

LON/00BA/LIS/2005/0025

DECISION OF THE LEASEHOLD VALUATION TRIBUNAL
ON AN APPLICATIONS UNDER SECTION 27A & 20C
OF THE LANDLORD AND TENANT ACT 1985 (AS AMENDED)

Applicants: Ms N Wills & Others

Respondent: Daejan Investments Ltd

Re: The Holt, London Road, Morden, SM4 5AP

Application received: 18 February 2005

Hearing date: 16 August 2005

Members of the Leasehold Valuation Tribunal:
Ms Mohabir LLB(Hons)
Mr J Power MSc FRICS FCI Arb
Mr T W Sennett MA FCIEH

IN THE LEASEHOLD VALUATION TRIBUNAL

LON/00BA/LIS/2005/0025

IN THE MATTER OF THE HOLT, LONDON ROAD, MORDEN, SM4 5AP

BETWEEN:

NADINE WILS & OTHERS

Applicants

-and-

DAEJAN INVESTMENTS LIMITED

Respondent

THE TRIBUNAL'S DECISION

Background

1. The page references in bold in this Decision are to the Applicants bundle of documents **[AB]** and the Respondent's bundle of documents **[RB]** respectively.
2. This is an application made by the Applicants pursuant to s.27A of the Landlord and Tenant Act 1985 ("the Act") for a determination of the reasonableness of the cost of major works carried out by the Respondent during the service charge years 2000-2004. However, at the hearing the Tribunal was referred to a statement of agreed facts and issues **[AB/183]**, which confirmed that all of the original issues between the parties had been agreed save for the cost of replacing the external balconies ("the balconies"). The Tribunal's determination is, therefore, solely confined to this issue. The Applicants also made an application under s.20C of the Act to disentitle the Respondent to all or part of its costs incurred in these proceedings.

3. The Tribunal was told that there are in total 22 Applicants who make this Application. Although the Tribunal was not expressly told, it assumed that the terms of the Applicants leases were identical, as neither party contended otherwise. A specimen lease relating to Flat 5 in the subject property was provided [AB/15]. The lessee's service charge liability arises under clause 2(a) of the lease. In that clause, the lessee covenanted to be liable for the cost of maintaining, repairing, redecorating and renewing the structure of the building. The lessee's contribution is stated to be 1.99% of the total cost. It is not necessary to set out here the detailed provisions of the charging clause, as the Applicants liability to pay the service charge is not in issue in this matter.
4. The factual background to this matter is as follows. In 1999, the Freshwater Management Team ("Freshwater") prepared a specification of proposed major works to the subject property which included, *inter alia*, the replacement of the external balconies. It seems that the Respondent tendered the work and recommended that contractors by the name of R R Trading be instructed to undertake the proposed work [RB/158]. The tender price quoted by R R Trading for the replacement of the balconies was £130,680. The Holt Tenants Association instructed Mr Plant, a Chartered Surveyor, to comment on the specification and tender prices. He prepared a report dated 23 February 2000 [AB/112]. In relation to the external balconies, Mr Plant commented that they were in a state of disrepair as a result of neglect by the Respondent. He primarily advocated repair but did not exclude the possibility of having to totally replace them [AB/115 & 129]. Whilst Mr Plant, at the time, did not comment on whether or not the tender price was reasonable, he did so later when R R Trading produced the final account for the work. He said that the Applicants liability should be limited to £20,680. At paragraph 7.1 of his expert report he gave an explanation of how he arrived at this figure [AB/180]. He argued that the Applicants liability for the cost of replacing the balconies should be limited to the cost of repair (£12,000) and redecoration (£8,600) because had the Respondent carried out planned maintenance, the balconies would not have needed to be replaced.

5. In or about May 2000, Mr Plant attended a site meeting with the representatives of Freshwater and their project manager to discuss variations to the specification. In July 2000, the Holt Tenants Association suggested that Mr Plant should keep a watching brief on the works carried out and he did so from time to time by making site visits.
6. The major works commenced in August 2000 and were completed in June 2001 when Mr Plant's involvement also ended. The total cost of the major works was placed at £529,552 and was included in the service charge account for the year ended 31 March 2003 [AB/172]. In April 2002, Mr Plant was re-instructed by the Holt Tenants Association because it had some concerns about the standard of workmanship in some areas. It was shortly thereafter that he received the final account from R R Trading and was able to comment on the final cost of the balconies as already set out in paragraph 4 above. Apparently, the Applicants remained dissatisfied with various items of work carried out, both as to cost and standard of work. When negotiations between the parties proved to be unsuccessful, the Applicants issued this application. Prior to the hearing all of the outstanding matters were agreed, save for the issue concerning the cost of replacing the balconies.

Hearing

7. The hearing in this matter took place on 16 August 2005. Mr Maunder Taylor, a Chartered Surveyor, represented the Applicants. The Respondent was represented by Miss Taskis of Counsel.
8. Mr Maunder Taylor opened the Applicants case by relying on the argument of historic neglect advanced by Mr Plant in 2002. As evidence of this, he directed the Tribunal to an earlier specification of works dated October 1992 that had been prepared by the firm of surveyors, Daley & Hall, on the instructions of the Respondent [AB/60]. Clauses 3.17 and 3.31 of the specification recommended that only repairs be carried out to the balconies [AB/79 & 82].

9. Mr Maunder Taylor submitted that the 1992 specification was well thought out and should have formed the basis of a planned maintenance programme in 1993. He also relied on a subsequent updated specification prepared by Daley and Hall dated October 1997, which continued to recommend repair rather than replacement of the balconies [RB/61]. Mr Maunder Taylor further submitted that had this maintenance work to the balconies been carried out, it would not have been necessary to replace them in 2001.
10. The Applicants case largely relied on the expert evidence of Mr Plant. He had prepared an expert report dated 21 April 2005 in which he set out his involvement with and knowledge of the subject property [AB/175]. His evidence, in chief, was that since 1980s the property had been neglected. The paint on the balconies dated from 1960s because the colour used was from that era and was in bad condition. In answer as to whether the balconies had reached the end of their useful lives at 70 years, he said that this was dependant on the type of maintenance that had been carried out. The exposed steel had to be painted frequently and this appeared not to have taken place since 1960s. The cycle of repainting should have taken place every 5 years. There was no evidence of any proper maintenance having been carried out to the balconies by the Respondent. In his opinion the level of neglect had been gross and that the property had looked derelict. He accepted that, if the Tribunal found against the Applicants, then the cost of £130,680 for replacing the balconies was reasonable. No challenge was being made in relation to the standard of workmanship.
11. In cross-examination by Miss Taskis and the Tribunal, Mr Plant conceded that he had not investigated or surveyed the structure of the balconies at the time of his involvement with the property. He was not able to comment on the construction of the floors of the balconies and how they related to the building. The steel cantilever beams below the balconies were an important factor in the construction of the balconies and probably extended back into the building. He confirmed that at the time he inspected the balconies, there was significant corrosion to the steelwork generally on the balconies. This would have been caused by water penetration either at the edge and drainage through the

balconies. The corrosion would have started shortly after the original construction. As to the construction of the balconies, Mr Plant said that he could not contradict the evidence of Mr Henderson, the Structural Engineer retained by the Respondent in 1998 because he was not sufficiently qualified to do so. Mr Plant accepted that at the time his involvement with the property commenced, the renewal of the balconies was an appropriate decision for the Respondent to make.

12. However, Mr Plant did not resile from his original opinion that it would not have been necessary to replace the balconies in 2001 had regular planned maintenance been carried out. He said that the cost of doing so would not have necessarily been expensive. He estimated that the cost of the proposed maintenance set out in the 1992 Daley & Hall specification was £20,680. In cross-examination he later conceded that his estimate did not include other ancillary costs such as scaffolding and concrete works. Mr Plant also accepted that the cost of planned maintenance to the balconies would have accrued over each cycle of maintenance but was unable to say if those accrued costs would have exceeded the cost of replacing the balconies in 2001. The conclusion of Mr Plant's evidence formed the case for the Applicants.
13. Mr Gammon was then called as the first witness for the Respondent. He is the Area Manager employed by the Respondent with overall responsibility for the management of the subject property. At paragraph 10 in his witness statement **[RB/3]** he explained that the specification of works prepared by Daley & Hall in 1992, which included the carrying out of maintenance work to the balconies, was not carried out because the Respondent had been negotiating to sell the freehold interest to The Holt Tenants Association. During those negotiations, the lessees specifically requested that no further costs be incurred by the Respondent in relation to the proposed major works. Mr Maunder Taylor denied that any such negotiations took place.
14. In August 1997 the negotiations between the parties broke down. In October 1997, Daley & Hall prepared the updated specification. It seems that the decision to replace the balconies was not made until December 1997, as a

result of a meeting between Mr Hall of Daley & Hall and Mr Harper, who at the time was employed by the Respondent as the department head of the regional executive. It was on the basis of that decision that Mr Henderson of Angell Thompson, Consulting Structural Engineers & Surveyors, was instructed to produce drawings specifically for the replacement of the balconies.

15. In cross-examination, Mr Gammon was unable to give any specific evidence as to what maintenance to the balconies had been carried out. He did not accept that the last maintenance had been carried out in 1960s. However, he accepted that there was no evidence of subsequent maintenance having been carried out. Mr Gammon said that since 1996 the Respondent was of the view that major external repairs and redecoration was required and could be criticized for not carrying out the work after that date.
16. The Respondent then called Mr Hall, who prepared the 1992 and 1997 specification of work. The important parts of Mr Hall's evidence were set out in paragraphs 11 and 15 of his witness statement **RB/ 204 & 205]**. He said that the decision taken in December 1997 with Mr Harper was on the basis that the cost of repairs to the balconies would have been extensive and not significantly cheaper than the cost of replacing the balconies. Regard was also had to the potential cost savings to the lessees by the reduction in future maintenance costs in having the balconies replaced. His view was that even if regular planned maintenance had been carried out to the balconies, it would not have affected his decision to replace them because they were approximately 70 years old and had come to the end of end of their useful lives.
17. In cross-examination, Mr Hall was unable to say when the last planned maintenance to the balconies had been carried out by the Respondent. He believed it was possibly in 1970s. None had certainly been carried out recently. He accepted that the balconies should have been redecorated on a regular basis. Mr Hall said that in 1992 he had recommended asphaltting the balconies and installing drainage to protect what was there. The asphaltting

would have prevented further water penetration. However, Mr Hall did not accept the suggestion by Mr Maunder Taylor that the property was neglected. It simply needed some work. He went on to say that the replacement of the balconies in 1992 was within the range of options available to him but at the time did not adopt this course of action because to do so then would not have been cost effective.

18. The second expert called by the Respondent was Mr Henderson of Angell Thompson. In early 1998, he had been instructed by the Respondent to provide a number of solutions for the replacement or repair of the balconies. Five schemes were ultimately proposed. The scheme to replace the existing balconies with a new galvanized structure was adopted.
19. At paragraph 3.4 of his witness statement **[RB/15]**, Mr Henderson did not accept that asphaltting the balconies in 1992 would have prevented or deferred the need to replace the balconies, as claimed by the Applicants. He also did not accept that regular maintenance by painting the steelwork would have deferred the need for renewal. He stated, at paragraph 3.5 of his witness statement **[RB/16]** that repainting would have been required at more than intervals of 5 years and even then he was doubtful that it would have been effective to prevent the corrosion that was taking place because the balconies had an inherent defect by having random drainage. He said in evidence that the concrete did not overhang the steelwork. This had the effect of exposing large areas of the steel construction to water drainage. Asphaltting would not have prevented the random run-off of water or minimised the corrosion to the exposed steelwork. At paragraph 4.4 of his witness statement **RB/19]**, Mr Henderson concluded that the cost of regular painting of the steelwork over the life of the building would have exceeded the cost of replacing the balconies. However, Mr Henderson accepted in cross-examination that in 1998, when he inspected the balconies, they were in a poor state of disrepair.
20. The Tribunal then heard evidence from Mr Eagles, who is a Chartered Surveyor employed by Stace Building Surveying, the Contract Administrators of the major works. His evidence, at paragraphs 39 and 40 of his witness

statement [RB/31(iii)], largely dealt with the cost comparison of repairs as opposed to replacement of the balconies in 1992 and 1997. Mr Eagles also commented on the cost comparison of maintaining the old balconies against the new balconies. He placed those costs at £30-40,000 and £20,000 respectively.

Decision

21. It was common ground between the parties that the balconies had not been maintained by the Respondent. There was some dispute as to when the last maintenance work had been carried out. Mr Maunder Taylor relied on the specification of work prepared by Mr Hall in 1992 as evidence of the Respondent's failure to maintain the balconies certainly by that date. The Applicants case was put on this basis. Mr Gammon was prepared to concede that certainly no maintenance had been carried out since 1996.
22. The Applicants case was that, as a result of the Respondent's failure to maintain the balconies, they had to be prematurely replaced and that the cost of doing so had unreasonably been incurred. It was accepted by Mr Maunder Taylor and Mr Plant that when the balconies were replaced in 2000, it was necessary to do so because they were in disrepair.
23. At the time the decision to replace the balconies, they were approximately 70 years old. It was generally accepted by the experts for both parties that they were coming to the end of their useful lives. It was, therefore, a fine decision to be taken as to whether to replace or repair them.
24. In the Tribunal's judgement, this case largely turned on whose expert evidence it preferred in deciding whether the costs of replacing the balconies were reasonably incurred.
25. The expert evidence relied on by the Applicants was that of Mr Plant. His evidence was that, if the Respondent had carried out the maintenance work specified by Mr Hall both in 1992 and 1997, it would not have been necessary to replace the balconies in 2000. In his view, the lifespan of the balconies

could have been extended by 30 years if the asphaltting and concrete repairs recommended by Mr Hall had been carried out by the Respondent.

26. The Respondent's expert evidence was provided by Mr Hall and Mr Henderson. Importantly, Mr Hall's evidence was that although he specified repairs be carried out to the balconies in 1992 and 1997, he had also considered replacing them but had rejected this on the basis of cost. He was unable to say how much longer the lifespan of the balconies would have been had the asphaltting and concrete works been carried out.
27. Mr Henderson's evidence went further. He said that even if the Respondent had carried out the asphaltting and concrete repairs and regular painting of the steelwork, it would not have prevented the corrosion that had taken place. In his opinion, there was a structural design flaw that resulted in random drainage of water down the face of the concrete and on to the perimeter steelwork. This would have resulted in corrosion of the steelwork soon after construction of the balconies had taken place. Asphaltting would not have prevented leakage against the face wall because it would not have effectively sealed around the service pipes. In addition, asphalt would still not have prevented the random run-off of water at the slab edges or minimised the corrosion of the steelwork.
28. In determining this matter, the Tribunal preferred the Respondent's expert evidence and, in particular, the evidence of Mr Henderson. With respect, the Tribunal found the evidence of Mr Plant to be limited. At the material time, he was not instructed to carry out a structural survey of the balconies in the way that Mr Henderson did. Mr Plant accepted in evidence that he had only been instructed by the Applicants to comment on the cost of the proposed major works and not specifically to comment on the decision to replace the balconies. Mr Plant also accepted that he would have to defer to Mr Henderson on structural matter, as he was not sufficiently qualified to comment on these matters. Mr Plant said that the asphaltting and concrete repairs would have extended the lifespan of the balconies by 30 years, but this assertion was not supported by any evidence. It was material that the points now taken by Mr Plant in relation to the replacement of the balconies were not

taken by him or any of the Applicants when the s.20 notice was served. Perhaps importantly, he accepted in evidence that both in 1992 and 1997, the decision to replace the balconies would have been a reasonable decision for the Respondent to make. The Tribunal did not consider that Mr Plant could, on balance, sufficiently establish that the Respondent's accepted failure to maintain the balconies had significantly resulted in the need to prematurely replace the balconies.

29. The Tribunal found Mr Henderson to be an impressive and credible witness. He had overall greater expertise than Mr Plant on matters of structural engineering. Mr Plant is a general building surveyor. Mr Henderson had been retained in 1998 by the Respondent to specifically comment on the condition of the balconies. As stated earlier, he did not accept that the Respondent's failure to maintain the balconies would have materially affected the decision to replace them in 2000. The balconies suffered from a structural design flaw, which resulted in corrosion of the exposed steelwork taking place almost immediately after they had been constructed. Asphalt and concrete repairs would not have prevented this from continuing. There was no evidence before the Tribunal that these repairs would have significantly lengthened the lifespan of the balconies as alleged. It was accepted by the experts that the balconies were in fact coming to the end of their useful lives in any event. The Tribunal accepted Mr Henderson's evidence generally and, therefore, found that the Respondent's failure to maintain the balconies had not resulted in them having to be replaced prematurely. It follows that the Tribunal finds that both the Respondent's decision to replace the balconies and the cost of doing so were reasonably incurred. It was not necessary for the Tribunal to go on to consider the comparative replacement or cyclical maintenance costs in 1992, 1997 and 2002 in making a finding as to reasonableness because Mr Maunder Taylor conceded that, if the Tribunal found against him, the Respondent would be entitled to claim all of the cost of replacing the balconies. Accordingly, the Tribunal allowed the cost of replacing the balconies of £130,680 exclusive of VAT as having reasonably been incurred.

Section 20C & Reimbursement of Fees

30. It was not necessary for the Tribunal to consider the application because Miss Taskis conceded that under the terms of the leases, the Respondent was not able to recover the costs incurred by it in these proceedings.
31. It follows, that the Tribunal having found against the Applicants on the substantive issue, it made no order under Regulation 9 that the Respondent should reimburse to the Applicant any fees paid by them to the Tribunal in these proceedings.

CHAIRMAN.....

J. Nicholson

DATE.....

12/10/05