RESIDENTIAL PROPERTY TRIBUNAL SERVICE
SOUTHERN RENT ASSESSMENT PANEL
LEASEHOLD VALUATION TRIBUNAL

S.27A Landlord & Tenant Act 1985 (as amended)

Residential Property
TRIBUNAL SERVICE

CERTIFICATE PURSUANT TO PARAGRAPH 18(2)
LEASEHOLD VALUATION TRIBUNAL (PROCEDURE)(ENGLAND)
REGULATIONS 2003 (SI 2003/2099)

Case Number:	CHI/00ML/LSC/2007/0010
Property:	26-30 High Street Rottingdean East Sussex BN2 7HR
Applicant:	Paul Andrew Dunford (landlord)
Respondents:	Derek Edward Blissett (Flat 1) Jenna Matthews (Flat 2) Lyn Sherwood (Flat 3) Roger Dacus Stokes and Mary Ann Stokes (Flat 4) (tenants)

I certify that there is an error in the Decision of the Leasehold Valuation Tribunal in this matter issued on 12 June 2007.

The figure of £9,150 in the last line of paragraph 50 of the Decision is incorrect. The second sentence of paragraph 50 is hereby corrected to read as follows:

"For the reasons given above the Tribunal determines that one-sixth of £54,240, being half the estimated contribution, is payable by each of the tenants as demanded on 7 July 2006, and a further one-sixth of £54,900, being the second half of the estimated contribution, as demanded on 8 November 2006."

Dated 19 July 2007

J Talbot

Ms J A Talbot MA
Chairman

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DECISION

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Applicants:	Paul Andrew Dunford (landlord)
Respondents:	Derek Edward Blissett (Flat 1) Jenna Matthews (Flat 2) Lyn Sherwood (Flat 3) Roger Dacus Stokes and Mary Ann Stokes (Flat 4) (tenants)
Application:	6 February 2007
Directions:	16 February 2007
Hearing:	30 April 2007
Appearances:	For the Applicant: Mr Bromilow, barrister Mr Druce, solicitor, and Mrs Hobey, of Fitzhugh Gates Mr Dunford, landlord; Mr Magson, business partner; Mr Foulds, building surveyor; Mr Jewel, builder. For the Respondents: Mr Stokes, in person
Decision:	12 June 2007

Members of the Tribunal

Ms J A Talbot MA, Chairman
Mrs H Bowers FRICS
Mr A Cresswell

Case No. CHI/00ML/LSC/2007/0010

26-30 High Street, Rottingdean, East Sussex BN2 7HR

Application

1. This was an Application dated 6 February 2007, made by Mr Paul Dunford, the landlord, pursuant to Section 27A of the Landlord and Tenant Act 1985, for a determination on the payability of service charges in relation to repairs and proposed major works at 26-30 High Street, Rottingdean, East Sussex.

2. Directions were issued on 16 February 2007 and provided for the Applicants to produce a Statement of Case together will all relevant documents, and for the Respondents to produce a Statement in reply. The Applicant complied with the Directions. Mr Stokes provided a Statement of Case in reply on behalf of himself and Ms Matthews, tenant of Flat 2. Neither of the other tenants opposed the Application.

Jurisdiction

3. The Tribunal has the power to decide about all aspects of liability to pay service charges and can interpret the lease where necessary to resolve disputes or uncertainties. Service charges are sums of money that are payable – or would be payable - by a tenant to a landlord for the costs of services, repairs, maintenance or insurance or the landlord's costs of management, under the terms of the lease (s18 Landlord and Tenant Act 1985 "the 1985 Act"). The Tribunal can decide by whom, to whom, how much and when service charge is payable. A service charge is only payable insofar as it is reasonably incurred, or the works to which it related are of a reasonable standard. The Tribunal therefore also determines the reasonableness of the charges.

Lease

4. The Tribunal had a copy of the leases all 4 flats and 1 commercial unit at the property. They were granted on varying dates but contain almost identical terms. The lease of Flat 4 is dated 16 August 1977 and is for a term of 99 years from 25 March 1977 at a ground rent of £20.

5. In the recitals at the beginning of the leases of flats 2,3 and 4, the flats are defined as "the flat ... forming part of the building known as 28 High Street Rottingdean". The title pages also refer to 28 High Street. In the later lease of the restaurant, however, the premises are defined as "30 High Street Rottingdean more particularly described in the First Schedule", and the building as "the two shops and four flats above known as 28-30 High Street". The First Schedule refers to "the ground floor flat and basement known as 30 High Street ... and part of the Basement known as 28/30 High Street". Flat 1,originally demised with the other ground floor shop, is defined as "all that ground floor shop No.26 and ground floor flat No.1 (hereinafter called the demises premises *[sic]* forming part of the building known as 28 High Street Rottingdean" (there was a subsequent Transfer of Part of Flat 1 dated 5 December 1980).

6. The provisions relating to the calculation and payment of the service charge are to be found at Clause 2. At 2(2)(a) the lessee is to pay to the landlord one sixth of the landlord's costs, including (insofar as is material):

2(2)(ii) the cost of maintaining repairing decorating and renewing:
(A) the structure of the Building including the main walls drains roofs foundations chimney stacks gutters rainwater pipes and any boundary walls ...
(B) the gas water pipes electric cables and wires and conduits in or under the Building
(C) the entrance drive pathways driveways entrance hall staircases and landings of the Building including the cleaning and lighting thereof and of the carpeting or other covering of the entrance hall staircases and landings.

7. Clause 5(2)(a) contains the landlord's repairing obligations:

5(2) subject to the payment by the tenant of the contributions hereinbefore provided to maintain repair redecorate and renew:
(a) the structure and in particular the main walls drains roofs foundations chimney stacks gutters and rainwater pipes in the building
(b) the gas and water pipes drains and electric cables and wires in under and upon the building and enjoyed or used by the tenant in common with the owners and tenants of any other flats
(c) the entrance driveway communal gardens passages landings and staircases fire escapes and equipment including all fire precautions installations and other parts of the Building so enjoyed or used by the tenant or the other tenants of the other flats in common as aforesaid and the boundary walls and fences of the said Building".

8. The amount of the tenant's contribution is to be calculated and certified by the landlord's agents after 29 September each year. There is no provision for payment in advance or on account. However, there is a reserve fund provision. The tenant's contribution includes, at Clause 2(2)(a)(C)(v), "*such sums as the landlord shall reasonable [sic] consider necessary from time to time to put to reserve to meet the future liability of carrying out major works to the building or the flat with the object as far as possible of ensuring that the contribution shall not fluctuate substantially from time to time*"".

Inspection

9. The Tribunal members inspected the property before the hearing. It comprised a 3 storey mixed commercial and residential block in a terrace of similar properties situated very near the sea front in Rottingdean, with 4 residential units and 2 ground floor commercial units, currently used as a restaurant and shop. According to the Application, the property is believed to have been a private house when first built in the early 1800's. It was then used as a guest house and given a Victorian façade, and then converted to its present layout in the 1970's before the current residential leases were granted.

10. Access to a basement area was through the restaurant, and this led to an outside area at the rear, including a garden demised to Flat 1 on ground floor level. The existing escape route in case of fire was by way of a staircase leading up to a doorway opening through a small door on to a side alley. This basement area was generally in poor condition. The Tribunal members saw the proposed alterations for planned fire precaution works, namely, the enlargement of the side exit door and a new access route through the residential common parts.

11. The 3 upper flats were accessed by a separate entrance between the 2 shops, marked "28". The front door and common parts were run down and in poor decorative order. Flat 1 comprised a studio flat on the ground floor. Flats 2, 3 and 4 were arranged over the 1st and 2nd floors of the building and accessed from the 1st floor landing. Flats 2 and 4 overlooked the front and Flat 3 the rear. Flat 2 had double doors leading to a balcony, which had wooden railings and was surfaced with felt tiles laid by the tenant. Internally, in Flat 2, was evidence of some movement, bowing to the kitchen floor, and water ingress above and below the front bay windows.

12. Externally the property was in poor decorative order with some cracks to the render (not visible internally). Some of the windows were of old timber, and these were in poor condition with rotting cills. Flat 4 had replacement aluminium windows and evidence of a patch repair to one side.

Issues before the Tribunal

13. The Applicant asked the Tribunal to determine the payability of service charges for the years 2004-5 and 2005-6. As a result of Mr Stokes's challenge and the Tribunal's questioning the following issues arose:

(i) The extent of the building to which the tenants' liability to pay service charges relates;
(ii) Whether the tenants are liable to contribute to the cost of proposed fire precaution works to the commercial premises, scheduled as part of proposed major external works;
(iii) Whether the cost of repair works to the balcony carried out in 2005-06 are recoverable;
(iv) Whether the tenants would be liable for any potential cost overruns should the cost of the works escalate.

Facts

14. On the basis of the written and oral evidence before it the Tribunal found the following facts:

15. Mr Dunford, a property investor, is the freehold owner of the property. His business partner Mr Paul Magson helps with management. Mr Dunford retained direct ownership of the shop at No.26. By 2002 Mr Dunford knew the balcony was leaking and defective. In April 2002 he commissioned a report on the structural condition of the property from building surveyor Mr J Foulds, of Andrew Dixons Associates, from which it was apparent that major repair works were required, including the replacement of beams supporting the property, and fire precaution works. In June 2002 a copy of the report was sent to the tenants but no further steps were taken.

16. Concerned at the complexity of the required works, Mr Dunford decided to try and sell the freehold but without success. A builder pulled out of a potential purchase and the tenants did not exercise their right of first refusal. During this period no attempt was made to progress the works.

17. In October 2004 Mr Dunford obtained a specialist fire safety report dealing with fire precaution works, which confirmed that the property was subject to fire safety standards relating to commercial premises and houses in multiple occupation. A detailed Specification of works, including fire precautions, was

not prepared until June 2005. It was necessary to rebuild the shop fronts for which planning permission was required. A planning application to replace the existing shop front and balcony was not made until 23 October 2006. It was suggested that the local authority may insist that the wooden balcony railings must be replaced by cast iron and hat the original character of the shop fronts must be preserved.

18. In July 2005 Mr Dunford took legal advice on the service charge provisions in the leases. He was advised that the balcony was part of the structure of the building but that the windows were the tenants' responsibility. A draft budget for the works totaling £105,456 was not produced until June 2006 by Mr Foulds. Mr Dunford decided to fund the works by including one half of the estimated costs in the accounts for the year ending 29 September 2005 and the remaining half in the year ending 29 September 2006. A notice of intention to carry out works was served on each tenant by his solicitors, Fitzhugh Gates, on 9 March 2006.

19. A meeting was held in May 2006 attended by the tenants, Mr Magson and Mr Foulds, to discuss the works. According to a subsequent letter from Mr Stokes to Fitzhugh Gates, at that time the tenants were concerned about the lateness of the accounts, the delay in progressing the works since the original report of April 2002, the continuing deterioration on the property, the cost of the works, and the fact that the residential tenants were being asked to contribute towards fire safety works to the commercial units.

20. On 7 July 2006, Fitzhugh Gates, sent to each tenant a document headed "maintenance accounts 30 September 2004 to 29 September 2005 and estimated expenditure 2005/2006", together with a written demand to all the tenants for £9,485.50 plus ground rent. These accounts were dated 7 July 2006. This was the first set of accounts received by the tenants since 5 March 2004, when accounts for the year ending 29 September 2003 and estimated expenditure for the year 2003/4 were produced, also by Fitzhugh Gates.

21. It was not clear exactly how the sum demanded of £9,485.50 had been arrived at. The total estimated contribution due from the tenants was stated to be £54,240, including one half of the projected cost of the major works, management fees and insurance. The proportion attributable to the major works was £52,728. This was based on the anticipated cost of the works plus a contingency sum. A spreadsheet showed one sixth of £54,240 due from all 6 tenants. In addition, one fifth of £40 was shown for shop 26 and the 4 flats, plus one quarter of £750 for the 4 flats but not the shops. These additional figures were obscure, and Mr Dunford's solicitor, Mr Druce, could not explain them, even though his firm had produced the estimated maintenance statement.

22. A further set of accounts for the year ending 29 September 2006, and estimated expenditure for 2006/7, in similar form, was sent out on 8 November 2006. The total estimated contribution due was £54,900 including the second half of the cost of the major works. Again, additional costs were attributed to shop 26 and the 4 flats. The total demanded at that time (including the £9,485.50 previously demanded) amounted to £18,339.46.

23. In the meantime, the balcony over the shops was leaking causing water ingress to the ground floor units. Temporary repairs were carried out by builder Mr Jewel in November 2005 and May 2006 at a cost of £380 and £625

respectively. In August 2006 Andrew Dixon Associates charged £205.63 for inspecting this work.

The case for the landlord

24. In answer to questions from the Tribunal about the meaning of "the Building", and whether because of the wording of the leases (and the Land Registry Property Register) the flats were arguably restricted to No.28 only, Mr Bromilow said that, interpreting all the leases together, the building should be taken as a whole and that it was not possible to identify the residential flats as being part of a separate building. If this were the case, the flats would have no right of support and the residential tenants no rights in relation to the maintenance and repair of the ground floor and foundations. Historically, the whole building appeared to have been known as "28 High Street" and this would explain the parcels clause in the leases. Mr Stokes agreed that 26-30 should be taken as one building.

25. Mr Bromilow explained that substantial repair works were required to the property and that this was supported by the surveyor's report and fire safety report. The estimated cost had been prepared by Mr Foulds as an approximate estimate, item by item, based on his knowledge and expertise. The Specification had been put out to tender and 4 tenders had been received, which had not yet been analysed. The lowest tender received was from Anglia Pilbeam in the region of £105,000. The contingency was priced at 10% of the estimated cost.

26. Mr Bromilow contended that under the terms of the lease the tenants had to contribute such sum as the landlord reasonably considered necessary and that the landlord was entitled to ask for the sum demanded as a reserve towards the cost of the major works.

27. In relation to the fire precaution works, Mr Bromilow argued the evidence showed these were necessary, and that relevant regulations had to be complied with, both as to the commercial and residential premises (which were treated as an HMO). The criteria fell to be applied by the environmental health department of the local authority. The fire safety report obtained by Mr Dunford indicated, for example, a 60 minute fire resistance standard, needed to protect the residential flats. Most of the fire precaution works were needed in the restaurant and some in the residential common parts. These works were an integral part of the major works as a whole, and as such, were structural in nature, and fell within the landlord's repairing obligations in the leases.

28. On the question of whether the residential tenants were liable to contribute towards the cost of fire precaution works to the shop units, Mr Bromilow submitted that the leases were clear. The liability was for each tenant to contribute one sixth of the landlord's costs of the works. The building had always consisted of the 2 ground floor shops and 4 residential flats. Whilst it may be that the presence of the 2 commercial units increased the amount of service charges payable by the residential tenants, this did not make the charges irrecoverable or unreasonable: it was simply the consequence of the nature of the property and the terms of the leases.

29. Turning to the balcony repair costs incurred in the year ending 29 September 2006, Mr Bromilow argued that the leases did not oblige the landlord to keep

the property in repair but simply "to repair". The landlord was not in breach. To successfully challenge these costs, Mr Stokes would have to show that he had a claim in damages against the landlord which he could set off against the sum due by way of service charges. It was not enough to say that the cost of the interim repairs was unreasonable due to any delay in progressing the major works. In any event the landlord did not accept that there had been undue delay, given the complexity of the project and the need to consult the tenants.

30. On the question of any potential overruns in the cost of the works as they proceeded, Mr Bromilow contended that the Tribunal had no power to limit the cost to the agreed contract cost. This would require the landlord to bear the costs of any additional works found to be necessary. The lease terms entitled him to recover the one-sixth share from each tenant of the total cost.

The case for the tenant

31. Mr Stokes accepted that the building should be taken as one whole for the purposes of calculating the tenants' one-sixth share. He did not dispute that the major works were necessary. In his view, they were overdue and there had been an unreasonable delay on the landlord's part in that no progress had been made between the surveyor's report of April 2002 and the service charge demand being sent out in March 2006. He was not satisfied with the late production of the maintenance accounts. He did not regard his approach as obstructive; he had been involved with the flat since his late mother purchased it and had always paid service charges when demanded in the past.

32. Mr Stokes's main objection to the service charges in issue was that as a matter of principle and fairness, the residential tenants should not have to pay towards the cost of the fire precaution works that were of benefit only to the commercial units. The works were only required because one of the shops was used as a restaurant, as a result of which the costs of the work would be significantly increased, and he did not regard it as his responsibility to contribute to these.

33. On the question of the lease terms, Mr Stokes contended that the landlord was obliged under Clause 5(2)(c) to carry out works to "*the entrance driveway communal gardens passages landings and staircases fire escapes and equipment including all fire precautions installations and other parts of the Building so enjoyed or used by the tenant or the tenants of the other flats in common*". However, this obligation in respect of fire precautions was not contained in the corresponding tenants' obligation to contribute at Clause 2(ii)(A). Mr Stokes drew the conclusion that as the fire precautions were specifically itemized as the landlord's responsibility that he had no corresponding liability to contribute towards them. Mr Bromilow's reply to this point was that as a matter of construction the list in Clause 5(2)(c) was not intended to be an exhaustive list, and that in any event the fire precaution works were structural, and some were within the common parts, and therefore fell within Clause 2(2)(a)(ii)(A).

34. Mr Stokes did not seek to argue that the overall cost of the major works would be greater as a result of the delay. However, he did contend that it was not reasonable for the tenants to pay for the interim repair works to the balcony carried out in 2006. In his view, the major works should have been carried out

sooner and not put on hold whilst Mr Dunford attempted to sell the freehold. If the works had been carried out earlier, the patch repairs in 2005-06 would not have been necessary. In reply to questions from the Tribunal, Mr Foulds said that the inspection costs represented 3.5 hours of his time @ £50 per hour, and that the work was urgently required as the timber posts on the balcony had weakened and presented a safety risk.

35. Finally, Mr Stokes was concerned that once the works had commenced, the costs could well escalate if further problems emerged and further work became necessary. He asked the Tribunal to determine that the costs should be capped.

Decision

The Building

36. The Tribunal accepted Mr Bromilow's analysis, which was not opposed by Mr Stokes. It decided that, both in reality and for the purposes of repairs and service charges, there was one whole building consisting of numbers 26-30 High Street, Rottingdean, even though the language of the leases suggested that the building was number 28 only. This wording was potentially confusing.

Fire Precaution Works

37. The lease terms were clear in that the tenants were liable to contribute one-sixth of the costs of maintaining and repairing the structure of the building. The lease was poorly drafted around the description of the landlord's responsibility to carry out fire precaution works, in that although it was specifically itemized in Clause 5(2)(c), this precise wording was not mirrored in Clause 2(2)(ii)(C), which contained the corresponding description of the common parts to which the tenants covenanted to contribute.

38. There is no general presumption, when construing a lease, that it will have been intended for a landlord to recoup all his expenditure. However, it was necessary for the Tribunal to consider the leases as a whole and in context. It took the view that the fire precaution works were structural in that they were integral to the building, and thus fell within the cost of repairing and maintaining "*the structure of the Building*" at both Clause 2(2)(ii)(A) and Clause 5(2)(a).

39. There was no exemption for the tenants of the residential leases in respect of the fire precaution works to the commercial premises. In fact the residential tenants will also derive some benefit from the fire precaution works. Although acknowledging that Mr Stokes found it unfair, the Tribunal had no difficulty in accepting Mr Bromilow's argument that all the tenants were liable to contribute one-sixth of the total cost of the works, including the fire precautions, and that this was the consequence of the terms of the leases and the nature of the property.

Interim Repair Costs

40. The Tribunal agreed with Mr Stokes that, even taking into account the complexity of the project, there had been an unreasonable delay on Mr Dunford's part in progressing the works. He had been aware that the property was in disrepair, especially in relation to the balcony, since at least early

2002, many months passed at each stage of obtaining reports, producing a Specification of works, taking legal advice, and corresponding with the tenants. The interim repairs would not have been necessary had the major works been more expeditiously progressed. The Tribunal decided that the costs of these repairs and attendant inspection costs were not reasonably incurred and disallowed Mr Jewel's invoices of £625 and £380, and Andrew Dixon Associate's invoice of £205.63.

Run-on costs

41. It was clear that the Tribunal had no power to determine that any future additional costs which might become necessary as a result of any as yet unknown problems becoming apparent during the course of the major works (when they eventually commence) would or would not be payable. If this does happen, issues may arise as to whether any additional works form part of the same contract, or a new and separate contract, so that further statutory consultation under Section 20 Landlord and Tenant Act 1985 is required, but this is beyond the scope of the current Application.

Service charge demands

42. The Tribunal further considered whether the 2 large service charges demanded in quick succession on 7 July 2006 and 8 November 2006 were payable and reasonable. It shared Mr Stokes's concern over the delay in providing maintenance accounts. The accounts for the year ending 29 September 2005 were not served until 7 July 2006, along with the first of the large demands. They were not certified and appear to have been produced by solicitors. The breakdown of the amounts demanded – totaling £9,485.50 for each of the residential tenants– were not self-explanatory.

43. The Tribunal accepted for the reasons stated above that each tenant would in due course be liable for one-sixth of the actual total cost of the major works, including fire precautions. The evidence as to the likely actual cost was incomplete, because the matter had not progressed to the stage where any sum had been expended. Other smaller items in the accounts of actual expenditure, namely, electricity and insurance, were not in dispute.

44. The evidence of the potential cost of the works was Mr Foulds' draft budget of June 2006. The first stage of the statutory consultation procedure – the Notice of Intention to carry out works – had been served in March 2006, but by the date of the Application (and indeed the hearing), the second stage – the Paragraph (b) Statement – had not been prepared or served. The tenders had not been analysed and the planning application was only in its early stages. This slow progress was regrettable, given the run-down state of the property and the obvious and undisputed need for the works.

45. There was no entitlement in the leases for the landlord to demand service charges on account in advance, even if based on best estimates. The tenants' liability to pay arises after the expenditure has been incurred and the amount of their contributions has been "*ascertained and certified by the landlord's managing agents*" after 29 September each year. Plainly this has not yet been done in relation to the major works, as they have not yet been carried out. It remains possible that the actual costs might increase, for example as a result of any specific requirements of the local planning authority.

46. The Tribunal then considered whether the sums already demanded in relation to the projected costs of the works were recoverable by way of the reserve fund provision in the lease at Clause 2(2)(a)(C)(v). This provides for any advance contributions towards future liability in relation to major works. It is perhaps unfortunate that Mr Dunford (and his advisors) did not consider demanding a regular contribution towards a reserve from 2002 onwards, as he would have been entitled to do, when he first obtained a surveyor's report became aware of the need for the works and their likely extent.

47. The Tribunal concluded that, despite Mr Dunford's lack of forward planning, he was not prevented from demanding the service charges as he has done, in July and November 2006. The relevant lease terms are widely drawn and entitle the landlord at his discretion to demand "*such sums as the landlord shall reasonably consider necessary from time to time ... to meet the future liability of carrying out works to the Building*". The Tribunal accepted that Mr Foulds' estimate of the cost was not unreasonable and provided adequate evidence upon which to base the demands in question. The two demands, although served a few months apart, fell within different accounting periods. Overall it was not unreasonable for the landlord to exercise his discretion in this way, and ultimately the tenants will become liable for their full contribution in any event.

Determination and Summary

48. The tenants are each liable for a one-sixth contribution towards structural works carried out by the landlord at the property, including all fire precaution works.

49. For the year ending 29 September 2006: the sum of £1,210.63 relating to builders and surveyors costs, is not recoverable as it was not reasonably incurred. All other items of actual expenditure (insurance, electricity) are recoverable and were reasonably incurred.

50. The landlord is entitled to demand such sums as he considers necessary for a reserve fund towards the cost of the major works. For the reasons given above the Tribunal determines that one-sixth of half the estimated contribution of £54,240 is payable by the tenants as demanded on 7 July 2006 and a further £9,150 as demanded on 8 November 2006.

51. Other items of expenditure for the year ending 29 September 2007 are not payable until the amount has been calculated and certified in accordance with the terms of the lease.

52. No order is made under Section 20C of the Landlord and Tenant Act 1985 as there was no application before the Tribunal.

Dated 12 June 2007

Ms J A Talbot MA
Chairman