RESIDENTIAL PROPERTY TRIBUNAL SERVICE

SOUTHERN RENT ASSESSMENT PANEL
LEASEHOLD VALUATION TRIBUNAL

LANDLORD AND TENANT ACT 1985

Case Number: CH1/00HH/LSC/2006/0013

Decision on an Application under Section 27A Part 1V (Section 35) of the Landlord and Tenant Act 198 For a determination as the reasonableness of service charges

Applicants:	Mr G B Melhuish (with Messrs A Skelding, D Huxley, A Phillips and D Perry joined as Applicants)
Respondent:	Southwood Court (Torquay) Association Limited
The Property:	Flat 14, Southwood Court, Middle Warberry Road, Torquay
Date of Application:	10 February 2006
Venue:	Torbay Suite, Livermead House Hotel, Seafront, Torquay
Representation:	Mr G B Melhuish, for the Applicant Mr N Faulkner Bsc (Hons) FRICS (of Labyrinth Properties Ltd) for the Respondent
Tribunal Members:	Mr A L Strowger MA (Cantab) (Chairman) Mr P J R Michelmore, FRICS Mr P G Groves
Date of Decision:	9 May 2006

DECISION

The Background

1 Southwood Court is a development of three blocks of flats set in communal grounds at Torquay and erected in 1962/63 by a development company called Parkinson Griggs Developments Limited ("the Developer"). In 1961 the Developer had granted a lease for a term of 999 years from 18 July 1961 to Southwood Court (Torquay) Association Limited, the Respondent to the present application. According to copies of Land Registry Office Copy Entries title Number DN1339 supplied to the Tribunal by Mrs S-A Huxley, wife of one of the Applicants, the freehold of Southwood Court was transferred to Freehold

Portfolios GR Limited on 21 September 2000, subject to the 999 year Head Lease to Southwood Court (Torquay)Association Limited.

2 The Property, flat 14, is one of 10 flats in Block B at Southwood Court. Altogether 20 flats at Southwood Court were demised by the Developer for a term of 999 years less one day from 29 September 1960. Block A comprises 8 flats and Block C, 2 flats. The blocks are different but the individual flats in each block are identical in floor area, although there may have been internal alterations in the lay-out of some of them.

3 The Leases provides for payments of service charges. To summarise the provisions, under clause 1 each Lessee is to pay by way of further or additional rent a proper proportion of the insurance of the Block and the garages and also a "maintenance charge", being a share of the costs incurred by the Lessor in complying with his covenants as set out in clause 4. Each Lessee in each Block is required to pay an equal share (according to the number of flats in that Block) of the costs attributable exclusively to that individual Block ("the Block cost"). In addition each Lessee is to pay one twentieth of the costs common to the whole development ("Court costs"), excluding costs attributable exclusively to any of the individual Blocks. Southwood Court (Torquay) Association Limited is the Management Company ("the Management Company") and its board of directors is called the Council of Management ("the Council")

The Application

4 The first Applicant, Mr Melhuish, and the four others joined as Applicants pursuant to Directions, are all owners of flats in Block B. The dispute is essentially between that Block and the Respondent Company and in particular has focussed on its Council. It is noted that reference is made on the application form to the Respondent being the Chairman of Southwood Court (Torquay) Association Limited and four Directors of the company with the Chairman named as the Landlord. However this cannot be correct. The Landlord is Southwood Court (Torquay) Association Limited in which the 999 year lease granted by the Head Lease remains vested. The Tribunal only has jurisdiction to consider the application on the basis that Southwood Court (Torquay) Association Limited is the Respondent.

5 The Tribunal is asked to exercise its jurisdiction under Section 27A of the Landlord and Tenant Act 1985 ("the Act") to determine the reasonableness of service charges. The key issues are set out in the application and in the Applicants' statement of case. The concerns relate to the fairness of apportioning service charges between individual flat owners and between Block costs and Court costs. The challenge is not as to the reasonableness of the amount of specific items of expenditure but as to the underlying principles of charging and the alleged deviations from the Leases and the consequential inequities that the Applicants claim have resulted. The particular issues relate to the basis of charging for exterior painting, electricity in communal areas, building insurance, window cleaning and lift services charges for Block B. In addition, the chargeability of legal fees is challenged and the Applicants claim that under the terms of the leases a maintenance/sinking/reserve fund should be established. In

general the Applicants contend that the terms of the leases have not been followed.

The law

6 Section 27A of the Act sets out the provisions relevant to this application. Under sub-section (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.

7 Meaning of "service charge" and "relevant costs" are defined in section 18 of the Act as an amount payable by the tenant of a [dwelling] as part or in addition to the rent:

a. which is payable, directly or indirectly, for services, repairs, maintenance,[improvements],or insurance or the landlord's costs of management, and the whole or part of which varies or may vary according to the relevant costs.

b. Under 18 (2) the relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or superior landlord, in connection with the matters for which the service charge is payable.

8 Section 19 sets out the limitation of service charges with regard to reasonableness

(1) Relevant cost shall be taken into account in determining the amount of a service charge payable for a period:

(a) only to the extent that they are reasonably incurred, and
(b) where they are incurred on the provision of services or the carrying out of works, only if the services or works are of a reasonable standard;
and the amount shall be limited accordingly

(2) where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise.

The Hearing

9 Prior to the Hearing the Tribunal made a site inspection in the presence of representatives of the Respondent and its managing agents, Labyrinth Properties Limited.

10 It was agreed by the parties that the Tribunal should only consider the reasonableness of service charges for the years 2004 and 2005 and the basis of charging to be applied in future years. However the Tribunal agreed it would look at previous years in considering that basis of charging.

11 Mr Melhuish gave evidence and presented the Applicant's case; Mr Huxley of flat 13 and Mr Skelding of flat 12, gave supporting evidence. 8 other flat owners/co-owners attended the Hearing. Mr D Faulkner of Labyrinth Properties Limited, managing agents for the Respondent, presented the Respondent's case and gave oral evidence. The Tribunal also heard oral evidence from Mr Bond and Mrs Frew, Chairman and director of the Respondent Company.

Summary of oral evidence and submissions

12 Mr Melhuish looked to remedy anomalies in the management and administration of service charges that have given a financial advantage to some of the lessees at the expense of others. He gave as an example the painting of the Court in 2001 which he said was grossly unfair. The builder's estimate was based on flat cost rather than Block costs. Mr Melhuish maintained that if individuals were allowed to paint their own balconies then the management company would lose control of timescale and quality. More and more people would want to do their own decorating if the work was not managed in accordance with the provisions of the leases. In response Mr Faulkner said there were cost savings by having the same contractor but that, whilst the estimate referred to individual flats, the charging out was actually done on a Block basis.

13 With regard to the communal electricity, Mr Melhuish maintained that this could not be subdivided. There was only one meter for the whole Court. Mr Faulkner recognised there was a security entry system that had not been taken into account but said that the electricity bill had been charged to each Block according to the number of electricity bulbs in it.

14 Mr Melhuish argued in favour of treating the garages as a Court cost but Mr Faulkner favoured it being treated as a Block cost.

15 With regard to insurance, Mr Faulkner said that in 2003 a surveyor had been instructed and since then the charging had been a Block cost with the total premium apportioned between the Blocks on the basis of the floor areas of each Block (pages 73 – 80 of the bundle).

16 Mr Melhuish said that surpluses from charges raised in respect of the lift had gone into general funds and that as a result Block B had been subsiding the others. However Mr Faulkner denied that was the case and said that any surplus in the past had been used to off-set against Block B charges. The present position was that he had been instructed to refund any surplus or it could be offset. Mr Faulkner referred to the high cost of replacing the lift – on another building that his firm were managing the cost was £75,000.

17 Mr Melhuish re-iterated his view that the Leases provided for a reserve fund to be established.

18 Mr Bond explained that between 2004 and 2005 there had been a change of accountants and there had been a great deal of confusion. A draft set of accounts had been prepared but the fact that there was a second bank account in Torquay

had been overlooked. There was a large sum in that account and it represented half the money that was due to be paid out.

Consideration of the evidence and findings of the Tribunal

19 The Applicants included in their bundle the Lease of flat 16 (Block B) and the Respondent's bundle included the Lease of flat 3 (Block A), flat 14 (Block B) and flat 19 (Block C). The evidence was that the other Leases in each Block contained the same provisions. There was however no evidence as to whether the Leases of the two flats that did not have a garage included a reference to garages.

20 Central to this Application is the interpretation of the Leases and the division of the costs of service charges between individual Lessees on the basis of Block costs and Court costs. The Leases are the starting point of the Tribunal's consideration of the issues. The reasonableness of any specific item of expenditure or the standard of works is not in issue. The Leases set out that the costs attributable exclusively to an individual Block are Block costs and divisible between the number of Lessees in that Block, whilst Court costs are residual i.e. they are all the service charges recoverable under the Leases (being sums that the Lessor has paid to meet his obligations under clause 4 of the Leases) not exclusively attributable to individual Blocks.

External decorating.

21 The Tribunal has considered the basis that should be applied to charging for external decoration. There was considerable disagreement as to the way in which the cost of decorating was divided between individual Lessees. This disagreement arose for a number of reasons, some of which may be attributed to misunderstandings and poor communication. The Tribunal has looked at the Leases provided and has no hesitation in finding that the cost of external decoration is a Block cost. Under clause 4 (v) of the Leases, the Lessor covenant is "That the Lessor will redecorate in a proper and workmanlike manner the common main hall staircase and landings of and in the said Block (if any) at least once in every five years and will paint the exterior wood and iron and cement work of the said Block and all additions thereto with two coats of good oil and white-lead paint in a proper and workmanlike manner at least once in every three years of the term hereby granted." It is hard to see how the covenant by the Lessor could have been more plainly expressed and the Tribunal is surprised that the Applicants have interpreted the cost of redecoration under this clause as a Court cost. The reference in each lease in respect of redecoration is referred to as redecoration "of the said Block". There is no reference to redecoration of the Court. Whether or not the redecoration is carried out on the three Blocks by the same contractor under one contract or not is irrelevant. The costs are attributable to each Block and should be charged and paid accordingly as a Block cost. There should be no difference in the sum paid by individual Lessees in each block to reflect any differences between the cost of decorating different flats: the cost of decorating each Block should be divided equally between the Lessees in that Block.

22 The Tribunal heard evidence that some Lessees have carried out, at their own cost, the external redecoration, or at least in part. This is not in accordance with the Leases and the individual Lessees have no right to do so. To achieve uniformity of appearance and standard, the Leases appropriately provide that the work is done by the Lessor with the Lessees sharing the cost as a Block cost. In the event that an individual Lessee carries out their own redecoration, that Lessee should not as a result be absolved from paying an equal share of the Block cost; the Lessor has the right to have the work done again by the contractor carrying out redecoration of the Block and may choose to do so. There should be no relief for DIY.

23 There is yet another inadequate provision in the Leases with regard to the cost of redecoration of the garages: the Leases make no specific provision for this at all. There is neither a Lessor covenant to redecorate the garages (and to charge either as a Block cost or as a Court cost) nor is there a Lessee covenant to redecorate garages. The Tribunal finds that no one has the responsibility to redecorate (or, indeed, to repair and maintain) the garages. Common sense and prudent management would suggest that the garages should be maintained and decorated to the same standard and the Tribunal would advise that the work should be carried out by the Lessor. Arguably the Leases should have treated the garages as a Court cost but in the absence of any provision in the Leases, the Tribunal would regard it as equitable that the costs incurred should be divided equally between the garage owners. If a satisfactory agreement cannot be reached between the parties then an application could be made to the Tribunal under section 35 of the Act for the Leases to be varied to include the appropriate provision on the grounds set out under section 35 (2) (a) (iii).

Insurance.

24 The Lessor's covenant in each Lease under clause 4 (i) is "to insure the said Block and the garages shown on the said plan". Clause 1 of each Lease describes the flat and refers to the Block in which the flat is situated, describing it as "the said Block" and referring to "the said Plan". There is a covenant on the part of the Lessee in clause 1 to pay by way of additional or further rent "a proper proportion of the amount the Lessors may expend in effecting or maintaining the insurance of the said Block and of the garages..." The Leases do not refer to insurance of the Blocks in the plural or refer to insurance of the Court. The insurance cover to be effected under the Leases is in respect of the buildings and loss of rent. After considering the terms of the Leases the Tribunal has no doubt that the insurance of each Block is a Block cost and is recoverable under the service charge provisions as a Block cost.

25 Perhaps as a matter of practical convenience and common insurance practice, the insurance policy does not distinguish between the three Blocks but aggregates the buildings (i.e. the Blocks and the garages) with a buildings sum insured of £6,546,000. The policy also includes Landlord's Contents, Property Owners Liability and Employers Liability, but does not separate the premium for this cover. There is no indication on the policy as to whether or not boundary

walls to the Court are included. The covenant to insure is, however, a covenant to insure buildings; there is no covenant to effect any other insurance and no covenant to pay for any other insurance, however prudent (and with which the Tribunal would agree) it may be that there should be the additional cover provided by the present policy.

26 The Tribunal does not therefore find that the total insurance premium is a Court cost and that it should be divided on that basis i.e. one twentieth to each Lessee. The only provision in the Leases for insurance is as a Block cost. However in order for it to be charged out appropriately there should be a more refined approach to the calculation of the insurance premium payable and it should be broken down into its component parts.

27 There has been a long running dispute about the apportioning of the insurance premium. It is for the Respondent to determine the proper proportion. Initially, it appears that the proportions were determined on the basis of rateable values. The present practice is to apportion the total premium between the Blocks according to the respective square footage of each block. Professional Property Advisors Limited's ("PPAL") advice as to the square footage is set out in their letters of 3 May 2003 and 24 July 2002 (pages 74 -78 of the Respondent's bundle). The resultant figures have provided the basis of charging as a Block cost. The Tribunal approves the principle that calculation of floor areas of each block is an appropriate method of apportioning the insurance between the Blocks. However the last sentence of PPAL's letter dated 2nd May 2003 on page 75 of the Respondents bundle reads " In respect of the first two Blocks the calculation specifically excluded staircases, entrance halls, stairwells and the lift well in Block B." The Tribunal finds that those specifically excluded parts form integral parts of each Block and should be included within the gross external area of each Block when considering reinstatement cost calculations and resultant apportionment of premiums. Furthermore, the calculations used do not follow the recommendations of the Building Costs Information Services (BCIS) guide to re-building costs of flats. As set down at 1.4 of the Guide, the calculations of the re-building costs of each Block should be based on gross external area of the Block and then calculated on the basis of the Rebuilding Cost Tables in the Guide to reflect the different nature of the Blocks i.e. the number of storeys and number of flats. The insurance company will then be able to give a breakdown of premium in respect of each Block. These figures will then provide the Block premium, divisible according to the number of flats in the Block, as a Block cost. Block B has its own engineering insurance with regard to the lift and that clearly is a Block Cost divisible equally between the residents of Block B.

28 The Tribunal does not approve of the method previously adopted of differentiating between the share of premium attributable to each Lessees based on which floor of the building an individual flat is situated or by aggregating internal floor areas of the flats in a Block. Such an approach is not in accordance with the terms of the Leases.

29 The insurance element attributable to the garages is not a Block cost because by definition a Block cost is a cost exclusively attributable to a Block. The garages do not fall within that definition and are dealt with separately in the Leases. The insurers should be asked to separate out that insurance element attributable to the garages and the Lessor should supply any information required to facilitate this. The calculation should not be difficult using the Building Costs Information Services (BCIS) guide to re-building costs of garages in table 4.12. The Leases require, under clause 1, a Lessee to pay a proper proportion of the insurance. Accordingly all the Lessees whose Leases contain such a provision should share the cost of insuring the garages. Those Lessees who do not own a garage but have such a clause in their Leases will, accordingly under the terms of their Leases, have to bear an equal share of the garage insurance regardless of the fact that they do not own a garage. They will have bought their flat in that knowledge.

30 Having taken out of the total insurance premium the element attributable to the rebuilding of the Blocks and the garages, there will be the residual element of insurance for Landlord's Contents, Property Owners Liability, Employers Liability and the garden/retaining walls. The Leases do not provide for this to be recovered from the Lessees as there is no Lessor's covenant to take out such cover. It would be imprudent for the Lessor not to insure against such losses and it is in the interests of each Lessee that there is such cover in place. The Tribunal strongly recommends that this is done. It is prudent management that the Lessees should have the benefit of this extra cover and pay for it as a Court cost. To attempt to apportion it on any other basis would be difficult and probably not worthwhile. However it may be that the insurance company would include this cover in its package, without an additional or separate premium being payable. If there are difficulties in resolving these issues by agreement the parties may wish to consider a further application to the Tribunal for an appropriate variation to the Leases under section 35 (2) (b) of the Act or under section 37.

Legal fees.

31 The Applicant has challenged the inclusion in the service charge of legal fees with regard to the advice given to the Management Company by Mr R Lewis of Messrs. Woollcombe Beer Watts, Solicitors. In February 2003, 9 of the 10 Lessees of Block B, frustrated by the long running dispute with the Council of Management of the Management Company – and following the suggestion of the Chairman - instructed Messrs. Almy & Thomas, Solicitors, to act on their behalf. An exchange of correspondence between the two firms (and the Company Secretary, Caroline Bell who had given the instructions on behalf of the management Company) ensued. The outcome was somewhat inconclusive and the Block B residents terminated their instructions and paid a bill of £1198. The account rendered to the Company was £1628 and this was included as part of the service charge, as a Court cost.

32 The residents of Block B wrote to LEASE, the Leasehold Advisory Service asking whether they were liable under the terms of the Leases to pay the costs

incurred by the directors of the Management Company. Mr Nicholas Kissen in his letter of 1 February 2005 (at page 57 of the A's bundle), said "I have to say that I cannot see that there is any provision on which the directors can rely specifically in asserting that the legal costs are recoverable through the service charge account".

33 The Tribunal has considered the terms of the Leases and the general law with regard to the inclusion of legal costs as a recoverable service charge and finds the Leases make no provision for the recovery of legal fees as a service charge. The most recent case on the subject is **St Mary's Mansions Ltd v Limegate Investment Co Ltd & Sarruf [2003] 05 EG 146.** In that judgement, which reviews the relevant case law, the court found that for legal costs to be recoverable there has to be a clause in clear and unambiguous terms to that effect. In the present Leases there is no such clause. Mr Falkner was invited by the Tribunal to show where in the Leases such a clause existed. He was unable to do so. He could only point to the Lessor's covenant under clause 4 (ii) which states "that the Lessor will throughout the term hereby granted pay all existing and future rates taxes charges assessments and outgoings whatsoever which now are or shall be charged or imposed upon or payable in respect of the Court so far as the same are not payable by the Lessees or by any one of the several tenants in the flats in the Court". Mr Falkner suggests that the reference to "all outgoings whatsoever" can be construed to include legal costs. The Tribunal does not agree. These words must be construed within the context of the clause which is to enable rates, taxes etc "charged" or "imposed upon" or payable in respect of the Court. The "whatsoever" must be construed "ejusdem generis", to use the time honoured legal maxim. This means that general words (in this case "all outgoings whatsoever") must be construed and interpreted as meaning matters of a like kind to the specific words that precede them. Legal costs would not fall within that interpretation. Mr Falkner expressed concern that legal cost should not be recoverable. Whilst the Tribunal understands that concern, it must apply the general law, however inconvenient that may be in its consequences. It finds without doubt that legal costs are not recoverable as part of the service charge either as a Court cost or a Block cost. In the present case the contribution of the Lessees who have paid their share of the £1628 must be refunded to them; it is for the Council members personally to meet the legal costs of instructing Messrs. Woollcombe Beer Watts. Whilst the Tribunal finds this to be the situation under the Leases, the Lessees and the Management Company may find it a constructive suggestion that the two sets of legal costs – those of the Management Company and those of the Block B Applicants – should be aggregated and divided amongst all the Lessees as a Court cost. The deficiency in the Leases with regard to the absence of provision for the payment of legal costs is no doubt a matter the Managing Agents will wish to explore further and look for solutions to this problem - which may possibly include consideration of section 35 (2) (e) of the Act or an application to the Tribunal by a requisite majority under section 37.

34 It is perhaps somewhat surprising that in accepting instructions, and after considering the terms of the Leases, that the firm instructed to give legal advice, did not advise the Management Company that its costs would not be

recoverable as part of the service charge. However on the limited information available to it (there being no account from the firm setting out the basis of its charging and showing how it arrived at the figure of £1628) even if its fees were recoverable, the Tribunal would have difficulty in finding that the fees were, in any event, reasonable, given the limited advice it appeared to have given and reservations as to the value of that advice to the Respondent. It is also surprising that Messrs. Woollcombe Beer Watts suggested the Respondent making application to the Court to resolve the problems, but made no reference to the arbitration procedure contained in the Leases or indeed to a possible application to the Tribunal itself. Even if it were considering whether or not it was reasonable to incur legal fees, the Tribunal would find that it was not reasonable to do so without the Respondent looking in the first instance to arbitration as a means of resolving the dispute.

Communal electricity

35 Under clause 4 (iv) the Lessor covenants to "ensure that the common areas hall staircase and landings in the said Block are kept clean and suitable lighted". This is clear and unequivocal. Reference is made to the individual Block in which the flat demised by that Lease is situated. It is a Block cost. There may be difficulties of calculation because there is one electricity meter for the communal areas of the Court. However that does not change the nature of the cost as set out in the Leases though it leaves open the question as to how the electricity charge is apportioned. That must fall to management. Presumably cleaning and replacement bulbs or repair to any fittings in an individual Block are charges readily attributable to that Block and are not contentious. The practice adopted of counting the light bulbs appears to the Tribunal to be a sensible and practical one which it endorses. It may also be appropriate to treat each entry system as the equivalent of one light bulb – the managing agent could take advice from the manufacturers with regard to the electricity consumption of electricity by the entry system. The alternatives would be to incur the cost of separate sub-metering or following the arbitration procedure laid down in the Leases. Both are likely to be disproportionately expensive.

Window cleaning

36 The window cleaning of each Block is an expense that relates exclusively to each individual Block whether or not it is done by the same window cleaner or on the same occasion. The Tribunal finds that window cleaning is a Block cost. It should not be difficult for a window cleaner to separate his charges to show the time spent on each Block and the consequent charges.

Lift service charges

37 The Applicant challenges the way in which the respondent has administered the charges to Block B in respect of Lift charges. The Tribunal accepted the evidence of Mr Falkner that the surplus of monies paid by the Lessees of Block B in respect of lift charge were not absorbed in the general funds of the Court or

the other two Blocks. As the accounts indicate, and Caroline Bell affirmed they were treated as Block costs and off-set against Block B costs. Better presentation of figures and accounts might have prevented misunderstandings.

Reserve/Sinking fund.

38 The issue of the lack of a reserve or sinking fund has been a major concern of the Applicant. This is entirely understandable, particularly with regard to Block B that still has the original lift, now approaching its 40th year. Mr Falkner gave evidence of another block of flats that his company manage where the cost of replacing the lift was of the order of £75,000.

39 There are common misunderstandings as to the meaning of "reserve funds" and "sinking funds". The terms are often used synonymously. Traditionally a sinking fund is a fund intended to provide for expenditure that might only occur infrequently during the term of a lease - the replacement of plant such as a lift or re-roofing for example. Reserve funds were established to meet recurring expenditure such as re-decoration of the exterior and common parts. They are a means of evening out expenditure from year to year. Today the distinction is often blurred. In the present Leases it would have been prudent had a sinking fund been provided for in the Leases of Block B to build up a fund for the replacement of the lift. It would also have assisted good management to have evened the cash flow required from the Lessees for the Leases to have provided for a reserve fund. However the Leases provide for neither and in their absence there is no power to require Lessees to contribute to such funds.

40 The Leases provide in clause 1 for payment to the Lessors from time to time "such sum (hereinafter called "the maintenance payment") as shall be determined to be the maintenance payment under the provisions hereinafter contained..." At the end of clause 1 each Lessee is required "to pay to the Lessors on account of such maintenance payment as aforesaid the initial sum of Ten pounds on the execution hereof and monthly sums of such amount as may be determined by the Lessors from time to time on the first day of each month hereafter..." The Applicants have argued that this provision enables – indeed requires – the Lessor to establish and maintain, in effect a reserve or sinking fund - to meet future expenditure. The Tribunal does not accept that argument. The wording of a sinking or reserve fund clause in a lease must be specific as to its intent. Caroline Bell as company secretary, asked Woollcombe Beer Watts Solicitors "to confirm that the Leases do not include provision for any contingency funding". In many respects it was the wrong question to ask and the answer did not clarify the point. She should have asked about reserve or sinking funds, not contingency funds. Mr Lewis in his reply said "confirmed except at the end of clause 1 of the lease there is provision for the lessees to pay an amount on account in advance". His answer was equivocal and left doubts. The Tribunal has no doubts on the matter. The provision in the lease with regard to the maintenance payment is simply to provide a mechanism for advance payment of the annual service charge and enables it to be paid by monthly instalments to assist cash flow.

41 The Block B self help scheme seems an eminently practical approach to their need to accumulate funds for replacement of the lift. If the Lessees of Block B agree (or even so many of them as do), there is no reason why a "lift fund" cannot be built up over a period of time to soften the impact of a large bill when the lift reaches the end of its life and has to be replaced. This, however, can only be a voluntary scheme and the Management Company has no power to require payment although it may be prepared to agree to hold a separate fund for Block B.

42 It is, of course open to the parties to vary their Leases to provide for sinking funds or reserve funds. However this would have to be by agreement of all the parties or by application to the Tribunal under section 37 of the Act by the requisite majority.

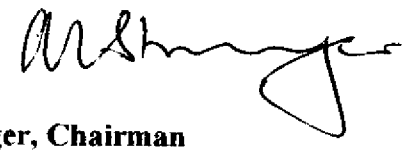
Costs under section 20C

43 There is an application under section 20C of the Act for an order of the Tribunal preventing the Respondent from seeking to recover costs incurred in connection with the proceedings before the LVT as part of the service charge. The Applicants have complained that there has been a lack of consultation between Leaseholder and the Council; there appear to have been problems of communication and misunderstandings. Certainly the Lessor has been at fault in the lack of transparency in procedures and in failing to supply clear information to the Lessees. Both parties appear to have been unwilling to move from fixed viewpoints with regard to some of the issues.

44 It is perhaps surprising that (on the information supplied to the Tribunal) neither any individual Lessee nor the Lessor have chosen to at any time to invoke the arbitration provisions set out in clause 1 of the Leases in an attempt to resolve the issues of disagreement. A great deal of time and frustration might have avoided had they done so. Whilst the arbitration provisions could be better phrased, neither party can be absolved from the responsibility of at least attempting to follow the procedures available. Either party could have set those in motion.

45 Given the claims that the Respondent faced in this application, it is reasonable that the costs of engaging the managing agent to deal with them should have been incurred. It is for the managing agent to decide how much of its costs can be absorbed in its general charges as hopefully the findings of the Tribunal have brought clarity to some of the difficult management issues it has faced. However, leaving aside the charging provisions in respect of managing agents in clause 1 of the Leases, the Court in the case of Embassy Court Residents' Association v Lipman (1984) held that, where the landlord was a residents company with no funds of its own, a term should be implied to the effect that it had power to incur necessary administrative expenses (including the costs of employing managing agents) and to recover these from the service charge. In the present application the Tribunal has found in favour of the Respondent on all the issues except the recovery of legal costs under the service charge provisions. Looking at all the circumstances the Tribunal does not make a ruling preventing

the costs of these proceedings being recovered under the service charge provisions.

Signed:  **Dated:** 13 June **2006**

A.L.Strowger, Chairman