Landlord and Tenant Act 1985 as amended
Section 27A

Case Number:	LON/00AC/LSC/2006/0194
Property:	753A Finchley Road London NW11 8DL
Applicant (Landlord):	Raleigh Close Investments Ltd.
Respondent (Tenants):	Mr. M L and Mrs. I E Ellis
Date of Hearing:	7th and 18th August 2006
Appearances:	Ms. Lorraine Scott of BLR Property Management (Managing Agent) on behalf of the Applicant. The Respondents Mr. Matthew L Ellis and Mrs. Edith I Ellis in person.
Tribunal Members:	Ms. F. Dickie (Chairman) Miss M. Krisko (Professional Member) Mrs. S. Baum (Lay Member)
Date of Decision:	25th September 2006

Summary of Decision

1. The Tribunal finds that a total of £3321.24 is recoverable from the Respondents as service charges in respect of the Applicant's claim, as follows:

Accounting year ending March 2003: £266.67 for insurance. No amount in respect of repairs or management fees is recoverable.

Accounting year ending March 2004: £759.61 for insurance and £141 inclusive of VAT for management fees.

Accounting year ending March 2005: £836.11 for insurance and £152.75 inclusive of VAT for management fees.

Accounting year ending March 2006: £836.11 for insurance, £176.25 inclusive of VAT for management fees and £152.74 for repairs. The Tribunal allowed the Applicant's application to claim actual and not estimated service charges in respect of this year.

The Tribunal finds there is no provision under the Lease for recovery of the costs of these proceedings from the Respondent by way of service charges.

Background

2. The Applicant Raleigh Close Investments Ltd. is the freehold owner of the subject premises known as 753A Finchley Road ("The Property"), and the Respondents are the long leaseholders. By an Order of District Judge Marin dated 18th May 2006 the Applicant's claim no 5BT07166 for unpaid service charges for the accounting years ending March 2003 to 2006 was transferred from the Barnet County Court to the Leasehold Valuation Tribunal.

3. The Applicant's claim under s.27A of the Landlord and Tenant Act 1985 is for service charges in respect of insurance and management fees for the accounting years ending March 2003 to March 2006, and for repairs and professional fees for the accounting year ending March 2006. The issue for the Tribunal is the reasonableness and recoverability of service charges.

4. The Respondents made an oral application under section 20(C) of the Act that the Applicant be prohibited from recovering as service charges its costs in these proceedings.

5. The Property is a first floor flat in a building comprising 3 dwellings ("The Building"). The Tribunal did not carry out an inspection.

The Lease

6. The Respondents hold the Property under a Lease dated 1st July 1971 made between Cuda Limited and Mrs. and Mrs. J. Lucas for a term from 1st July 1971 to 25th March 2119 at the rents and on the terms and conditions therein mentioned. The First Schedule of that Lease prohibits the use of the Property as anything other than a private residence in the sole occupation of the Lessee and his family. Whilst the liability to pay service charges was not in dispute, the Tribunal was required to construe the Lease in determining the ability of the Applicant to recover estimated service charges and insurance costs, and professional fees (namely legal costs) as service charges. A summary of the relevant provisions of the Lease is therefore appropriate:

Insurance

7. The Lessor's obligation to insure the Building is set out in Clause 6(A) of the Lease. Clause 2 requires the Lessee to pay 1/3rd of "the amount which the Lessors may spend effecting or maintaining the insurance of the Building including professional fees against loss or damage by fire explosion storm tempest earthquake and (in peacetime) aircraft and such other risks (if any) as the Lessors think fit..."

8. In Paragraph 2 of the First Schedule the Lessor covenants "Not to do or permit to be done any act or thing which may render void or voidable any policy of insurance of any part of the Holding or may cause an increased premium to be payable in respect thereof..."

Service Charges

9. The Lessees are required by Clause 5(2) to pay 1/3rd of the actual expenditure incurred by the Lessors in carrying out their obligations under Clause 6(B) and by Clause 5(3) to pay 1/30th of the actual expenditure incurred by the Lessors in carrying out their obligations under Clause 6(C). Clause 6(B) contains the Lessor's obligations to maintain and repair the structure of the Building, and Clause 6(C) the Lessor's obligations with regard to the maintenance and repair of the Holding.

10. Clause 6(C)(4) provides that the Lessor will "Without prejudice to the foregoing do or cause to be done all such works installations acts matters and things as shall in the absolute discretion of the Lessors be necessary or advisable for the proper maintenance safety and administration of the Holding".

Clause 6(E) contains a covenant on the Lessor to engage staff and other such persons "for the purposes of performing the covenants on the part of the Lessors herein contained", and provides that all proper fees charges and expenses thus incurred are deemed to be part of the respective costs of fulfilling the respective obligations in clause 6(B) (C) and (D).

11. By virtue of Clause 1, the Holding includes all the land buildings footways and amenity areas and other premises of the property at 735 to 753 (odd numbers) Finchley Road, Hendon (with Title Number MX242873). "The Building" is defined with reference to being a part of the Holding known as numbers 753, 753a and 753b Finchley Road, Hendon.

The Hearing

12. The Tribunal invited the parties to put forward their case on each of the issues of Insurance, Management Fees, Repairs and Professional Fees in turn. The hearing that began on 7th August was rescheduled to 18th August due to emergency evacuation of the hearing centre.

The Evidence

Insurance

13. The Applicant produced copies of a buildings insurance policy for each of the 4 accounting years in question. It was Ms. Scott's case that the cost was incurred on the commencement date of the new policy, which was the 24th March in each year, being the day before the end of the accounting year:

Year end 25th March 2003: Cover for period 24/3/03 to 24/03/04, premium £2182. At the reconvened hearing on 18th August Ms. Scott clarified that (contrary to the Statement of Case) it was the Applicant's case that a bill for £336.67 was sent to the Respondents during the year ending March 2003. That amount, she said, was a 1/3rd share of a half yearly service charge estimate for insurance of £1600, repairs of £300 and management fees of £120. Ms. Scott conceded that further demands for the accounting year ending 25th March 2003 would be irrecoverable by virtue of section 20B of the Landlord and Tenant Act 1985. She argued that estimated insurance costs were recoverable as service charges by virtue of the wording of Clause 2.

Year end 25th March 2004: Cover for period 24/03/04 to 24/03/05, premium £2278.83.

Year end 25th March 2005: Cover for period 24/03/05 to 24/03/06, premium £2508.33.

Year end 25th March 2006: Cover for period 24/03/06 to 24/03/07, premium £2508.33.

14. The Applicant's evidence was that the building of which 753a forms part is insured through brokers in a large portfolio of properties it owns. Ms. Scott was not sure how many properties were in the portfolio, but said it could be hundreds or thousands. She explained that risks (such as terrorism) if covered must be taken out on the entire portfolio, and that the policy could not be tailor-made - if the Applicant has higher risk properties then that cover would have to be taken out across the whole portfolio. In justifying the Applicant's approach, Ms. Scott relied on the decision of the Court of Appeal in the case of Berrycroft Management Limited –v- Sinclair Gardens Investments Limited [1997] 1 EGLR 47.

15. Ms. Scott explained that the same Mr. Brooke had worked for consecutive managing agents – having moved from David Glass Associates to Basicland, then to Temple Property Consultants, and finally to BLR in 2004. She said however that the Applicant directly appointed independent brokers GHBC and that the BLR did not provide the insurance (it was not regulated by the FSA to do

so). Ms. Scott could not say why the level of insurance on properties 742 and 749 appeared to be lower than for 753, but said that BLR usually valued the rebuilding cost for insurance purposes every 5 years. Ms. Scott also relied on the Respondents' letter dated 18th May 2006 as an admission that the claim for insurance costs for the period 24th March 2003 to 25th March 2006 was accepted. Ms. Scott pointed out that no alternative quotations had been produced by the Respondents.

16. Mrs. Ellis gave evidence that in 2002 they received a letter saying that the then managing agent was being replaced by BLR, and that soon after June 2002 BLR wrote asking them to suspend service charge payments whilst they got on top of their files. Mrs. Ellis said that from that point they received no further service charge bills and it was not until January 2005 that they started receiving bulk invoices from BLR. She said these were difficult to manage and that this agent had not visited their flat or attempted to build up a relationship. She said she felt the only way they could have a say was to withhold payment.

17. Mrs. Ellis accepted that insurance costs had to be paid to the freeholders, but said she wrote the letter dated 18th May 2006 in a panic and it was not an admission of the Applicant's claim. She did not agree the sum of the insurance, only that insurance was necessary. She complained at the rejection of an insurance claim made against the Applicant's policy in 2001 after bricks from an interior wall fell down without warning. Carpets, a computer and clothes had been damaged.

18. Mrs. Ellis said they were not happy about the Applicant's choice of insurer and found it suspect that David Glass Limited, the managing agent at one point, is also the insurance broker. They were also suspicious about the choice of AXA and Groupama as insurers. The Respondents did not produce any alternative quotes for insurance or other evidence to show that the premiums were unreasonable. Mrs. Ellis said the insurance was excessive and the companies used were not independent.

Management Fees

19. Year end 25th March 2003: with regard to service charges (other than insurance) Ms. Scott conceded on behalf of the Applicant that the terms of the Lease (Clause 5(2)) did not entitle the Landlord to recover estimated amounts. In addition therefore to her concession as to the effect of section 20B of the Landlord and Tenant Act 1985 making further unbilled service charges for this year irrecoverable, she accepted that the element of the invoice for £336.67 that related to estimated management charges (ie. £40) was not recoverable.

20. Year end 25th March 2004: Ms. Scott referred to accounts recording a management fee for the Building of £423 charged by Temple Property Consultants, the previous managing agents, at the year end.

21. Ms. Scott referred to invoices from Basicland Registrars Limited for management of the Building for the remaining accounting years in dispute:
Year end 25th March 2005 £458.24.
Year end 25th March 2006 £528.76.

22. Ms. Scott submitted on behalf of the Applicant that these management fees were a reasonable reflection of the services performed for the Building, which included accounting, issuing service charge invoices and reminders, paying and collecting ground rent, arranging buildings insurance, ensuring compliance with current legislation, dealing with Lessees enquiries, organising inspections and repairs. Ms. Scott said that the invoices produced were for management of the whole Building (number 753), not just the Respondents' flat.

23. The Respondents argued that the Building had been badly managed, maintenance and repairs had not been attended to, and their insurance claim refused. They stated that they had received no invoices between June 2002 and January 2005. They believed the charges were too high, and that they were subsidising other blocks as no repairs or maintenance had been carried out to their Building but they were charged a management fee regardless.

Repairs

24. Ms. Scott referred to an estimated bill for £2566.07 for building work that had not been carried out. She said this amount had been re-credited to the Respondents' service charge account and the building work rescheduled. Ms. Scott said that the bill for these major works had not been raised until after the County Court claim had been issued and this item did not form part of the Application to the Tribunal. The Applicant claimed the sum of £152.75 from the Respondents, being their share of the total expenditure on the Building of £458.25 in respect of repairs carried out in the year ending March 2006. Invoices were produced for work costing £52.87 and £405.38 to the drains at the Building and Ms. Scott argued that these amounts were reasonable and reasonably incurred.

25. Mrs. Ellis said that she knew a neighbour had had to get something done to the drains, but did not know jetting had been done. She felt very frustrated that there were so many repairs that had not been done.

Professional fees

26. Ms. Scott originally claimed that the amount of £33.33 is recoverable as a service charge under Clause 6(4) of the Lease, being 1/3rd of the County Court allocation fee of £100 in respect of the claim issued against the Respondents. However, at the hearing she conceded that the Applicant could not recover 1/3rd of these costs under Clause 5(2) as Clause 6(B) placed no obligation on the

Lessor to take proceedings against the Lessee to recover service charge arrears and the entitlement to recover costs under Clause 6(E) only applies for the purposes of performing a covenant on the part of the Lessor.

27. Ms. Scott therefore sought a determination as to whether 1/30th of such costs were recoverable as service charges under the Clause 5(3) as expenditure incurred under Clause 6(C)4. She confirmed that the Applicant was not seeking interest in these proceedings and would need to seek such an order from the County Court. She indicated that BLR's costs in this case would be £250 plus VAT for preparation and £600 plus VAT for representation at the hearing.

Determination

Insurance and Management Charges

28. The Tribunal notes that the Lessor is only obliged under the Lease to insure the Building and the Lessor's own contents (in the common parts). Contrary to the apparent understanding of the Respondents, the Lessor is not obliged to insure the Lessee's contents (and the Tribunal does not consider it likely it has ever done so). The Tribunal made it clear to the Respondents that it did not have jurisdiction at the hearing to determine the merit of any claim they may have for loss arising from the incident in 2001 from which the insurance claim arose. It is open to the Respondents' to seek legal advice on their position in relation to that matter.

29. It is not necessary for a Lessor to obtain the cheapest insurance quotation. The case of Berrycroft cited by Ms. Scott confirms this position. The Tribunal considered whether it was reasonable of the Applicant to include this Property in a portfolio that included higher risk properties, particularly in light of the Lessees' covenant only to use it as a private family residence, and the Lessor's covenant in Paragraph 2 of the First Schedule not to do anything which might cause an increased insurance premium. However, the Tribunal was satisfied that an "act" referred to in the First Schedule must be an act referable to the Property, and not to the choice of insurance from the market and the manner in which it was effected. The Tribunal found that as a matter of law the Lessor is entitled to seek insurance for this Property as it does as part of its large portfolio.

30. The Respondents had not produced any estimates for alternative insurance of the Property. GHBC are independent brokers and the Tribunal was not persuaded of any conflict of interest, improper relationship with the Lessor or bad faith. The Tribunal was satisfied on the evidence that the insurance cover obtained through brokers GHBC who go to the market on an annual basis was not unreasonable, and that the Respondents are liable to pay one third under the terms of the Lease. The sums for insurance the Tribunal therefore finds are reasonable and payable by the Respondents for the years ending March 2004, 2005 and 2006 are £759.61, £836.11 and £836.11 respectively.

31. The Tribunal found that the wording of Clause 2 of the Lease permitting the Lessor to recover the amount which it "may spend effecting or maintaining the insurance" was such as to permit the Applicant to recover by way of service charges the estimated cost of insurance. The right to recover other estimated service charges was specifically prohibited by the wording "actual expenditure" in Clauses 5(2) and (3), but there was nothing in the wording of Clause 2 that would require such a restrictive construction in relation to the cost of insurance. The amount of £266.67 in respect of insurance for the year ending March 2003 is reasonable and recoverable from the Respondents, the Tribunal being satisfied on the balance of probabilities that an invoice that included that estimated amount was received by them during the year in question.

32. The standard of management of the Property fell short of the Respondents' expectations. However, in the expert opinion of the Tribunal the management fees ranging from £120 to £150 + VAT per unit per annum were in the normal range and were a reasonable reflection of the limited level of services that were in fact carried out by the Lessor, in spite of the fact that repairs were not carried out other than in the most recent year. The Tribunal finds that the sums claimed by the Applicant for management of the Building are reasonable and that one third of those sums for the years ending March 2004 – March 2006 are recoverable from the Respondents (£141 inclusive of VAT for the year ending March 2004, £152.75 inclusive of VAT for the year ending March 2005 and £176.25 inclusive of VAT for the year ending March 2006).

Repairs

33. There was no evidence before the Tribunal that the amounts claimed in respect of repairs for the year ending March 2006 were unreasonable. The Tribunal finds that the sum of £152.74 is recoverable from the Respondents as claimed by the Applicant. The Respondents claimed that necessary repairs had not been attended to, and that may be so. However, the Applicant's claim under this head only relates to the items of repair to the drains that were actually carried out. The Respondents have not been asked to contribute to repairs that have not been done. They are free to take legal advice about their options should they be of the opinion that the management of the Property is inadequate.

Professional Fees

34. The Tribunal finds that a proportion of the County Court allocation fee is not recoverable from the Respondents as a service charge. On a proper construction of Clause 6, these costs (in recovering insurance for the Building, management fees for the Building and the cost of repairs to the Building) are referable to the management of the Building, and not to management of the Holding. They therefore do not fall within costs recoverable in Clause 6(C)4. An equivalent provision does not exist in Clause 6(B) and as conceded by Ms. Scott

recovery of these costs is not therein permitted. As further admitted by Ms. Scott, Clause 6(D) only relates to costs referable to the Landlord's performance of positive covenants in the Lease. No such covenant exists to take these proceedings and the costs cannot be recovered therein either. It is the finding of the Tribunal that there is no provision in the Lease entitling the Landlord to recover legal costs in these proceedings. It is therefore not necessary for the Tribunal to consider the Respondents' application under s.20(C).

CHAIRMAN .....

DATE 25th September 2006

Ms. F. Dickie
Miss M. Krisko
Mrs. S. Baum