willis (document KH5) dated 10 September 2002 records that Mr Willis was going to take urgent action to clear the gutters and was to supply each leaseholder with a copy of a quotation for repairs to the water pipes. The gutters were cleared in November 2002.
 - ii. A meeting took place on 28 November 2002 between the leaseholders and Mr Young to formulate a plan to put the structure of the building into better

repair, but the landlord considered itself to be hampered in so doing by the fact that the leaseholders or some of them were in arrear with payment of service charges.

- iii. In June 2003 a water main adjacent to Flat 6 burst causing a severe flood inside the flat; the water main was replaced later that month.
- iv. A firm called Dampcure inspected Flat 6 in order to prepare a report for the then proposed purchasers of Flat 6. The purpose of their report (D28), which was made on the instructions of a chartered surveyor, was to inspect the walls for the presence of rising damp, and the timbers to the garage annex for evidence of timber infestation and fungal decay. The report says that several of the walls of the flat were dry-lined and wainscoted and that no detailed inspection of all the brick or stonework was possible, but that rising and penetrating damp was found and that it was considered possible that there was "a build-up of condensation between the cavity between the original brick and stonework and that of the back of the dry-lining, the problem being exacerbated by the fact that they do not have the benefit of hit/miss vents to allow the evaporation of any moisture build-up within the cavity". Various works were recommended to remedy the perceived problems.
- v. Mr Young wrote to the proposed purchasers of Flat 6 on 18 September 2003 (D29) to say that he considered the proposed works to be excessive and saying that he proposed to ask another firm to inspect the Flat for rising damp.
- vi. Mr Young inspected Flat 6, which was then unoccupied, on 3 October 2003 and found (D31) that there was penetrating damp caused by raised ground levels adjacent to the hallway and exacerbated by the previous burst water main. He also found that there was no ventilation in the property and little or no background heating giving rise to severe condensation, and penetrating damp in parts of the flat caused by an overflow pipe from a boiler and also around two of the windows in the rear bedroom.

- vii. Mr Young instructed Dri-Wall Services to inspect the accessible walls of Flat 6 for rising damp and their report dated 21 October 2003 (D32) also confirms that there was no ventilation or background heating and that humidity readings showed 70% moisture content which was, the report said, well above the norm. Their recommendations included increasing the ventilation and background heating and carrying out repairs to rain water goods and pipework to stop external water penetration into the brickwork.
- viii. The proposed purchasers of Flat 6 withdrew from the purchase, and Ms Wootton, who is an architect, proposed to purchase it and negotiated a reduction in the price because of the damp. Having bought the flat she instructed Terminix Property Services to carry out works to eradicate the damp. On her instructions they investigated the problem and their first report, dated 2 February 2004, shows that they found damp penetration in different parts of the flat due to the high ground levels; and their recommendations included the installation of a chemical damp proof course.
- ix. Ms Wootton instructed Terminix to carry out the necessary work and in the course of the works they discovered the presence of dry rot. Mr Jones of Terminix met Mr Young at the flat on 26 February 2004 and he observed that there was extensive dry rot which had been hidden behind the dry lining and other decorative finishes. In bedroom 1 the timber lintel above the window had rotted to the point that it was no longer providing support to the structure above it. Mr Young asked the workmen on site to expose further parts of the flat to see how far the dry rot had spread. It emerged that it had spread through the joists above the ceilings of the flat and had affected the structural integrity of the floor of the flat above.
- x. A letter to Mr Young from Terminix dated 2 March 2006 (KH8) included "The cause of the outbreak [of dry rot] is due to the high moisture content of the timbers owing to ingress of moisture via poor rainwater goods and lateral penetration from the external buttresses."

- xi. Mr Young considered that the works to eradicate the dry rot had to be carried out very urgently to prevent the infestation from spreading further, and he instructed Terminix, later re-named Peter Cox, to carry out the work.
 - xii. Terminix/Peter Cox were instructed to carry out the work, and did so at a cost of £15,868.50.
 - xiii. Bright Willis ceased to manage the property in July 2005 and the tenants have managed it themselves since then.
6. The tenants' case was they were not liable to pay the cost of eradicating the dry rot because the need to do the work had arisen because of the landlord's agents' negligence. They did not challenge the need to do the work, its cost or its standard, nor that the dry rot was a structural problem which, subject to the defence they raised, was the landlord's responsibility under the leases and subject to a service charge.
7. They said that it was reasonable to conclude that, on the balance of probabilities, the dry rot was caused entirely by the landlord's agents' negligent failure to notice or repair defects in the rainwater goods. They said that Mr Young had a history of not responding to tenants' concerns and had rarely visited the property. They did not agree that floods, leaks, condensation or other forms of dampness in Flat 6 could have caused dry rot, and considered much the most likely cause to be the fact that rainwater from the roof had been allowed to pour down the face of the building due to poor management and maintenance carried out by the managing agent.
8. Ms Wootton said in evidence that she knew before she bought the flat that it suffered from damp from a number of sources. She accepted that it was very difficult to pinpoint the cause of dry rot and said that it was necessary to consider the probabilities. Of the possible causes, she considered what she described as the continual ingress of water from the rainwater pipes to be the most likely.

9. Mr Bundy said that Mr Young's visits to the property were very infrequent and that if he had visited more frequently he would have noticed the continually leaking gutters. Mrs Witton and Ms Harris agreed.
10. Mr Young accepted that the gutters, and, indeed, the property as a whole, had not been in the best of condition during the period of his management, but said that it had to be borne in mind that it was a converted building on a sloping site which had required work since before his firm started to manage and that there had been arrears of service charges throughout the period of his firm's management. He maintained that it was very far from established that leaking gutters had caused the dry rot. He said that Terminix had in their letter dated 2 March 2004 given the cause as leaking gutters and lateral penetration from buttresses at his request in order to make easier his task of recovering service charges from the tenants, but that neither Terminix nor anyone else could be sure of the cause, which could have been one or a combination of a number of factors. These included inherent design problems in the building such as the high ground levels around it and the buttresses adjacent to ground floor level, the high levels of humidity in Flat 6 during the period when it was unoccupied, and the damp store and outbuildings adjacent to Flat 6. He said that the fact that bedroom 2 in Flat 6 had suffered most seriously from dry rot tended to suggest that the leaking gutter was not the cause of the outbreak because bedroom 2 was well away from the leaking gutter. He considered that if the intermittently leaking gutters had been the cause of the outbreak there would have been evidence of wet rot in the window frames of Flat 6, which was not the case. Indeed, he said, photographs taken at the time suggested that the window frames on the elevation most affected by dry rot were sound. Nor was any dry rot found in Flat 4, on the side elevation above Flat 6 which, he said, one might have expected to be affected first if the cause of the problem had been the leaking gutter above the two flats.
11. Mr Young did not deny that there was a problem with occasionally leaking gutters which he had sought to address by having them cleaned on a number of occasions before they were eventually replaced on the tenants' instructions after the dry rot had been eradicated. A particular problem had been the need to scaffold the building in order to carry out works to the gutters. He agreed that he could not

categorically say what the cause of the outbreak was. However, in his opinion the most likely cause was a combination of stagnant air, lack of ventilation and high levels of humidity in Flat 6. He considered it quite likely that dry rot had been present for a considerable time, hidden behind the dry lining; but, he said, none of the classic signs of dry rot, such as peeling paint or the efflorescence of salts, had been present, and none of the experts or independent contractors who had inspected the flat prior to the discovery of dry rot had suggested that it might be present.

12. If we had been satisfied that the landlord's agents' failure to carry out repairs had caused the dry rot we would have regarded such failure as a defence to the claim for service charges, following the decision of HH Judge Rich QC in the Lands Tribunal in *Continental Property Ventures Inc v White* (LRX/60/2005). Furthermore, we would not have regarded any failure by the tenants to pay service charges as a good reason for any neglect on the landlord's part to maintain the structure of the building: *Yorkbrook Investments v Batten* (1985) 276 EG 493, Court of Appeal. However, we are not satisfied on the evidence that the dry rot was caused by any failure of the landlord's agents.
13. While it is clear that the rainwater gutters had required attention for some time before dry rot was discovered, it is not clear that failure to provide it caused the outbreak. Clearly there were several possible causes, and any of the factors identified by Mr Young, or, indeed, other factors, could, alone or in combination, have caused the outbreak. We bear in mind that Mr Jones of Terminix said in his letter to Mr Young dated 2 March 2004 that the cause of the outbreak was the ingress of moisture from poor rainwater goods and lateral penetration from buttresses. However we accept that this was included at Mr Young's request and it does not in our opinion amount to proof that, on the balance of probabilities, poor maintenance of the structure of the building was responsible. In our view the onus is on the tenants to establish that the cause of the outbreak was the negligence of the landlord through its managing agent, and they have not discharged it. Accordingly we are satisfied that they are each liable to pay one sixth of the full cost of the works, namely £2644.75.

xiii. Dispensation from the consultation requirements

15. The Service Charges (Consultation Requirements) (England) Regulations 2003, which came into force, with certain exceptions which do not apply in this case, on 31 October 2003, set out the consultation procedures with which the landlord must comply where the contribution of any leaseholder to the cost of proposed works will exceed £250. It is agreed that the landlord did not follow the procedure because it regarded the work as urgent. Section 20ZA of the Act permits the tribunal to dispense with the consultation requirements if it is satisfied that it is reasonable to do so.
16. Mr Young said that he would have regarded it as negligent to delay carrying out the works once the need to do them had been identified, because, once exposed and disturbed, dry rot can spread quickly. Moreover, he said, if Terminix/Peter Cox had left the site while estimates were obtained and consultation carried out the costs would have been greater than they were. The landlord accordingly asked us to dispense with the consultation requirements.
17. The tenants opposed the application. They said that the contractor had provided support for ceilings which might otherwise have collapsed and that there was no reason why the works should not have been delayed while normal consultation procedures were carried out.
18. We are quite satisfied that it is reasonable to dispense with the consultation requirements. This was a genuine emergency in that there was a definite risk that the dry rot might spread if not dealt with quickly. Furthermore we accept that the costs of eradicating it might have been greater if Terminix/Peter Cox had left the site while consultation took place. In our view the landlord acted reasonably in proceeding immediately to instruct, as it did, a well-known and reputable company, expert in the field, to carry out the work.

ii. Replacement of the guttering

19. The tenants maintained that it had been more expensive to replace the guttering in 2004 or thereabouts than it would have been if the work had been carried out earlier. They said that the work had cost around £4500, but that they had been informed by the builder who did the work that if it had been done two years earlier the cost would have been about £2700. However they provided no evidence either of the actual cost of replacing the guttering or of its probable cost at an earlier date, and we are not satisfied on the evidence that it has been established either that the cost would have been less at an earlier date after allowance is made for inflation to reflect the fact that the tenants have had the use of the money in the interim, and we accordingly determine that the tenants cannot recover anything from the landlord under this head or set off anything against the landlord's claim for service charges.

Costs

- 20 The landlord's representatives agreed that the landlord either could not under the lease, or would not, seek to place any of its costs of and incidental to the proceedings on any service charge.

CHAIRMAN.....

DATE..... 20 March 2006