Ref: LON/00AN/LSC/2006/0345

LEASEHOLD VALUATION TRIBUNAL

LONDON RENT ASSESSMENT PANEL

DETERMINATION

OF APPLICATION UNDER SECTION 27A OF LANDLORD AND TENANT ACT 1985 (as amended)

PREMISES:	**No.s 1, 1A, 2, 2A, 3 & 3A Astrop Terrace, Hammersmith, London W6 7HQ**
Applicants:	Mr Chris Bruce (1A), Ms Florence McDermott (1), Ms Diana Blease & Ms Julia Hodgkins (2A), Ms Lailla Mercier (2), Mr Angus Maclean (3A) and Ms Lorraine Ainscow (3) [*Tenants*]
Representative	Mr Chris Bruce, with Ms Ainscow, Ms Blease & Mr Maclean also attending
Respondents:	Triplerose Limited [*Landlord*] Avon Estates (London) Ltd [*Managing Agent*]
Representative:	Mr Israel Moss, Director of the second Respondent
Hearing:	27 November 2006
Tribunal:	Professor J T Farrand QC LLD FCIArb Solicitor Mr M L Jacobs FRICS Ms T L Downie MSc

1. The Application to the Tribunal under s.27A of the 1985 Act, dated 27 September 2006, essentially sought determinations for the years 1996 onwards of two questions: First, were the Respondents entitled to make a service charge for the costs of arranging insurance? Second, were buildings insurance premiums reasonably paid and properly recoverable from Tenants?

2. As to the second question, the Application elaborated what was actually wanted:

> "We wish the tribunal to force the managing agent/landlord to produce documentation to prove the level of our liability beyond doubt, i.e. excluding any mark-up. Additionally, we wish the tribunal to decide, given the premium size in relation to the market (see section 7.1 above), whether or not the managing agent/landlord can be deemed to have been acting as a 'prudent man of business' over the course of the years pertinent to our application. If not, we would ask the tribunal to award recompense for over-payments made by the tenants."

The cross-reference to section 7.1 was, in effect, to three quotations obtained from an Insurance Broker (Swinton) by individual Applicants in respect of certain of the buildings within the Premises in August and September 2006.

3. The Application also stated: "We wish the LVT's decision to apply to all future years that current landlord is in possession of the freehold."

4. In addition, the Application confirmed that the Applicants wished to apply under s.20C of the 1985 Act for an order "to prevent the landlord claiming LVT related costs from us."

5. The Premises were briefly described in the Application:

> "Grouped numerically the properties form upstairs/downstairs maisonette pairs on Astrop Terrace. The internal structures vary slightly in relation to partition walls but, generally speaking, the upstairs/downstairs flats are 3 and 2 bedroom respectively."

6. Tables detailing payments made by the Applicants in the years 1996 to 2006 inclusive were contained in the Application. These had two heads: 'Insurance Arrangement Fee Service Charge' and 'Buildings Insurance' and showed that sums under the former head had been charged at £50 in 1996

rising to £88.13 in 2006. Premiums paid under the second head, which had been said to "vary wildly across properties that are, in essence, identical", were shown as being £109.47 (Nos 1 & 3) and £133.85 (No.1A) in 1996 rising to £448.24 (No.s 1, 2, 3 & 3A), £547.87 (No.1A) and £1,253.20 (No.2A) in 2005 and then £568.26 (all except No.2A) and £1,328.82 (No.2A) in 2006. The Tables were preceded by an explanatory statement:

> "The following sections detail Service Charges and Buildings Insurance premiums for the years 1996 through to the present. The tenants in flats 3a, 2 and 2a have only been in residence from 1997, 2002 and 2004 respectively, so figures have only been included from these dates."

7. Copies of the Leases of the six maisonettes were supplied by the Applicants. These all dated from the 1970s and could be treated as identical in all material respects. They granted 99 year terms in consideration of a premium plus ground rent and Tenant's covenants.

8. All but two of the Leases contain a covenant by the Tenant (Clause 2(1)(b)):

> "To pay throughout the said term and by way of additional rent one half of the total amount which in each year of the said term the Landlord shall expend by way of premium in effecting and maintaining the insurance referred to in Clause 4 (1) hereof such additional rent to be paid forthwith on demand"

9. Clause 4(1) in the Leases contains the Landlord's covenant to insure the relevant building constructed as two maisonettes –

> "...against loss or damage by fire storm tempest and aircraft and such other risks as the Landlord may from time to time deem expedient including professional fees and two years loss of rent in an Insurance Office of repute to the full replacement value thereof and to make all payments necessary for the above purposes within seven days after the same shall respectively become payable and to produce to the Tenant on demand the policy of insurance and the receipt for every such payment and consent to a note of the interest of the Tenant as Lessee and any mortgagee of the Tenant being endorsed on any such policy of insurance"

In addition, Clause 4(2) contains a Landlord's covenant to use insurance money to reinstate the building and adds: "if the monies received under such policy of insurance shall be insufficient for that purpose the Landlord will make good the deficiency out of its own funds".

10. The Leases of No.s 1A & 2A differ slightly but not significantly in containing the same provision as a reservation rather than a covenant whilst the Landlord's equivalent covenants about insurance are in Clause 5(3).

11. None of the Leases contains any provision, other than the one relating to payment of insurance premiums, making costs incurred by the Landlord payable by the Tenant.

12. All but two of the Leases contain a Tenant's covenant restricting selling or letting part of the maisonettes (Clause 2(13)):

> "Not to assign transfer underlet part with or share possession or occupation of any part (as distinct from the whole) of the said maisonette"

The Leases of No.s 1A & 2A contain no similar restrictive covenant.

Costs of arranging insurance?

13. The Applicants' case primarily relied upon the fact that there was no provision in the Leases making this payable as a service charge. Secondarily, however, they queried the level of the charges.

14. For the Respondents, Mr Moss explained that the Managing Agent arranged insurance for the Landlord via brokers and as part of a block policy and charged fees for doing so directly to the Tenants. He stated that the two Respondents were separate companies but confirmed that, in general they comprised the same people. He confirmed that the Managing Agent received no commission for arranging the insurance although the Landlord (or an unidentified family member) did receive commission for introducing this of, at least, 10%.

15. Mr Moss's justification for charging these fees to Tenants was that a certain amount of work was involved, including attending to post-claim work, which the Managing Agent would not do for nothing. In his submission, a charge of £75 plus VAT per maisonette "for the potential magnitude of the work...is eminently reasonable". He accepted that "the Lease does not authorise the collection of service charges or management fees" but argued, in effect, that this would be implied for fees relating to services specified in the Lease.

16. In support of charging fees, Mr Moss referred to a passage in *Woodfall's Law of Landlord and Tenant* (para.7.170), which begins: "As a general rule the cost of employing managing agents will not be recoverable by way of service charge unless the lease expressly so provides." The passage continues by indicating an exception to the rule applied in a case where the landlord was a residents' company without funds of its own. Here, neither Respondent is a residents' company. Nevertheless, Mr Moss relied on the decision of Mr David Neuberger QC (as he then was) sitting as a Deputy Judge in *Lloyds Bank Plc v Bowker Orford* [1992] 2 EGLR 44. In that case, the lease had provided that the lessee should pay a due proportion "...of the total cost to the lessors...of providing the services specified...". Mr Neuberger decided that this wide wording "as a matter of normal language" would include the cost of employing managing agents to organise and supervise the provision of those services. Here, however, there is no such wide provision about "total costs" in the Leases but only to "the total amount...the Landlord shall expend by way of premium".

17. The Tribunal has decided that the Respondents are not entitled under the Leases to charge the Applicants any management fees in connection with insurance of the Premises. The appropriate approach in law was authoritatively stated by Laws L.J. in *Gilje v Charlegrove Securities Ltd* [2001] E.W.C.A. Civ 1777 (at para.27):

> "The landlord seeks to recover money from the tenant. On ordinary principles there must be clear terms in the contractual provisions said to entitle him to do so."

Here, there were no terms at all, never mind clear ones, entitling the Landlord to recover any money other than a proportion of actual expenditure on insurance premiums.

18. It follows that the Tribunal determines that none of the charges made under this head, ie costs of arranging insurance, in the years 1996 to 2006 inclusive were payable by the Applicants.

19. This determination renders it unnecessary to determine the secondary query as to whether the level of charges was reasonable. However, the Tribunal considers it appropriate to indicate its opinion that these charges cannot be regarded as costs reasonably incurred by or on behalf of a landlord within ss.18 and 19 of the 1985 Act. The fees have been charged by the second Respondent not to the first Respondent, the Landlord, but directly to the Applicant Tenants. No written contract appointing the second Respondent as a managing agent or other agreement as to this practice or as

to the level of fees has been in evidence before the Tribunal. Further, according to the general knowledge and experience of the Tribunal, the reasonable level of a managing agent's fees in relation to a full range of services, as would be required for a block of flats, would currently be about £150 per annum per unit (plus VAT). Here, the second Respondent is concerned with only one service, arranging buildings insurance, and the Tribunal has come to the conclusion that the fees charged, ranging from £50 to £88.13 per annum per maisonette (inclusive of VAT) were grossly excessive. Indeed, the Tribunal would not have regarded it as reasonable for the first named Respondent as Landlord to have incurred any costs by appointing a managing agent for the sole purpose of arranging insurance.

Buildings insurance premiums

20. For the Respondents, Mr Moss referred to the provisions of the Leases as to insurance, drawing particular attention to Clause 4(2) under which the Landlord must meet any deficiency in insurance moneys "which induces him to exercise his absolute discretion...in the most cautious manner." He also asserted that the lack of restrictions on sub-letting led to higher premiums being charged. A copy letter from a partner in Reich Insurance, dated 8 November 2006, was exhibited which confirmed that the possibility of tenants "whose rent is paid by DSS or, alternatively, the property is let to Housing Associations or Local Councils, to occupy these properties" meant that the rates were higher than usual. The writer also explained that the Swinton quotations obtained by the Applicants were for household policies available for occupying freeholders which dramatically reduced premiums. In addition, he stated:

> "The policy covering the above properties [ie the Premises] falls due for renewal on 1st February 2007 and in the usual manner we will be checking carefully to ensure that we obtain the best possible quote."

21. Mr Moss relied on this quoted sentence as showing that the Insurance Brokers tested the market annually so that the buildings insurance was not renewed automatically with AXA (which had taken over the previous insurer, Guardian). However, somewhat inconsistently, he also submitted:

> "Finally the Respondent is a large property owner and has negotiated a block policy with Axa through its agents which is to be maintained year in year out. The high risks mentioned above and in the exhibit are continuously covered including the conditions to which the cover of

> unlimited empty property provision are subject which most Insurance Companies will not offer at all. The Respondent could surf the market for the least expensive premium each year. However this process itself would have grave disadvantages. This is because new policies exclude claims for matters which were in existence prior to taking out the policy. The cover for subsidence would thus be compromised by adopting "a shopping for the cheapest price strategy.""

22. At the Hearing, Mr Moss also explained that the Respondents had simply adopted the index-linked insurance rebuilding cost valuation existing at the time of their acquisition of the freehold in 1996. He referred to an insurance valuation of the building containing No.s 2 & 2A, revised as at 17 February 2006, at the sum of £345,000 by Skyline Chartered Surveyors, which had actually been obtained by Applicants. In the light of this, he asserted that the properties had been underinsured throughout, the Respondents bearing the resultant risks, and that he, therefore, anticipated higher premiums in future.

23. Mr Moss additionally stated that, because block insurance was involved, one overall premium was paid annually to (he mentioned £110,000), with the consequence that receipts were not available for payments of premiums in relation to the Applicants' buildings. He contended that the annual Summary of Cover produced by AXA together with the letter from the Insurance Brokers should be sufficient.

24. As to the variations in insurance premiums charged to Tenants, he explained that he had continued to apportion cost on same basis as the previous Landlord and that some of the maisonettes were larger than others and for this reason the Respondents had not always applied the equal division provision in the Leases. He also exhibited a copy letter, dated 4 August 1998, from the then Lessee of No.2A (Mr Stephen Atkinson) requesting that the insurance cover for his maisonette should be increased from £83,000 to £185,000. This was effected on the basis that Mr Atkinson agreed to pay the increased premium. Mr Moss thought that Mr Atkinson might not have understood that market value was not the same as insurance value but asserted that the current Lessees of No.2A had inherited this agreement to pay increased premiums when they acquired the maisonette in December 2003. He did not explain how this would become legally binding upon them or how over-insurance equated with the Landlord's covenant to insure "to the full replacement value thereof".

25. At the Hearing, for the Applicants, Mr Bruce had continued to stress their concerns that acceptable evidence establishing their pecuniary liabilities in respect of insurance premiums should be produced, in particular receipts for payments of the relevant premiums. He also persisted with the points of complaint about unequal charges in respect of premiums and, particularly, about the higher premium charged in respect of No.2A.

26. In support of the challenge made by the Applicants to the level of premiums payable for the insurance with AXA, a selection of 'Alternative Insurance Quotes', had been produced which were referred to as showing that significantly cheaper household insurance could have been obtained in 2005 and 2006.

27. Despite doubts about the accounts given by Mr Moss of how the buildings insurance had been arranged for the Respondents during the relevant period and as to the explanations given by him for AXA's increased rates, the Tribunal is unable, on the evidence available, to find that the insurance premiums payable in respect of the Premises for the years 1996 to 2006 were, in general, other than reasonably incurred costs. For an effective challenge to be mounted against the level or rates of premiums charged from 1996 to 2006, the Tribunal would have had to receive satisfactory evidence (preferably expert) about the insurance market and alternative quotations for demonstrably similar policies in each of the years in issue. This evidence would have to show not just that cheaper cover was obtainable but that the cover actually obtained by the Respondents had been outside the scope of what could be regarded as reasonable. In this respect, the Tribunal took into account the point made by Mr Moss that, under the Leases, the Landlord would be at risk if the buildings insurance proved inadequate, so indicating that 'reasonableness' cannot be tested solely by reference to the insurance requirements of Tenants.

28. However, even though these insurance premiums may be payable by Tenants on the general basis that they have not been shown to be unreasonably incurred costs, the Tribunal has other concerns which mean that they have not all been reasonably or properly charged.

29. First, on the understanding that the Landlord has benefited throughout the period in issue from a 10% 'introducing' commission, the Tenants' liability should be limited to (re)payment of the costs actually incurred by the Landlord, excluding any profit, so that only the net amount of the premiums would be payable. Accordingly, the Tribunal determines that all the premiums should have been reduced by 10%.

30. Second, the Respondents have not always charged the premiums to Tenants in equal shares as provided by their Leases. The fact that the Respondents may not consider equality fair in relation to larger maisonettes does not justify overriding the Leases without the Tenants' agreement. Nor has any satisfactory explanation been offered by the Respondents as to why the total premiums for the building containing No.s 1 & 1A were, in all the years except 2006, higher than for the building containing No.s 3 & 3A. From the information available, the three buildings within the Premises are essentially identical so that identical premiums would be expected. It does not appear that the Respondents ever queried this with the insurers. Consequently, the Tribunal has decided that the premiums payable by the Tenant of No.1A during the period in issue should be reduced to equal those payable by the Tenants of No.1, 2, 3 & 3A.

31. Third, it is apparent to the Tribunal that the insurance cover for No.2A has involved over-insurance in rebuilding value terms. Because the Landlord's covenant is to insure "to the full replacement value thereof", the Tribunal considers that the extra premium for the excess cover constitutes an unreasonably incurred cost. The original Tenant (Mr Atkinson) who requested the increase clearly could not now complain but the present Tenants, who are parties to the Application, plainly can: no suggestion has been made that the Respondents had explained the position to them and obtained their agreement. To rectify this in relation to the three years since these Applicants acquired the Lease of No.2A, the Tribunal has decided that the share of premiums payable by them should be equal to those payable by the Tenant of No.2.

32. The Table attached as an Appendix shows the results of the Tribunal's determinations as to the insurance premiums payable for the years 1996 to 2006. This Table relates to the Application made so that no figures are inserted for the years before the relevant Applicants acquired their maisonettes (ie No.3A in 1997, No.2 in 2002 and No.3A in 2004). It is not feasible for the Tribunal to make any similar determinations for 2007 or future years before proposed premiums have been quoted. The results may well mean that there have been overpayments made by some or all of the Applicants. However, the Tribunal has no jurisdiction to make decisions about recoverability or to order restitution; these are matters for the Courts, although it is possible that any established overpayments may be set-off against future charges or other payments becoming due from Tenants.

Premium receipts

33. The Applicants have expressed considerable and continuing concern that the Respondents have failed to produce premium receipts despite numerous requests. The Tribunal observes that all the Leases include a covenant on the part of the Landlord to produce such receipts to Tenants on demand (see para.s 9 and 10 above). It follows that non-production is a breach of covenant. The Tribunal is also aware, as mentioned at the Hearing, that there are statutory provisions requiring, in effect, the production of "accounts, receipts or other documents which provide evidence of payment of any premiums due" (see para.3(1) & (7) of the Schedule to the 1985 Act). Failure to comply with this requirement without reasonable excuse is a criminal offence (see para.6 of the Schedule). However, the Tribunal has no jurisdiction to order the production of such receipts. Further, the Tribunal felt able to rely on the Summary of Cover provided by AXA and produced by the Respondents in respect of the years 2000 to 2006 as sufficient evidence of the annual premiums payable (ex IPT) in those years.

Costs

34. As noted (in para.4), the Application also sought an order under s.20C of the 1985 Act to limit future service charges by excluding costs of the proceedings incurred by the Landlord. However, since it was common ground that the Leases contained no provisions for the recovery of service charges or of such costs otherwise, it was thought by the Tribunal and accepted for the Applicants that such an order would be otiose.

35. At the Hearing, the Applicants asked for costs but it was explained that the Tribunal only had power to order a party to pay costs if of the opinion that that party had "acted frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with the proceedings" (see para.10 of Schedule 12 to the Commonhold and Leasehold Reform Act 2002). The Tribunal indicated that it did not consider that this extreme condition precedent could be established in respect of the present proceedings by either side.

36. However, it had also been stated in the Pre-Trial Directions, dated 16 October 2006, that requests for reimbursement of fees paid to the tribunal might be considered at the Hearing (ie under reg.9 of the LVT(Fees) (England) Regulations 2003). Mr Bruce made such a request on behalf of the Applicants. The relevant Regulation does not indicate any criteria for requiring one party to reimburse another party's fees but the Tribunal

applied the criterion stated in s.20C of the 1985 and considered whether this would be "just and equitable in the circumstances".

37. In the opinion of the Tribunal, the present proceedings were rendered inevitable because the Respondents knowingly demanded payments which were not in accordance with the provisions of the Applicants' Leases. Thus Mr Moss in evidence referred to making charges in "grey areas" of entitlement. The Tribunal interpreted this as meaning that the Respondents had tried on the so-called service charges as well as the differential insurance arrangements to see if they could get away with it. They have largely failed. In these circumstances, the Tribunal has decided to require the Respondents, jointly and severally, to reimburse to the Applicants forthwith the total sum of £250 paid by them as fees for the Application (£100) and for the Hearing (£150).

CHAIRMAN Julian Faulks

DATE 14th **December 2006**

1, 1a, 2, 2a, 3 and 3a Astrop Terrace (6 units), Shepherds Bush W6 7HQ