LON/00BK/NSI/2003/0109/01
LON/00BK/LSL/2003/0015

DECISION OF THE LEASEHOLD VALUATION TRIBUNAL ON AN APPLICATION UNDER SECTION 19(2A) & 27a & 20C OF THE LANDLORD AND TENANT ACT 1985

Applicants: Ionic Properties & Lessee's of Melcombe Regis Court

Respondent: Ionic Properties & Lessee's of Melcombe Regis Court

Re: Melcombe Regis Court, 59 Weymouth Street, W1N

Application received: 9th September & 1st December 2004

Hearing date: 5th, 6th & 7th April 2004

Appearances:

Ms M	Stacey	Counsel
Mr A	Georgiou	Shranks Solicitors
Mr J	Grey	Witness FRICS
Mr B	Maunder-Taylor	Surveyor
Ms R	Shah	Flat 22
Ms A	Shah	Flat 41
Mr C	Allinson	Flat 34
Mr L	Weiss	Flat 35
Mr S	Young	Flat 42
Mr J	Manning	Flat 36

Members of the Leasehold Valuation Tribunal:

Mr N Nicol - Chairman
Mr P Roberts DipArch RIBA
Mrs M Colville JP LLB

IN THE LEASEHOLD VALUATION TRIBUNAL Ref: LVT/00BK/NSI/2003/0109/01

DECISION

re: Melcombe Regis Court, 59 Weymouth St, London W1N 3LH

Lessors	:	Ionic Properties Ltd.
represented by	:	Ms M Stacey of counsel
Lessees	:	see separate list
represented by	:	Mr BR Maunder Taylor FRICS

Tribunal: Mr NK Nicol - Chairman
Mr PS Roberts DipArch RIBA
Mrs MB Colville JP LLB

1. Melcombe Regis Court is a 7-storey block with 58 leasehold flats, and four shop units on the ground floor, in the Marylebone area of central London. The freehold is owned by Howard de Walden Estates. There is a head lease currently owned by North Square Properties, out of which there is a sub-lease for the residential parts currently owned by Ionic Properties, one of the parties to these proceedings. Ionic Properties are, in turn, the landlords to the lessees who are the other parties to these proceedings.

2. Ionic applied on 5th September 2003 to the Leasehold Valuation Tribunal for a determination as to the reasonableness of service charges incurred in the years 1999-2002. The lessees in turn applied on 30th November 2003 for a determination as to the payability of some of the same service charges and an order that the costs of these proceedings may not be added to the service charge. The Tribunal inspected the property on the morning of 5th April 2004 and a hearing was held starting later the same day and continuing on 6th and 7th April 2004. Evidence was heard from Mr Jeremy Grey MRICS of Barnett Baker (Managements) Ltd, the managing agents acting on behalf of Ionic, and two of the lessees, Mr Christian Allison and Mr Jeff Manning. A witness statement was also provided from Mrs Deborah Eatock who could not attend due to illness. Submissions from the two representatives, Ms

Stacey and Mr Maunder Taylor, supported by written skeleton arguments, were heard on 4th May 2004.

The Law

3. It is important to note that the Leasehold Valuation Tribunal is a creature of statute, which means that it has only the power to determine those issues which statute specifically sets out. Ionic's application is governed by s.19 of the Landlord and Tenant Act 1985, the relevant parts of which state as follows:-

> (2A) A tenant by whom, or a landlord to whom, a service charge is alleged to be payable may apply to a leasehold valuation tribunal for a determination–
>
> (a) whether costs incurred for services, repairs, maintenance, insurance or management of any specified description were reasonably incurred,
>
> (b) whether services or works for which costs were incurred are of a reasonable standard, or
>
> (c) whether an amount payable before costs are incurred is reasonable.

4. The Landlord and Tenant Act 1985 was amended by the Commonhold and Leasehold Reform Act 2002. The amendments came into force after the date of Ionic's application but before that of the lessees'. The amendments included the repeal of s.19(2A) and the insertion of s.27A, which governs the lessees' application and the relevant parts of which are as follows:-

> (1) An application may be made to a leasehold valuation tribunal for a determination whether a service charge is payable and, if it is, as to–
>
> (a) the person by whom it is payable,
>
> (b) the person to whom it is payable,
>
> (c) the amount which is payable,
>
> (d) the date at or by which it is payable, and
>
> (e) the manner in which it is payable.
>
> (2) Subsection (1) applies whether or not any payment has been made.
>
> (3) An application may also be made to a leasehold valuation tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any

specified description, a service charge would be payable for the costs and, if it would, as to–

(a) the person by whom it would be payable,

(b) the person to whom it would be payable,

(c) the amount which would be payable,

(d) the date at or by which it would be payable, and

(e) the manner in which it would be payable.

5. The lessees' additional application that the costs of these proceedings are not be added to the service charge is governed by of s.20C of the Landlord and Tenant Act 1985, which has not been repealed or amended by the Commonhold and Leasehold Reform Act and the relevant parts of which state:-

(1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a ... leasehold valuation tribunal ... are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant ...

(3) The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.

The Issues

6. When the applications were originally issued, there were a large number of items in dispute between the parties. Complaints were made on behalf of Ionic that the lessees had not given sufficient particulars of their case while the lessees complained that they had been given disclosure which was either insufficient or came late – these complaints are considered further in relation to the lessees' s.20C application below. In any event, issues were being resolved right up to and during the hearing before the Tribunal. It is understood that Mr Maunder Taylor has had correspondence with Ionic's solicitors which have dealt to all parties' satisfaction with those items of dispute other than those dealt with below. There is no point in the Tribunal pronouncing on issues which have been settled and therefore the Tribunal determines the remaining issues as set out in the following paragraphs.

Major Works

7. In around early 1998 the Baldwin Electrical Co., an electrical contractor commonly used by the managing agents, Barnett Baker, for electrical work in the property, identified the wiring in the whole building as being in a dangerous state. The wiring had been in place since the construction of the building in the 1930s and now needed replacement. In discussions with Barnett Baker, the Residents Association had also identified some of the lighting as being poor and, in places such as the staircases, dangerous. A questionnaire was sent to all lessees for their comments. The Brian Hoare Partnership, consultant electrical engineers, were instructed to inspect and drew up a specification dated 1st January 1999 which included substantial electrical work and consequent redecoration works. Barnett Baker then sought tenders for the works from five contractors. An additional contractor, Acorn, was invited to tender following a suggestion from one of the lessees, Emma Vergette.

8. By a notice dated 6th December 1999 Barnett Baker notified the lessees of the intended works in compliance with the consultation requirements under s.20 of the Landlord and Tenant Act 1985, although there was also other consultation with the lessees which included the specification being sent to the Residents Association for their comments and adjustments being made as a result. It was proposed that the work be carried out at a total cost of £149,797. The notice itself did not provide a breakdown of this cost, although a covering letter stated that 10% had been allowed for fees. According to Mr Grey, the sum broke down as follows:-

Westrow Services (main contractor)	£127,088
Frankham Associates (planning supervisor)	£1,292
Brian Hoare (specifier/supervisor of electrical works)	£2,128
Barnett Baker (project managers, 12% decs, 2.5% electrics)	£9,289
Contingencies	£10,000

Apart from Ms Vergette, no lessees responded to the proposals by 15th January 2000, the deadline set out in the notice. Mr Manning sent some comments and questions in May 2000 which started a lengthy correspondence in which Mr Grey

said he responded fully to the lessees' concerns while the lessees maintained that they were not satisfied with much of what he did say in response.

9. On 16th June 2000 a contract was issued to Westrow Services by Brian Hoare Partnership acting on behalf of Ionic. The form of contract was the Model Form of General Conditions of Contract recommended by the IMechE, IEE and the Association of Consulting Engineers MF/1 1988 Edition, subject to a number of special conditions specified in Brian Hoare's letter, including:-

14.2 The Works are to commence no later than the 8 May 2000 and be completed 20 calendar weeks thereafter.

34.1 Contract value to be paid or deducted for each week of delay – £500 per week.

34.2 Maximum amount which payments or deductions shall not exceed – £5,000.

36.1 The Defects Liability Period shall be 12 months after taking over.

40.1 Applications shall be made against the value of the Works completed and the value of unfixed materials on site. Payment shall be made with a retention of 5%, 50% of the retention being released at Practical completion and the remaining 50% at the end of the defects liability period.

10. The total contract cost actually turned out to be £156,962.74 which is 4.78% higher than the budgeted cost. This was partly due to the discovery during early 2000 of asbestos in the basement ceiling which had to be removed before the main work could continue. Specialist contractors, Progressive Asbestos, were instructed separately to deal with this. According to Mr Grey, the cost was also increased due to extra works carried out at the lessees' request, such as putting up heavy anaglypta paper on the walls instead of lining paper and sanding the oak corridor floors to their original colour.

11. The majority of leases at the property have an unusual service charge clause which does not allow Ionic to increase the basic service charge more often than every five years. This commonly resulted in deficits on the annual service charge

account which had to be funded by Ionic. It also meant that items such as the major works programme would not be funded in advance other than by Ionic or by special arrangement with the lessees. Mr Grey consulted the Residents Association and obtained their agreement that the cost of the electrical and redecoration works would be paid by the lessees in advance by stage payments. In the event, and principally due to ongoing disputes over the progress of the works as pursued in the aforementioned correspondence between the lessees and Barnett Baker, some of the payments were not made. This left Barnett Baker without funds for the works. Ionic did not provide any funds to help cover the shortfall and delays ensued while the contractors refused to continue work without payment.

12. By the time of the Tribunal hearing, the lessees had three principal complaints relating to the redecoration works, namely:-

(a) Mr Allison drew up a list of 10 items which he called a snagging list, i.e. a list of items which he said showed the redecoration works had not been completed and which should not be charged for unless they were remedied and then not in excess of the original contract cost.

(b) The work was substantially delayed but the penalty clauses built in to the contract (paras 34.1 and 34.2 set out in para 9 above) were not applied.

(c) Barnett Baker originally estimated their fees for their project management at £3,000 + VAT but ultimately charged £5,000 + VAT which the lessees claimed was unreasonable in amount.

(a) Snagging items

13. Mr Allison's complaints of snagging are as follows:-

1) "Floorboards have been coarsely sanded to remove existing finish." Mr Grey said that the lessees were expecting too high a standard of finish for the works, particularly given the cost – in the final account, the only elements for this work were £675 for "Industrial stripping of floors (equipment hire)" and £749 for "Staining to floors". However, on inspection, the Tribunal noticed that there was some dust and debris under the varnish in a number of places along the corridor floors to the common parts, suggesting that the contractors had not prepared the surface properly before varnishing. While the standard

of the work in general appeared to be commensurate with the amount expended, this does not excuse such inadequate preparation.

2) "The varnish finish to the staircases is unacceptable." On inspection, the Tribunal noticed a much greater problem with dust and debris under the varnish on the staircases than had been evident on the floors. However, it was not clear why there had been any varnishing of the stairs at all. It was never part of the specification and nothing has been charged for it. Since there is no cost for this work, the lessees have not been and will not be charged for it. Therefore, there is nothing for the Tribunal to rule on as having been reasonably or unreasonably incurred for this item.
3) "Caulking to be made good between skirting and wall finishes." The Tribunal did note one or two small areas where the caulking appeared to be missing or damaged but this work had been done up to four years earlier. Mr Grey said that this work had been done adequately at the time and there is no evidence that the minor defects which exist now are not the result of normal wear and tear over the intervening period.
4) "White painted skirting was completed prior to varnishing of floors. In several locations this has resulted in stain splashes to the skirting. This requires to be cleaned and repainted as necessary." Mr Grey suggested that the brown marks on the white skirting were down to the usual regular cleaning service provided to the common parts. The Tribunal felt he was being disingenuous. The Tribunal can only agree with Mr Allison on this point, having seen the marks on the skirting on inspection. The correct course of action would have been to have the additional preparation and painting done by the original contractors or by new contractors with the cost being deducted from the amount retained out of the contract sum by Barnett Baker for such snagging items.
5) "Fire-door frames have an unacceptable standard of finish, where these are white emulsion on one side and wood varnish on the other." This refers to the doors at the end of each landing corridor (although they are not actually fire doors). On inspection, the Tribunal would have to agree with Mr Allison's comment on this point. Remedial work would be simple and could have been dealt with in the same way as suggested above for the skirting.

6) "All staircase handrails were not removed prior to polishing as per the specification, and hence their fixings have been painted over." This appears to be based on a misunderstanding on the lessees' part since this work was not part of the specification. Again, the lessees are not being charged anything and so there is nothing for the Tribunal to determine.

7) "Lift doors should have brass effect paint which was hand applied removed. Metalwork to be properly cleaned and degreased prior to refinishing with a spray applied paint for an acceptable finish." The paintwork to the lift doors was the only item for which Mr Grey himself expressed any disquiet. He said that the paint used was not what he had expected but, in response to suggestions from the lessees, he also said that spray-painting was unlikely to have been feasible in situ and it would have been much more expensive and disruptive to have had the lift doors removed and spray-painted elsewhere. While the preference on both sides for a different finish to the lift doors might be understandable, the work done appeared on inspection to have been adequate and the Tribunal is not satisfied that this can amount to a snagging item which the contractors should be obliged to remedy or pay for.

8) "All locks to be replaced to the riser cupboards further to removal of these for the rewiring works." Again, this item was not in the specification and the lessees are accordingly not incurring any charge in respect of it.

9) "Any loose cables to be re-clipped further to completion of decoration works." The Tribunal did see some loose cabling on inspection but, again, could not be satisfied that this was not the result of normal wear and tear.

10) "Carpets should have been re-laid centrally to the corridors." In the Tribunal's opinion, the lessees are here urging a counsel of perfection which goes beyond what is necessary or reasonable. The Tribunal agrees with Mr Grey that the carpets are laid as close to the centre of each corridor as is reasonably practicable.

14. The lessees had understood Mr Grey to be retaining the sum of £15,000 out of the original contract sum until all snagging items had been dealt with. They claimed, albeit without any supporting evidence other than Mr Allison's "guestimate", that this would be the cost of remedying the items on Mr Allison's list. In fact, it

came out during the hearing that Mr Grey had released the final payment to the contractors some time earlier so that there is no retention left. In the light of the Tribunal's comments on some of the items above, it seems imprudent for him to have released the whole sum and retained nothing at all.

15. The Tribunal's conclusion is that there are some snagging items but they would not cost anything like £15,000 to remedy. Those items are the dust and debris caught under the varnish in some areas of the corridor floors, the varnish marks to the skirting and the finish to the corridor door frames. Doing the best it can, the Tribunal would estimate the cost of remedying these items as around £1,750 on the basis that it would take two men about 7 working days to cover the work on the five floors in question.

(b) Delay

16. The works were originally intended to take 20 weeks from May 2000 but the certificate of practical completion was not issued until 6th September 2001. Some delay was caused by the asbestos removal, although the lessees claimed that it had been discovered early enough that the necessary delay was actually already incorporated into the 20-week contract period. According to Mr Grey, the remaining delay was caused by:

(a) Variations to the specification for the works which he initiated mostly in response to requests from the lessees; and

(b) A lack of funding from the lessees or Ionic. Mr Grey said he asked Ionic for funds but did not receive any.

17. Ms Stacey submitted that Mr Grey was under no obligation to seek extensions of time for the works from the contractors and, even if he had, he would not have been able to justify them since the causes of the delay were outside his control or that of the contractors. However, there are two errors in this submission. Firstly, under the contract it was not for Mr Grey to seek extensions but the contractors. Mr Grey said that he discussed the time for the works during on-site meetings with the contractors but the fact remains that the contract provided for the contractors to make written requests for extensions but they did not do so. Secondly, there is a

confusion between Barnett Baker and Ionic. Circumstances may well have been out of Barnett Baker's control but they were not parties to the contract or these proceedings. Matters were not out of Ionic's control in that they could have provided funding for the works as, effectively, the lease obliges them to do when the service charge account is in deficit.

18. The contractors did not ask for any extensions of time and the contract period was exceeded. Therefore, the penalty clauses could have been applied. If the contractors could have relied on the defaults of others to avoid the penalty clauses, this was at least in part due to the failure of Ionic to provide funds to cover the shortfall. In the circumstances, the Tribunal concludes that an amount equal to the sum which could have been applied in penalties for delay, namely £5,000, was not reasonably incurred.

(c) Barnett Baker's fees

19. The lessees submitted that Barnett Baker were bound by their original statement that their fees would be £3,000 + VAT. However, the Tribunal can find no evidence to suggest that they are so bound. This figure was mentioned in documents which clearly refer to estimates, not final sums. The Tribunal accepts Mr Grey's assertion that the work involved for his firm in dealing with the major works, including the substantial correspondence and meetings with the lessees and contractors, could be valued at substantially more than the eventual fee of £5,000 + VAT. That fee is, in turn, substantially less than the amount of £9,289 allowed for at the time of the s.20 notice and amounts to approximately 4% of the original contract sum. Therefore, the Tribunal determines that Barnett Baker's fees of £5,000 + VAT have been reasonably incurred and are reasonable in amount.

Replacement Light Fittings

20. In 2001 and 2002 Baldwin Electrical was instructed by Barnett Baker to attend to some faulty light fittings in the common areas of the building. The lessees pointed to one of Baldwin's invoices dated 1st March 2002 which stated,

> "Visited site and found four common parts lights out and one making loud rattling noise. Disconnected noisey (*sic*) fitting and checked and found that

electronic side of fitting is faulty and require new fitting with integral maintained emergency lighting unit. All fittings require replacement."

The invoice goes on to refer to other visits and other work replacing lights. There is then another invoice dated 18th April 2002 which refers to further visits to replace lights and faulty fittings and states,

"Would advise that if routine maintenance is not carried out to emergency light fittings and they are not drained down on a regular basis it severely reduces lift of battery pack and control gear and also does not meet with regulations."

21. The lessees maintained that the Baldwin invoices showed faulty work by the electrical contractors, Westrow, who carried out the major works in 2000 in that their work had to be corrected within such a short period of time. They said that Mr Grey should have got the supervisor in to inspect the works and charge any remedial work to the original contractors. In fact, Mr Grey said that he did talk to Brian Hoare whose opinion was that the work to be done by Baldwin constituted a maintenance issue and was not evidence of faulty work by the original contractors.

22. The Tribunal is not satisfied that the cost set out in the Baldwin invoices was unreasonably incurred. The Tribunal cannot agree with the lessees that the Baldwin invoices show on their face that the original electrical work was faulty, particularly given the comment in the April invoice about routine maintenance which would only have been a relevant comment if Baldwin's work included maintenance as opposed to remedial work. Mr Grey, as the lessees pointed out, is not an electrical expert and did the right thing in consulting Brian Hoare. He is entitled to rely on the opinion he obtained by doing so. Accordingly, the Tribunal considers that the cost of the replacement light fittings was reasonably incurred.

Insurance Commission

23. Although there were variations between the terms of some of the relevant leases governing the relationship between Ionic and the lessees, the insurance clause was common to all and read as follows:-

3. THE Lessor HEREBY COVENANTS with the Lessee as follows:-

(1) At all times during the term hereby granted to insure and ... keep insured the building and the Lessor's fixtures and fittings therein against loss or damage ... in some Insurance Office of repute ...

24. Ionic was in turn subject to a covenant in its lease with North Square Properties which read as follows:-

3. THE Tenant HEREBY COVENANTS with the Landlord ... that the Tenant will throughout the said term:- ...

(19) (a) Insure and keep insured ... the demised premises against loss or damage ... in an insurance office of repute to be approved by the Landlord and through the Landlord's agency ...

25. In their turn, North Square Properties was subject to a further covenant in its lease with Howard de Walden Estates which read as follows:-

II. AND the said Lessees hereby covenant ... as follows ...:– ...

(6) That the said lessees will at their own expense forthwith insure or cause to be insured the buildings on the said demised premises against loss or damage by fire in the joint names of the Lessor and of the said Lessees and (except with the previous consent in writing of the Lessor or their agent) in no other names or name in the Alliance Assurance Company for Insurance in London or some other office for insurance in London or Westminster to be appointed in writing by the Lessor or by their agent ...

26. The property is currently insured with Royal & Sun Alliance in the name of North Square Properties. Royal & Sun Alliance is, of course, the successor company to the Alliance Assurance Company and Howard de Walden continue to require insurance to be carried out through them. Ionic pass the entire cost incurred by North Square Properties through to the service charge account. There is no dispute that Royal & Sun Alliance satisfies the requirement that the property be insured in an insurance office of repute but the lessees object to two elements, the first of which is commission.

27. Howard de Walden Estates receive 16.5% commission from Royal & Sun Alliance for placing the insurance with them. However, they carry out no actual brokerage, claims-handling or other function in relation to the insurance. In *Williams -v- Southwark LBC* [2000] EGCS 44 Lightman J. held that the landlord was entitled to retain 20% of the insurance premium because it represented the costs of handling claims which they did on behalf of the insurers. It was common ground between the parties, accepted without comment by Lightman J., that a further 5% discount as a loyalty bonus could not be retained by the landlord. It seems to the Tribunal that Howard de Walden's commission falls within the latter category. In the Tribunal's opinion the commission cannot be regarded as a cost which has been reasonably incurred within the meaning of s.19(2A) for the purposes of the service charge.

28. Ms Stacey pointed out that Ionic themselves did not receive any commission. She submitted that Ionic simply passed on the cost which they were obliged to incur in accordance with their obligations under the lease governing their relationship with North Square Properties. However, Ionic's obligation to the lessees under clause 3(i) is to insure, for which they may then charge the lessees under the service charge provisions of the lease, not to pass on the cost of insurance as incurred by them. Howard de Walden's commission is not part of the cost of actually insuring the property.

Insurance Premium

29. The lessees claimed that the insurance premium charged by Royal & Sun Alliance substantially exceeded market rates and thereby was of an unreasonable amount. The renewal premium for 2003 was £30,319.06 (or £24,061.72 excluding Howard de Walden's commission) whereas, as evidenced by the lessees, Zurich quoted £18,987.94 on 4th February 2004 and Norwich Union quoted £22,522.27 on 27th February 2004.

30. Ms Stacey pointed out that, in accordance with the analysis of the Court of Appeal in *Berrycroft Management Co Ltd -v- Sinclair Investments (Kensington) Ltd* (1997) 29 HLR 444; [1997] 1 EGLR 47, there is no term of reasonableness implied

into the insurance obligation under the lease. However, the Tribunal does have to be satisfied that the insurance cost has been reasonably incurred in accordance with s.19(2A). As stated by the Lands Tribunal in *Forcelux Ltd -v- Sweetman* (2001), at para 41 of the judgment transcript, "It has to be a question of degree, and whilst the appellant has submitted a well reasoned and, as I have said, in my view a correct interpretation of 'reasonably incurred', that cannot be a licence to charge a figure that is out of line with the market norm."

31. In the Tribunal's opinion, the lessees' evidence does not show that Ionic has charged a figure which is out of line with the market norm. Both Zurich and Norwich Union's quotes are subject to the usual conditions, including a survey of the property. The lessees pointed out that they had provided a claims history but that only went back to 1998 which excluded problems with fires which had occurred earlier. On the other hand, once Howard de Walden's commission is removed from the equation, it is worth noting that Royal & Sun Alliance do not charge significantly more than Norwich Union's quote.

32. Also, there is a gap of many months between the implementation of Royal & Sun Alliance's cover and the alternative quotes, during which market movements might have changed the appropriate sums to be charged. Mr Maunder Taylor submitted that Ionic was obliged to market test the insurance premium on a regular basis whereas Mr Grey was unable to say if or when the actual premium had been so tested. Of course, if a landlord does not market test, then they run the risk of falling foul of the approach suggested in *Forcelux*. However, in the Tribunal's opinion, a failure to market test cannot of itself constitute a breach of the lease nor render the premium unreasonable.

Insurance Excess

33. In the 2002 service charge accounts there is an amount of £3,000 for "Insurance excesses". According to Mr Grey, there is an excess of £500 for each insurance claim and so £3,000 would relate to six excesses on six claims paid out by the insurers. Mr Manning did a great deal of work checking through the service charge accounts and could not find a sufficient number of claims to explain this sum.

Therefore, the lessees claim that it has not been reasonably incurred.

34. Mr Grey's evidence was that, if there were not sufficient insurance claims in the preceding year to justify the sum, then it must represent excesses from claims in previous years. Therefore, the Tribunal looked at the claims history dating back to 1998. For the year 2002, there were five insurance claims but only two were paid out. Therefore, there were only two excesses, amounting to £1,000, rather than the £3,000 charged. The problem is that the total number claims paid out for the preceding three years exactly equals the number of excesses charged for in the accounts for those years. Therefore, there is nothing to justify the amount in the 2002 accounts. Therefore, the Tribunal determines that £2,000 for the insurance excesses for the year 2002 was not reasonably incurred and is not payable.

Pest Control

35. The service charge accounts for the year ending on 30th September 2001 include an amount of £3,201 in respect of "Pest control". According to Mr Grey's witness statement, this figure is made up of the following sums:-

Grey's figs	Period	M-T's figs
£213.75	To 5 September 2000	---
£641.26	6 September – 5 December 2000	£465.09
£641.26	6 December 2000 – 5 March 2001	£641.26
£641.26	6 March 2001 – 5 June 2001	£641.26
£666.59	6 June 2001 – 5 September 2001	£666.59
£427.51	6 to 30 September 2001	£183.13
£3,231.63	**Total**	£2,597.33

36. Mr Grey's evidence was that the partial sums at the top and the bottom were apportionments of invoices from the pest control contractors, Rentokil, to make up one calendar year's charges. The Tribunal takes from this that the total figure is not intended to include charges which relate to work done in any other year.

37. With all due respect to Mr Grey, his explanation does not make sense. The bottom five figures in the above table cover the period 6th September 2000 to 30th

September 2001, i.e. just short of 13 months. On top of that is the top figure for a further period before 5th September 2000. Inevitably, this means the charge is for more than one year and must be in error.

38. Mr Maunder Taylor re-calculated the amount by deleting the first sum and apportioning the second and last sums for the correct accounting year. His figures are given in the right-hand column of the table at para 35 above. The Tribunal accepts his calculation and his submission that £634.30 has been unreasonably incurred.

Cost of works to Flat 52

39. In 1995 major works were carried out to the roof of the property. During the works it is alleged that the contractors caused damage to Flat 52. The value of that damage was assessed at £2,050. This sum was actually deducted from the total amount paid to the contractors so that the service charge account was only charged for the lesser amount. Four years later, the lessee of Flat 52 submitted an invoice for the work to remedy the damage in the amount of £2,050. This was charged to the service charge account.

40. Unfortunately, this item has not been dealt with in the service charge accounts in the right way. It was not carried over each year in the accounts and so does not appear until 1999. The sum charged in 1999 was for work which is not chargeable to the service charge account, i.e. it was for work internal to the demise of one of the lessees. The sum which was chargeable to the service charge account, namely the work done to the roof by the contractors in 1995, was incurred more than four years previously. Therefore, the item in the 1999 service charge account falls foul of the prohibition in s.20B of the Landlord and Tenant Act 1985 on taking costs into account if they were incurred more than 18 months before a demand was served on the lessees in question. Therefore, the amount of £2,050 is not payable.

1998 Credit

41. The lessees challenged an amount of £2,000 which appears at the end of the

1998 service charge accounts described as "Overclaim of deficit in prior year". Mr Grey stated that this was a credit against expenditure, not a demand. That would mean that there was nothing for the Tribunal to determine, save for the fact that the net deficit has been increased from £19,260 to £21,260, rather than being reduced to £17,260. There appears to have been a simple arithmetical error which has made a £4,000 difference to the deficit in the 1998 accounts. This amount is, of course, not payable.

Management fee

42. The lessees challenged a sum of £356.90 which had been included as part of the management fee for 1998. Mr Grey stated that this was the amount by which the management fee had been under-charged in 1996 and this was simply an attempt to recover what was owed. However, under s.20B of the Landlord and Tenant Act 1985, already referred to above, it is not possible for this to be done. The charge is two years old, i.e. more than the 18 months allowed by s.20B, and it is therefore not payable.

Costs of the proceedings

43. As mentioned at the start of this Determination, the lessees have made an application under s.20C of the Landlord and Tenant Act 1985 that the costs incurred by Ionic in connection with these proceedings should not be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by them. There is no dispute that, subject to any ruling from the Tribunal, Ionic have the power under the lease to charge the costs of these proceedings to the service charge account. The relevant clauses of the lease are:-

> 2. THE Lessee HEREBY COVENANTS with the Lessor as follows:-
>
> (ii) (c) If the expenditure incurred by the Lessor in any accounting period of twelve months (hereinafter called "the maintenance year") in carrying out its obligations under Clause 3 (i) (ii) and (iii) and Clause 4 hereof (hereinafter called "the annual cost") exceeds the aggregate amount payable (or deemed to be payable) by the Lessees of all the flats in the building in respect of the maintenance year in question by way of basic

maintenance charges (hereinafter called "the annual contribution") ... then the Lessee shall pay to the Lessor ... a proportionate part (hereinafter called "the excess contribution") calculated as hereinafter mentioned of the amount of such excess shown therein ...

(xxv) To pay to the Lessor all costs charges and expenses (including legal costs and surveyors' fees) incurred by the Lessor ... in or in contemplation of any proceedings ...

4. THE Lessor HEREBY FURTHER COVENANTS with the Lessee as follows:- ...

(xi) ... to do or cause to be done all such works installations acts matters and things as may in the Lessor's absolute discretion be necessary or advisable for the proper maintenance safety and administration of the flat and of the building and curtilage including ... the appointment of ... solicitors ... and other competent persons firms and companies and the payment of their proper costs and fees in connection with the management and maintenance of the building and supervision and performance of the Lessor's covenants herein contained including the calculation and collection from the tenants of the maintenance charges and the excess contributions (if any) as hereinbefore referred to.

44. HHJ Rich QC, sitting as the Lands Tribunal in *Langford Court -v- Doren Ltd* (2001), gave the following guidance as to the application of s.20C:-

28. In my judgment the only principle upon which the discretion should be exercised is to have regard to what is just and equitable in all the circumstances. The circumstances include the conduct and circumstances of all parties as well as the outcome of the proceedings in which they arise.

30. Where, as in the case of the LVT, there is no power to award costs, there is no automatic expectation of an Order under s.20C in favour of a successful tenant, although a landlord who has behaved improperly or unreasonably cannot normally expect to recover his costs of defending such conduct.

31. In my judgment the primary consideration that the LVT should keep in mind is that the power to make an order under s.20C should be used only in order to ensure that the right to claim costs as part of the service charge is not used in circumstances that make its use unjust.

32. Oppressive and, even more, unreasonable behaviour however is not found solely amongst landlords. Section 20C is a power to deprive a landlord of a property right. If the landlord has abused its rights or used them oppressively that is a salutory power, which may be used with justice and equity; but those entrusted with the discretion given by s.20C should be cautious to ensure that it is not itself turned into an instrument of oppression.

45. The Tribunal's conclusion is that it is just and equitable to make an order under s.20C, taking into account the following matters:-

(a) Of the items which remained in dispute and which have been determined in the above paragraphs, the lessees have been successful in the majority.

(b) Ionic have created difficulties for themselves and their lessees by failing to fund the service charge account in the way necessitated by the leases. Barnett Baker's attempt to get around this by asking lessees to make payments outside the terms of the lease could foreseeably cause problems. In particular, Barnett Baker did this through the Residents Association while conceding that only around two-thirds of the lessees are represented by it.

(c) Barnett Baker have created further difficulties, again for both themselves and the lessees by their accounting practices. The Tribunal accepts Mr Maunder Taylor's criticism that the certificates which have been produced to justify the service charge demands do not comply with the terms of the lease and that the absence of a balance sheet has probably allowed errors to arise and has certainly made auditing more difficult.

(d) The lack of funding from Ionic resulted in a situation where there was a danger of the communal hot water supply ceasing. Barnett Baker sent a letter to lessees which would cause any reasonable person reading it to think that the hot water supply would be cut off unless they paid all service charges demanded, whether in dispute or not. Ionic's solicitors, Shranks, rightly apologised for this letter, although the Tribunal accepts Mr Grey's evidence

that Barnett Baker's actions were never intended to constitute a threat.

(e) Many of the items conceded by the lessees as being no longer in dispute at the hearing were only conceded following the receipt of documents or information which could and should have been provided earlier.

46. Having listed the above matters, the Tribunal is also satisfied that the fault did not lie solely on one side. The lessees have not succeeded on all matters. Further, at times some of the lessees have taken an overly suspicious and hostile attitude to the managing agents who the Tribunal accepts were at all times doing their best to satisfy the needs and requirements of both their clients and the lessees. The lessees sent a large number of requests for information and questions over many details regarding the service charge accounts and it is not reasonable to expect Barnett Baker to be able to deal with all of them. In particular, nearly all the queries in relation to the electrical and redecoration works were made several months after the deadline set out in the s.20 notice. Also, until they sought the assistance of Mr Maunder Taylor, the lessees' complaints about the service charges were not set out with as much clarity as would have enabled Ionic's solicitors to prepare fully for the hearing on all items in dispute.

47. In the circumstances, the Tribunal determines that it would be just and equitable to make an order that only a proportion of the costs incurred by Ionic in connection with these proceedings should not be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the lessees. Ms Stacey submitted that the Tribunal's power is limited to excluding all or none of the costs but she is contradicted by the wording of s.20C which refers to "all *or any* of the costs incurred" (*emphasis added*). Of course, the Tribunal cannot rule on whether the amount claimed is reasonable since the actual amount of the relevant costs has yet to be calculated, but it is still possible to express the order as a percentage of the costs, whatever the total turns out to be.

48. Therefore, the Tribunal orders that 70% of the costs incurred by Ionic in connection with these proceedings shall not be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the

lessees.

The effect of CLRA Sch.12 para 10(4)

49. A further point was made on behalf of the lessees as to the effect of para 10(4) of Schedule 12 to the Commonhold and Leasehold Reform Act 2002 which reads as follows:-

> A person shall not be required to pay costs incurred by another person in connection with proceedings before a leasehold valuation tribunal except by a determination under this paragraph or in accordance with provision made by any enactment other than this paragraph.

50. The rest of para 10 deals with orders for costs up to £500 as a sanction for frivolous, vexatious, abusive, disruptive or otherwise unreasonable actions during proceedings before a leasehold valuation tribunal. Neither side submitted that the other had acted in this way and so the Tribunal did not make any determination under para 10. However, it was submitted that the effect of para 10(4) is to override any contractual entitlement Ionic has in the lease so that costs of proceedings are recoverable only to the extent permitted by the remainder of the para 10.

51. The problem with this interpretation of para 10(4) is that it would deprive s.20C of any meaning or effect. S.20C gives the Tribunal a discretion to limit a landlord's contractual entitlement to costs of proceedings but this interpretation of para 10(4) means that there cannot now be any such contractual entitlement and so s.20C can never be brought into play. This is not, as Ms Stacey suggested, an implied repeal but it is a contradiction which it seems unlikely Parliament would have intended.

52. Mr Maunder Taylor quite rightly pointed out that the Tribunal must firstly have regard to the wording of para 10(4) and should only resort to Parliamentary intention if that wording is somehow unclear. However, the existence of the apparent contradiction must cause the Tribunal to look carefully to see if the wording is so clear as to lead to that result and no other.

53. Two leasehold valuation tribunals, both chaired by Prof JT Farrand, have considered the applicability of para 10(4) (*see Stoker* LON/00AE/LSI/2003/0025 and *Churston Mansions* LON/00AG/NSP/2003/0029). In *Stoker* the tribunal decided that para 10(4) meant that the only costs recoverable were under the remainder of para 10 but did not provide any supporting reasoning. In *Churston Mansions* the tribunal had already decided that no order should be made under s.20C and declined to make a determination in respect of para 10(4). Therefore, there is no authoritative decision on this issue and this Tribunal must consider it afresh.

54. At first glance, the wording of para 10(4) does appear to have the result argued for on behalf of the lessees. However, it must be read in the context of the whole of para 10 which is concerned with the powers of the Tribunal. The word "required" in para 10(4) means "required by the leasehold valuation tribunal". Costs paid as permitted under a clause in a lease are not required by the Tribunal but by the lessor using their power under the lease. Therefore, para 10(4) has no effect on costs payable in this way.

55. Further, as Ms Stacey submitted, on closer inspection an alternative interpretation appears which accords with all the wording of para 10(4) and leaves s.20C intact. Para 10(4) states that a person may be required to pay costs incurred in connection with LVT proceedings "in accordance with provision made by any enactment other than" para 10(4). The question is what "in accordance with" means in this context. The lessees in this case will be paying 30% of their landlord's costs of these proceedings "in accordance with" their leases in the sense of "as required by". However, "in accordance with" may also mean "in compliance with" or "as permitted by". The requirement under the lease to pay the costs of these proceedings is only binding to the extent that it complies with or is permitted by the Tribunal's exercise of its jurisdiction under s.20C. The Tribunal thereby holds that payment under the lease is made "in accordance with" s.20C. It is not necessary in this case to decide if this principle holds whether or not an order is actually made or even applied for but it is the Tribunal's opinion that it does. Therefore, the wording of para 10(4) preserves the effect of s.20C and the order made by the Tribunal in para 48 above stands.

Conclusion

56. In summary, the Tribunal determines the following in respect of the disputed service charges:-

(a) The cost of the redecoration works was reasonably incurred save for the sum of £1,750 in respect of snagging items and £5,000 in respect of delays.

(b) Barnett Baker's fees of £5,000 + VAT in respect of the same works were reasonably incurred and are reasonable in amount.

(c) The work done to the light fittings by the Baldwin Electrical Co was reasonably incurred and should not be incorporated within the contract price for the original electrical works.

(d) The element of the buildings insurance premium which represents the commission paid to the freeholders, Howard de Walden Estates, was not reasonably incurred for the purposes of the service charge.

(e) Subject to the commission element, there is insufficient evidence to suggest that the insurance premium is unreasonable in amount or was unreasonably incurred.

(f) The sum of £2,000 for the insurance excesses for the year 2002 was not reasonably incurred and is not payable.

(g) Due to an unexplained miscalculation, £634.30 has been unreasonably incurred in respect of pest control charges.

(h) The sum of £2,050 in respect of works carried out to Flat 52 is not payable as the charge is contrary to s.20B of the Landlord and Tenant Act 1985.

(i) There has been an arithmetical error in the 1998 service charge accounts whereby the deficit has been increased by £2,000 instead of reduced by that amount. The resulting £4,000 difference is not payable.

(j) A management charge of £356.90 included in the 1998 accounts is not payable because it is two years old and falls foul of s.20B of the Landlord and Tenant Act 1985.

57. Further, the Tribunal orders that 70% of the costs incurred by Ionic in connection with these proceedings shall not be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the

lessees under s.20C.

N.K. Nicol
Chairman
28th May 2004