RESIDENTIAL PROPERTY TRIBUNAL SERVICE

SOUTHERN RENT ASSESSMENT PANEL
& LEASEHOLD VALUATION TRIBUNAL

DECISION OF THE LEASEHOLD VALUATION TRIBUNAL

Case No.	**CHI/29UG/LSC/2009/0068**
Property:	**60 Burch Road** **Northfleet** **Kent** **DA11 9NE**
Applicants:	**Miss S. Williams** **Ms D. Chidgey** **Mr. J. Richardson** **Mr. N. Gibbs** **Mr. A. Sellars and** **Ms A. Duff**
Respondent:	**Three Keys Properties Ltd.**
Date of Consideration:	**24th July 2009**
Members of the Tribunal:	**Mr. R. Norman**
Date decision issued:	

RE: 60 BURCH ROAD, NORTHFLEET, KENT, DA11 9NE

Decision

1. The Tribunal made the following decision:

(a) The lessees are not liable to pay the £200 claimed by the landlord for the asbestos survey report.

(b) An order be made under Section 20C of the Landlord and Tenant Act 1985 ("the 1985 Act") that all or any of the costs incurred or to be incurred by the Respondent in connection with these proceedings are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the Applicants.

(c) The Tribunal require the Respondent to reimburse the Applicants for the whole of the fees of £50 paid by the Applicants in respect of these proceedings.

Background

2. Ms S. Williams, Ms D. Chidgey, Mr. J. Richardson, Mr. N. Gibbs, Mr. A. Sellars and Ms A. Duff ("the Applicants") are 6 of the lessees at 60 Burch Road, Northfleet, Kent, DA11 9NE ("the subject property") and have made an application under Section 27A of the 1985 Act for a determination of liability to pay one element of the service charges demanded by the landlord Three Keys Properties Limited ("the Respondent") in respect of the year ended 31st December 2008. That element is £200, being the cost of an asbestos survey. The remaining items in the same demand are not disputed but it is understood that they remain unpaid pending the outcome of this application as that will have an effect on the percentage administration fee which has been calculated.

3. The Applicants have also made an application for an order under Section 20C of the 1985 Act and for reimbursement of the application fee of £50.

4. On 29th April 2009 Preliminary Directions were issued and with those directions the Tribunal gave notice to the parties under Regulation 13 of the Leasehold Valuation Tribunals (Procedure)(England) Regulations 2003, as amended by Regulation 5 of the Leasehold Valuation Tribunals (Procedure) (Amendment) (England) Regulations 2004, that the Tribunal intended to proceed to determine the matter on the basis only of written representations and without an oral hearing. The parties were given the opportunity to object to that procedure by writing to the Tribunal no later than 28 days from the 29th April 2009. No written objection has been received and the matter is being deal with on the basis only of written representations and without an oral hearing.

Evidence

5. Written representations have been received from the Applicants and from the Respondent and those representations have been considered. A copy lease has been provided and, in the absence of evidence to the contrary it is assumed that all leases at the subject property are in similar form.

6. The Applicants' case is set out fully in their statement of case and in summary is that:

(a) This application is similar to a previous application made by the Applicants (CHI/29UG/LSC/2008/0056) in which it was determined that the lessees were not liable to pay costs relating to fire precaution works and repairs as the costs were not recoverable under the terms of the leases.

(b) The Respondent in the light of that decision subsequently applied to a Leasehold Valuation Tribunal (CHI/29UG/LVT/2008/0007) to vary the terms of the leases by inserting in each lease

the following sub-clause: "To comply with all statutory requirements regulation or requirement of any competent local or other authority relating to the Property". That application was refused.

(c) As the leases remain as worded at the time of the decision in respect of fire precaution works and repairs the cost of the asbestos survey, also a statutory requirement, is not recoverable from the lessees.

7. The Respondent's case is fully set out in letters dated 11th May 2009 and 11th June 2009 and the documents enclosed therewith and in summary is that:

(a) The demand is made in accordance with clauses 4. (4)(a) & (b) and 3. (2) of the leases.

(b) In the absence of an asbestos survey carried out pursuant to the Control of Asbestos in the Workplace Regulations 2002 the Respondent would not be able, as is required under clause 4.(4)(a) of the leases, "To paint or varnish all wood ironwork and walls on the exterior of the Property which are usually so painted or varnished....". Therefore the employment of a surveyor to carry out such a survey would fall within the remit of clause 4. 4 (b) of the leases which states that "The Landlord shall be entitled to employ such persons as shall be reasonably necessary for the performance of the covenants contained in sub clause (a) of this clause.".

(c) The Applicants are in turn required to contribute to that expenditure pursuant to clause 3. (2) of the leases which provides that the Applicants are "To pay to the Landlord such maintenance rent as is hereinafter defined as the Tenants proportionate part of all moneys expended or contracted to be expended by the Landlord in complying with the covenants on the part of the Landlord hereinafter contained....".

(d) In a case (LON/00AY/LSC/2008/0537) where the Respondent was the Applicant and made application under the 1985 Act in respect of another property in the Respondent's portfolio earlier in 2009 and where the leases were drafted in similar form, the Tribunal found that the cost of the asbestos survey carried out by the same surveyor was reasonable and payable.

Reasons for the Tribunal's Decision

8. The parties have referred to decisions made by other Tribunals. The Applicants have provided copies of the decisions they have referred to. I can see from those decisions the Tribunal's reasoning and in this case I am dealing with the same property and the same leases. The Respondent has not provided a copy of the decision referred to, but it is possible to find a copy on the Residential Property Tribunal Service web site. The evidence from the Respondent is that the leases in that case were drafted in similar form to the lease in this case but I have not been provided with copies of those leases. In all the decisions referred to I have not seen the written evidence or heard the oral evidence presented to the Tribunals. The decisions are therefore of limited assistance to the parties.

9. The Respondent does not contend that there is a covenant in the leases requiring the Applicants to pay the Respondent's cost of complying with statutory requirements. Indeed the

Respondent unsuccessfully applied for a variation of the leases which would have had that effect had the application been successful.

10. The leases do contain a covenant in clause 3. (2) that the Applicants are "To pay to the Landlord such maintenance rent as is hereinafter defined as the Tenants proportionate part of all moneys expended or contracted to be expended by the Landlord in complying with the covenants on the part of the Landlord hereinafter contained....".

11. If the cost of the asbestos survey report is money expended by the Respondent in complying with the Respondent's covenants under the leases then the Applicants are liable to contribute to that cost.

12. In the demand for the maintenance rent for the year ended 31st December 2008 there is an item of £200 and the Respondent has described that item as "Surveyors Fees: Asbestos Survey undertaken in line with current legislation". However, once that item was challenged, Ms Bagley on behalf of the Respondent in a letter dated 25th March 2009 addressed to the lessees of Flats 1,3 and 8 wrote the following:

> " This survey and report was carried out in respect of the communal areas, pursuant to the Control of Asbestos in the Workplace Regulations 2002.
>
> We covenant to carry out works to the communal areas under the lease, pursuant to Clause (4)(a) thereof, and you covenant to contribute to the same pursuant to Clause 3. (2) thereof. We would not reasonably be able to carry out such works without having first carried out such a survey for the protection of our contractors and, therefore, this sum is payable."

13. In the demand the asbestos survey was stated to have been undertaken in line with current legislation. There was no mention in the demand of any works connected with the survey which the Respondent was proposing to carry out. In this case the Respondent relies on clause 4. (4)(a) of the lease which is a covenant by the Respondent "To paint or varnish all wood ironwork and walls on the exterior of the Property which are usually so painted or varnished....".

14. The asbestos survey report is dated 19th February 2008 and apart from the references to clause 4. (4)(a) in the letter dated 25th March 2009 to the lessees and in the letter dated 11th May 2009 to the Tribunal Office, no evidence has been produced that the Respondent is planning "To paint or varnish all wood ironwork and walls on the exterior of the Property which are usually so painted or varnished....". For example, there has been no evidence that the consultation procedure under Section 20 of the 1985 Act has been commenced or evidence that the procedure is not required because the cost of painting and varnishing will not result in any lessee being liable to contribute more than £250 towards the cost.

15. At the time of obtaining the survey report in February 2008 there is no evidence that it was being requested with any particular work in mind. When the demand was made in January 2009 there is no suggestion that the survey report was obtained with any particular work in mind.

The survey report is described as being "undertaken in line with current legislation". I am not persuaded by the mention in letters written after the cost of the survey report was challenged and in the absence of any other evidence of painting or varnishing being contemplated, that the survey report was obtained as part of the Respondent's covenant to paint and varnish. I find on a balance of probabilities that it was, as stated by the Respondent in the demand "undertaken in line with current legislation". I therefore find as a result that the Applicants are not liable to contribute to the cost of it.

16. As to the application for an order under Section 20C of the 1985 Act and for reimbursement of the fees, I find that it is just and equitable in the circumstances to make an order under Section 20C of the 1985 Act and to require the Respondent to reimburse the Applicants for the whole of the fees of £50 paid by the Applicants in respect of these proceedings because the Applicants were justified in bringing these proceedings to clarify the position and were successful in their application.

R. Norman
Chairman