RESIDENTIAL PROPERTY TRIBUNAL SERVICE
SOUTHERN RENT ASSESSMENT PANEL
LEASEHOLD VALUATION TRIBUNAL

Residential Property
TRIBUNAL SERVICE

Ss 20C & 27A Landlord & Tenant Act 1985 (as amended)

DECISION AND REASONS

Case Number:	CHI/00ML/LSC/2006/0091
Property:	Flat 2 4 Kings Gardens Hove East Sussex BN3 2PE
Applicant (Tenant):	Mr C E Cleanthi
Respondent (Landlord):	Salemethod Limited
Date of Application:	14 September 2006
Hearing:	Documents only
Tribunal Members:	Mr B H R Simms FRICS MCIArb (Chairman) Mr R A Wilkey FRICS FICPD
Date of Decision:	5 June 2007

SUMMARY OF DECISION

The cost of work incurred by the Applicant in the total sum of £2,279.50 for the removal of pipes and asbestos within flat 2 was reasonably incurred. The Respondent landlord is to reimburse the Applicant with this amount.

When properly demanded as part of the service charge in accordance with the terms of the lease the relevant proportion calculated in accordance with clause 3(ii)(a) is payable by the tenant to the landlord. As the S.20 procedures were not followed the amount recoverable from the tenant as service charge in respect of this expenditure will be the relevant proportion or £250 whichever is less.

No Order is made under S.20C of the Act.

BACKGROUND

1. This is an application pursuant to S.27A of the Landlord & Tenant Act 1985 (the Act) for a determination on the payability of service charges for the accounting year ending 24 June 2007. An application is also made under S.20C of the Act.

2. An oral preliminary hearing was held on 25 October 2006 to decide whether the cost of work carried out by Dorton Asbestos Removal Services Ltd was payable as a service charge within S.18 of the Act or was solely the liability of the tenant under the terms of the lease. By a decision dated 6 February 2007, the Tribunal decided that it had jurisdiction to deal with the application under S.27A of the Act and also decided that the pipework was part of the Reserved Property that came within the landlord's general obligations for repair and maintenance pursuant to clause 4(4) of the lease.

3. The remaining issues to be determined under S.27A of the Act were reserved to this separate hearing as was the question of costs under S.20C of the Act.

4. Following the decision made on 6 February 2007, Directions for the substantive hearing were made on 2 March 2007. Notice was given that the case was to be heard without a formal hearing and no objection was raised by either party to this procedure.

5. The Applicant was Directed to make a Statement of Case with supporting documentation but, by his letter dated 13 March 2007, he indicated that he had nothing further to add to the submissions he had made to the preliminary hearing.The Respondent, by way of submission dated 6 May 2007, made its case by Gillian Levett, a company director.

6. The Tribunal had available to it documents presented at the preliminary hearing on 25 October 2006.

RELEVANT LAW

7. The Tribunal has had regard to all the relevant legislation but summarises some of the relevant parts here for the benefit of the reader.

8. The Tribunal's jurisdiction derives from the Landlord & Tenant Act 1985 as amended. In coming to our decision we have had regard to the Act in full but include a summary here for the assistance of the parties.

9. S.18 defines the meaning of a service charge as being *"...an amount payable by a tenant ... in addition to the rent – (a) which is payable directly or indirectly, for services, repairs, maintenance, improvements, insurance, or the landlord's costs of management and (b) the whole or part of which varies or may vary according to the relevant costs".*

10. S.19 limits the relevant costs to be taken into account in determining the amount of service charge only to the extent that they are reasonably incurred and only if the services or works are of a reasonable standard.

11. S.27A provides that a Leasehold Valuation Tribunal may determine whether a service charge is payable and if it is, the Tribunal may also determine the person by whom it is payable, the person to whom it is payable, the amount which is payable, the date at or by which it is payable and the manner in which it is payable. These determinations can (with certain exceptions) be made for current or previous years and also for service charges payable in the future.

12. S.20C allows the Tribunal to limit all or any of the costs incurred by the landlord in connection with the proceedings being recovered by way of the service charge if it considers it reasonable so to do. In this case the Applicant made a request for a limitation of costs as part of his original application.

LEASE

13. The Tribunal was provided with a copy of a lease of the rear basement flat (Flat 2) at 4 Kings Gardens, Hove, dated 15 August 1989, which is for a term of 125 years from 1 June 1999. When coming to its decision, the Tribunal has had regard to all the terms of the lease but highlights here those clauses which it believes are specifically relevant to the payment of service charges.

14. At clause 3(ii)(a), the tenant is to pay "... *such share to be the proportion which the rateable value of the flat bears to the total rateable value of the whole premises of all money expended by the Lessor in complying with its covenant in relation to the Property as set forth in Clause 4 hereof and of the expenses incurred in connection with any of the matters referred to in the Seventh Schedule hereof ...*".

15. Clause 4(4), the landlord covenant, "*To keep the Reserved Property and all fixtures and fittings therein and additions thereto in a good and tenantable state of repair decoration and condition including the renewal and replacement of all worn or damaged parts ...*".

16. Clause 5(f) provides that, "*The Building was constructed approximately 90 years ago and for the avoidance of doubt*

    (a) all defects or wants of repair arising in the Flat or the Building will be dealt with and paid for either by the Lessee under Clause 2(3) hereof or by the Lessor under Clause 4 hereof with the contribution by the Lessee under Clause 3(ii) hereof ...".

INSPECTION

17. Members of the Tribunal for the preliminary hearing made an inspection prior to that hearing on 25 October 2006. Members of this Tribunal did not inspect the property, although the valuer member was common to both Tribunals.

18. The property comprises a substantial detached, Edwardian property on the corner of Kings Gardens and Third Avenue, facing the main coast road and seafront in Hove. The building is arranged as nine converted, self-contained flats. Access to flat 2 in the basement is via the return frontage to Third Avenue. At the time of the inspection, the flat was being renovated. The Tribunal members saw into the ceiling void where some pipes had previously been removed.

FACTS

19. The Applicant, Mr Cleanthi, acquired the property in January 1999 as an investment for letting. The Respondent, Salemethod Limited, is a tenants management company whose directors and members occupy flats in the building. Flat 2 had been let under a series of assured shorthold tenancies.

20. By 2004 it had become clear that flat 2 was unlettable and was in need of repair and renovation. In early 2006, Mr Cleanthi decided to refurbish the premises and work commenced in April 2006. When the ceilings were removed, some old asbestos lagged pipework was discovered. The asbestos fibres had been disturbed, the area was unsafe, and the builders left the site.

21. Messrs Austin Rees, the managing agents, were made aware of the problem. A letter dated 4 August 2006 from Mr Franks on behalf of the Respondent, acknowledged the asbestos problem but stated that the freeholder has no repairing or other liability in respect of any old redundant pipes and they must be treated as being within the leaseholders' demise.

22. The Applicant instructed Dorton Asbestos Removal Services Ltd to advise on the situation and, following receipt of a quotation, appropriate work was carried out to remove the pipes and asbestos lagging, giving rise to an invoice from Dorton in the total sum of £2,279.50, dated 14 July 2006.

23. There is no dispute that the correct procedures were followed for the physical removal of the hazard or that the amount charged is a reasonable cost.

EVIDENCE

24. No statement from the Applicant in respect of this hearing was received. In his statement before the preliminary hearing, the Applicant stated, "*During the course of renovation of flat 2 ... suspended ceilings were brought down in the corridor, exposing asbestos clad pipework, which was in a dangerous state.*".

25. Mr Williams, who was administering the refurbishment project on behalf of Mr Cleanthi, contacted the managing agents, Austin Rees, and in an email dated 28 June 2006, states, "*When we took down the lowered ceiling in the flat we found the old heating pipes from the old central boilerhouse, which run through at the level of the former ceiling. These are lagged in white asbestos, which has been disturbed and partly removed, leaving them in a dangerous state.*".

26. The Respondent submits that the costs incurred by the Applicant are not the responsibility of the landlord.

27. The Respondent accepts, with regard to the asbestos lagged piping, that it is its duty to safely manage this to ensure that it is well protected and in a location where it is unlikely to be physically damaged. In this case the Respondent believes it could have been left in situ. However, the asbestos was exposed and disturbed by the Applicant during the course of his refurbishment work. The Respondent is not responsible for damage caused by a lessee in that the Applicant caused damage to the safe confinement of and disturbance of the asbestos lagged pipes and this is not within the landlord's maintenance responsibility.

28. The Respondent also submits that even if it is responsible for repairs to the pipework, the Applicant did not act properly in authorising works on behalf of the freeholder in that the freeholder was not allowed to fulfil its legal obligation amongst other things in accordance with S.20 of the Act.

29. Although the Applicant notified the managing agents on 28 June 2006, the remedial work was booked to take place on 12 or 13 July. The Respondent submits that the work could have been safely postponed to allow the issue of responsibility for costs to be determined and due process of consultation to take place. At the time that the hazard was discovered, the flat was unoccupied and had been vacated by the builders and closed.

30. The Applicant has made no comment on the Respondent's submissions.

CONSIDERATION

31. By the decision of the Tribunal following the preliminary hearing, the pipes and the asbestos cladding fall within the Reserved Property and the landlord's responsibility to this part of the property is set out at clause 4(4) of the lease. This is an unequivacable requirement to keep the Reserved Property in a good and tenantable state of repair.

32. Initially we considered whether the Respondent should have discovered the hazard as part of its usual and reasonable function to manage the building. It is arguable that the Control of Asbestos at Work Regulations (CAWR) may apply to retained parts of residential blocks of flats. Even if there is a responsibility under the CAWR, this particular hazard would not have been discovered by a reasonable visual inspection; it was concealed above a false suspended ceiling.

33. As soon as the Applicant's contractors discovered the hazard, the landlord was notified. When exposed, the pipes were found to be clad in white asbestos which had been disturbed and partly removed. We were not given evidence that the disturbance or removal was at the hand of the Applicant's contractor, contrary to the suggestion by the Respondent. We have been given no technical evidence but our understanding is that a hazard of this sort in its disturbed state cannot be left unattended and, on discovery, urgent action is required.

34. The landlord's managing agent was notified of the hazard as soon as practicable and they promptly notified the landlord. We are told that the flat was empty and closed so there was no urgency to deal with the problem. We have no technical evidence to assist us in assessing the relevant action to deal with this type of hazard. It is accepted that it was important to do something and, although there may have been an opportunity to delay action to await the landlord's decision the result is the same. Having taken advice, the landlord, by its letter dated 4 August 2006, denied responsibility for any work in connection with removal of the hazard. Someone had to take action and the Applicant was the only person willing to comply. There was a dangerous hazard and the only solution was to employ a specialist to take the appropriate action. This is what was done and the cost should be met by the Respondent landlord.

35. The Respondent now argues that because of the tenant's actions, it was denied the opportunity of complying with the S.20 procedures as the Tribunal has now decided that it should have accepted responsibility for the work as part of the service charge. The Respondent landlord lost the opportunity of complying with S.20 by denying responsibility at the time the work was carried out. Without proper consultation the amount recoverable is limited to £250 per lessee. However, the 20ZA procedure is still available to the Respondent should it wish to take advantage of it.

36. The S.20ZA procedure is available for a determination by a Leasehold Valuation Tribunal (LVT) to dispense with all or any of the consultation requirements in relation to any qualifying works. Whether or not a LVT grants such dispensation will be for another tribunal to decide but the Respondent has not lost its opportunity to attempt to comply with the Act.

37. The Respondent has not, to our knowledge, either reimbursed the Applicant or included the relevant cost of the work within the charges for the current service charge year. As we have been presented with no evidence to the contrary we are satisfied that the cost of the work was reasonably incurred and will be payable when properly demanded as part of the service charge in accordance with the terms of the lease. As the S.20 procedures were not followed the amount recoverable from the Applicant as service charge will be the relevant proportion calculated in accordance with clause 3(ii)(a) or £250 whichever is less.

20C

38. Neither party has addressed the Tribunal on the question of whether or not there should be a limitation of costs under S.20C. This application was included in the original application dated 14 September 2006 and was referred to in the decision of the preliminary hearing and the directions for this hearing.

39. Some leases allow a landlord to recover costs incurred in connection with the proceeding before the LVT as part of the service charge.

40. This is an unusual case and although the Respondent's original decision has been found to be incorrect, we believe that the parties could not have avoided seeking a determination of the Tribunal.

41. We are not told whether costs have arisen or whether it is the Respondent's intention to try to recover these by way of service charge. The terms of the lease and the relevant sections of the Act will apply to the actual cost and in view of this additional test, the Tribunal proposes to make no Order under S.20C.

DECISION

42. The cost of work incurred by the Applicant in the total sum of £2,279.50 for the removal of pipes and asbestos within flat 2 was reasonably incurred. The Respondent landlord is to reimburse the Applicant with this amount.

43. When properly demanded as part of the service charge in accordance with the terms of the lease the relevant proportion calculated in accordance with clause 3(ii)(a) is payable by the tenant to the landlord. As the S.20 procedures were not followed the amount recoverable from the tenant as service charge in respect of this expenditure will be the relevant proportion or £250 whichever is less.

44. No Order is made under S.20C of the Act.

Dated 5 June 2007

Brandon H R Simms FRICS MCIArb
Chairman