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HM COURTS AND TRIBUNAL SERVICE

LEASEHOLD VALUATION TRIBUNAL
CASE NO CHI/00HP/LSC/2011/0167

Application: Sections 27A and 20C of the Landlord & Tenant Act 1985 as amended ('the 1985 Act')

Applicant/Leaseholder: Mr Noel Thomas Boulsover and others

Respondent/Landlord: Stour Developments Ltd

Building: Conifers 1 The Avenue Poole Dorset BH13 6BA

Date of Application: 30 November 2011

Date of Initial Directions: 5 December 2011

Date of Directions Hearing and Further Directions: 10 January 2012

Date of Substantive Hearing: 20 April 2012

Venue: Chalet Suite Best Western Hotel Royale 16 Jervis Road East Cliff Bournemouth BH1 3EQ

Appearances for Applicant/Leaseholder: Mr N T Boulsover (Flat 19) and Mr S Lister (Flat 22)

Appearances for Respondent/Landlord: Mr W Miller, Solicitor, Mr M Hill MRICS, and Mr P Heasman of Foxes Property Management Limited

Observing: Mr Paul Garfield on behalf of Mrs M Simester (Flat 21)

Members of Tribunal: Mr N P Jutton BSc (Chairman) Mr P R Boardman MA LLB

Date of Tribunal's Reasons: 26 April 2012

1 **Introduction**

2 The Applicants apply under Section 27A of the 1985 Act to determine liability to pay and the reasonableness of service charges in relation to the Building, and for an Order pursuant to Section 20C of the1985 Act that the Respondent's costs incurred in connection with these proceedings are not to be regarded as

relevant costs to be taken into account in determining the amount of any service charge payable by the Applicant.

3 At the directions hearing on 10 January 2012, the following were matters identified as issues for the Tribunal to determine at the substantive hearing, namely:

i. In relation to the items in the 2011/2012 interim service charge budget proposal produced to the Tribunal for inspection at the directions hearing, and forming the basis of a demand dated 1 November 2011, whether each of the sums referred to was a reasonable budget figure.

ii. Whether, and, if so, to what extent the costs incurred by the Respondent/Landlord in relation to 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 Applicant.

4 It was recorded at the directions hearing that no dispute had been raised concerning the identity of the person by whom the service charges were payable, the person to whom they were payable or when or in what manner they were payable.

5 **Documents**

6 The documents before the Tribunal were:

a. Those contained in a bundle, pages 1-268; references in these reasons to page numbers are to page numbers in the bundle.

b. A form of insurance valuation dated April 2012 submitted by Mr M Hill of Michael Hill Associates Limited at the hearing.

c. A form of quotation from NIG Residential Landlords' Insurance submitted by the Applicants at the hearing.

7 **The Inspection**

8 The Tribunal inspected the exterior of the Building on the morning of the hearing, 20 April 2012. Also present were Mr Boulsover and Mr Lister. The Building is a purpose built block of flats in roughly an "L" shape. The block comprises 21 flats which it is understood were built in the late 1960s on top of which had been added a further 7 flats by the Respondent in 2010/2011. Surrounding the Building were well maintained grounds together with 21 garages including 2 rubbish stores a tool shed and a cycle shed.

9 The Building is served by 4 communal hall and stairways. The Tribunal inspected two of the communal halls/stairways, firstly that serving Flats 20-22 and 28-29 and secondly that serving Flats 14-19 and 27. The communal halls and stairways were noted to be in good condition well maintained and decorated. New fire screens had been erected within the halls and stairways as part of the development of the 7 additional flats as had emergency fire lighting and smoke escape hatches.

10 Within the grounds were car parking spaces for each of the 7 new flats together with 6 visitor car parking spaces.

11 **The Law**

12 The statutory provisions primarily relevant to applications of this nature are to be found in Sections 18, 19, 27A and 20C of the Landlord and Tenant Act 1985 (The Act). They provide as follows:-

18 (1) In the following provisions of this Act "service charge" means an amount payable by a tenant of a dwelling as part of 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

(b) the whole or part of which varies or may vary according to the relevant costs.

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

(3) For this purpose –

(a) "costs" includes overheads, and

(b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

19 (1) Relevant costs 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 payable 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.

27A (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.

(4) No application under subsection (1) or (3) may be made in respect of a matter which –

(a) has been agreed or admitted by the tenant,

(b) has been, or is to be, referred to arbitration pursuant to a post dispute arbitration agreement to which the tenant is a party,

(c) has been the subject of determination by a court, or

(d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

5 But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

20C (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 court, residential property tribunal or leasehold valuation tribunal, or the Upper Tribunal, or in connection with arbitration proceedings, 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 or any other person or persons specified in the application.

(2) The application shall be made –

....

(b) in the case of proceedings before a leasehold tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any leasehold valuation tribunal;

(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.

13 **The Parties**

14 The Directions dated the 10 January 2012 provided at paragraph 9 that each Lessee of a flat in the Building who wished to join the application should by the 17 January 2012 apply to the Tribunal in writing to do so. On the 16 January 2012 (the letter had been wrongly dated 16 January 2011) a bundle of letters and emails were sent to the Tribunal. The Tribunal proposed that it would treat that bundle of letters and emails as applications by Lessees to be joined as applicants. Mr Miller on behalf of the Respondent agreed that the said Lessees be joined as applicants. The Tribunal therefore determined the following Lessees be joined as applicants:

Grant Nicholas Squires	Flat 1
Mary Stewart	Flat 2
David Charles Tilt	Flat 3
Irene Garnett	Flat 4
Howard Ridgeley	Flat 5
D Gibbs	Flat 6
Betty Ridgeway	Flat 7
Mrs M S Hillen	Flat 8
Donald Freeman and Jon Stewart	Flat 9
Mrs P Herridge	Flat 10
D Rhodes and E Vercruyz	Flat 11
Mrs J Cole	Flat 12
Mrs P Jackson	Flat 14
Mr Doreen Bousfield	Flat 15
Startline Holdings Limited	Flat 16
Brian Kenneth Flax	Flat 17
Antonella Mancini	Flat 18
Mary Western	Flat 20

Maureen Simester	Flat 21
Stephen Lister	Flat 22

15 **Background**

16 The Respondent had pursuant to the Directions of the 10 January 2012 produced within the bundle a copy of each different form of Lease together with a schedule identifying which form of Lease related to which flat. The schedule appeared at page 1 of the bundle.

17 In response to questions from the Tribunal Mr Boulsover confirmed that the schedule correctly identified which form of Lease related to which flat, and that such Leases were in the form of the Leases contained within the bundle the only difference being that Mr Boulsover understood that the Lease to Flat 21 contained a differently worded Clause 9. It was agreed by the parties that that was not relevant to service charges and thus to the issues before the Tribunal.

18 The Schedule identified 4 different forms of Lease which were:

a. At pages 2-10 inclusive Lease dated 24 September 1969 (the Original Lease) in respect of Flats 1, 2, 4, 7, 9, 10, 11, 12, 14, 16, 17 and 22.

b. At pages 11-37 inclusive Lease dated 22 July 2010 being a Lease granted pursuant to the provisions of the Leasehold Reform Housing and Urban Development Acts 1993 (the 1993 Act Lease) which related to Flats 6, 18, 19, 20 and 21.

c. At pages 38-66 inclusive Lease dated 28 January 2011 being an extended Lease agreed on each occasion between the Lessor and Lessee following the surrender of an original Lease (the Extended Lease) relating to Flats 3, 5, 8 and 15.

d. At pages 67-95 inclusive Lease dated 16 September 2011 being a Lease of the additional flats erected by the Respondent in 2010/2011 (the New Lease) in relation to Flats 23, 24, 25, 27, 28 and 29.

19 The Tribunal referred the parties to the document headed 'Conifers Residents Association 2011/2012 Interim Budget Proposals for Consideration by Annual General Meeting' (page 96). Mr Boulsover and Mr Miller agreed that that document was the 2011/2012 interim service budget document produced to the Tribunal at the Directions Hearing on 10 January 2012 and that the expenditure figures therein listed under the column headed 2011/2012 estimated were the items which the Applicant wished the Tribunal to address.

20 Mr Boulsover stated that the only item of expenditure listed on the said budget which was in dispute was the first item headed 'insurance' in the sum of £5,420.

21 **Insurance**

a. **Valuation**

At page 130 was an insurance policy renewal schedule produced by Allianz Insurance Plc to the Respondent Landlord's Managing Agents Property Management which provided as follows:

Renewal date: 22 August 2011

Building Sum insured: £6,894,784 (£5,107,247)

Total renewal premium: £5,423.63.

22 **The Applicant's Case**

23 The Applicants contended that the valuation of the Building, upon which the renewal premium was based, was too high. Mr Bouslover said that according to the letter from Foxes Property Management dated 22 August 2011 at page

207 the figure of £5,107,247 in the insurance policy renewal schedule at page 130 appeared to be the figure for rebuilding costs, and that the figure of £6,894,784 included the 35% "day-one uplift"

24 The Applicants said they had sought advice from a Surveyor, an Insurance Broker and a Property Developer.

25 The advice from the Surveyor was contained in a letter at page 229 from Graham C Thorne FRICS addressed to Mr Lister dated 2 November 2011. In that letter Mr Thorne stated *"... based on the overall square footage of the block at a figure of 25,760 sq ft as calculated by you, we consider that the re-building figure for insurance would be covered at £125 per sq ft which would also include the demolition costs.*

We would therefore consider that our valuation figure for insurance purposes would be the same as your insurance broker's figure and, therefore, a total cost of £3,220,000 to re-build the block of flats. A figure of £6,500,000 would more than cover both the land value and any profit that a developer may seek. It would, therefore, be too high."

26 Mr Boulsover said that Mr Thorne had further advised that because the 7 new flats (Flats 23-29 inclusive) were of a timber frame construction rather than a solid construction, that they would be cheaper to re-build and that would have the effect of reducing the overall re-build value.

27 The Applicants said the advice from the Insurance Broker and Developer was referred to in an exchange of emails between Mr Lister and Mr Boulsover at page 227. Mr Lister said that the emails had been sent following discussions that he had had with the Broker A-Plan.

28 The first email on page 227 suggested that the square footage of the Building could be based upon 1000 sq ft x 28 (the number of flats).

29 The second email on page 227 referred to A-Plan having contacted a local Property Developer who had stated that re-build costs *"are £115 per sq ft for similar properties in this area. They said that working on our previous estimation of 28 x 1,000 sq ft, the re-build cost of the block is £3,220,000".*

30 Mr Lister said that he had been advised by Mr Thorne that Mr Thorne's valuation was inclusive of demolition costs and professional fees, and that he had also been advised by Mr Thorne that building costs had reduced in the past 3-5 years.

31 Mr Lister accepted, upon being questioned by the Tribunal, that the area measurements referred to in Mr Thorne's letter (page 229) and in the emails (page 227) were not accurate measurements.

32 Mr Bolsover referred to a letter dated 10 October 2011 that he had received from Foxes Property Management Ltd (page 213) which stated *"On instructions from Stour Developments, the building's declared value was increased as from 8 March 2011 by £1,680,000 producing an increased premium of £754.68".*

33 **The Respondent's Case**

34 Mr Miller handed up to the Tribunal a calculation prepared by Mr Hill. A copy was passed to the Applicant. There were two pages – the first marked Sheet A and the second Sheet B.

35 Mr Hill explained that the calculations set out on Sheet A and Sheet B were intended as comparisons with the figures produced by the Applicants.

36 Mr Hill explained that Sheet A was a comparison using the figures contained in Mr Thorne's letter (page 229). This applied the figure of 25,760 sq ft and the re-building figure of £125 per sq ft contained in Mr Thorne's letter. Mr Hill had converted the square footage calculation from sq ft to sq m and the re-build calculation from a price per sq ft to a price per sq m. Mr Hill's calculation allowed nothing in relation to demolition costs or professional fees and did not take into account the garages and bin stores. On that basis, his calculation produced a re-build valuation of £3,220,000.

37 Mr Hill explained Sheet B. Sheet B again utilised the floor area referred to in Mr Thorne's letter (page 229) but then added a further figure of 735 m^2 in relation to Flats 23-29 inclusive. Mr Hill said that in calculating the area of 735 m^2 he had treated Flats 23-29 as 90% of the ground area to take into account overhang and balconies. He then applied the same re-build per sq m figure as in Sheet A and produced a valuation of £4,208,725. He then added professional fees of 20% totalling £841,745 and thus a total recommended insurance value of £5,050,470.

38 The Tribunal adjourned for 15 minutes to allow the Applicants to consider Mr Hill's calculation.

39 Mr Hill said he disagreed that re-building costs for timber frame construction were cheaper (with reference to Flats 23-29). Indeed he felt that generally such construction costs were 10% more than traditional brick construction.

40 In Mr Hill's opinion, it was an incorrect approach to calculate floor area by taking an average figure and applying it to the number of flats. He described that as an absurd approach.

41 Mr Hill said he had carried out a measurement of the Building and that had produced a total figure of 34,283 sq ft, and that as such, there was a clear difference in floor area as calculated by Mr Hill and as contended for by the Applicant.

42 Mr Miller said he did not know how the figure of £1,680,000 referred to in the letter at page 213 had been produced. Mr Hill suggested it might include the day one uplift figure.

43 **Tribunal's Decision**

44 The Tribunal found Mr Hill's evidence to be persuasive, that Mr Hill alone had carried out a measurement of the property, and that his measurements appeared to cover all matters that required to be insured. The Tribunal found Mr Hill's calculations persuasive when compared with the letter from Mr Thorne at page 229.

45 The Tribunal appreciates that the Applicants understandably have not been able to undertake accurate measurements.

46 The Tribunal does not find Mr Thorne's letter at page 229 to be a persuasive document.

47 Further, with reference to the emails at page 227 which purported to pass on advice received from A-Plan Brokers and an unnamed property developer, the

Tribunal does not find that sufficiently persuasive to suggest that the figure of £5,107,247 referred to in the Renewal Schedule at page 130 to be unreasonable.

48 The Tribunal is of the opinion that the Applicant's argument that the valuation of £5,107,247 was excessive when compared with valuations for previous years and was not persuasive for two reasons. Firstly, the new premium reflected the addition of 7 further flats. Secondly, there was no evidence that the valuations in respect of previous years were correct. Simply because valuations in previous years were lower than an up to date valuation for the current year was not evidence that the current valuation was wrong.

49 The Tribunal considers that the difference in valuations contended for by the parties can in the main be explained by the different floor area measurements. The Tribunal accepts that the measurements and resultant valuation figure produced by the Applicants is produced in good faith but the Tribunal does not find the Applicants' arguments persuasive.

50 **One Day Uplift**

51 Mr Heasman said that the insurance premium is calculated by reference to the declared value shown on the renewal schedule at page 130 of £5,107,247, and that the building sum insured shown on the schedule of £6,894,754 represents an increase of 35% of the declared value known as 'a day one uplift'.

52 Mr Heasman said that a day one uplift of 35% is a standard uplift in the insurance industry. It is an additional value to cover, amongst other matters, the costs of accommodating lessees during rebuilding and of inflation. Mr Heasman said that the one day uplift is offered at no cost to the policy holder

because it is a standard uplift and the premium is based upon the declared value figure.

53 Mr Heasman upon being questioned by the Tribunal agreed that it might be arguable that a 35% one day uplift may be higher than is necessary in days of relatively low inflation but in his view it was the current standard figure applied by the insurance industry.

54 Mr Boulsover wondered whether a 35% one day uplift was relevant in the current market given the current single figure rate for inflation. He understood that it might be possible to obtain a one day uplift as low as 20%.

55 Upon being questioned by the Tribunal, Mr Boulsover accepted that he had no evidence to refute Mr Heasman's contention that the premium was based upon the declared value figure of £5,107,247 and therefore not affected by the amount of the one day uplift.

56 **The Tribunal's Decision**

57 The Tribunal noted that Mr Boulsover accepted that he was unable to produce evidence to show that the insurance premium was increased by the rate of or the amount of the one day uplift. Upon the evidence before it, the Tribunal accepts that the amount of the one day uplift does not affect the amount of the premium and therefore it does not affect the reasonableness of the amount of the premium.

58 **The Premium**

59 Mr Boulsover referred to the renewal schedule for the property (page 120) for the year commencing 22 August 2010 which showed a total renewal premium

including insurance premium tax of £3,126.20. In his view that did not compare favourably with the renewal premium for the year commencing 22 August 2011 shown on the latest renewal schedule (page 130) of £5,423.63 including insurance premium tax.

60 Mr Boulsover referred to a letter he had received from Foxes Property Management dated 10 October 2011 (page 213). The letter stated that the declared value for the building had been increased from 8 March 2011 by £1.68m which had produced an increased premium of £754.68. Mr Boulsover calculated that that increase covered a 5 month period which equated he said in round terms over a 12 month period to an increase in premium of £1,800. Mr Boulsover noted that the increase in overall premium for the building between the years commencing 22 August 2010 and 22 August 2011 was some £2,300.

61 Mr Miller said that the premium nonetheless of £5,423.63 for the year commencing 22 August 2011 was reasonable because that was the figure that the managing agents were able to obtain.

62 Mr Heasman explained that the insurance was arranged by brokers, A1 Insurance, that the insurance provider had been changed to Allianz Insurance Plc in 2008 because the brokers advised that was the most competitive insurer at that time, that for all subsequent renewals, the brokers had searched the market on behalf of the managing agents to obtain comparisons, and that as at the renewal date of 22 August 2011 the brokers had advised that apart from Allianz Insurance Plc, the only other company who were prepared to offer cover were Liverpool Victoria and the figure produced by Liverpool Victoria was not competitive. For that reason, the brokers had renewed the insurance with

Allianz Insurance Plc upon the basis that was the best cover that the brokers could obtain.

63 Mr Lister referred to a letter he had received from A-Plan Insurance Group dated 28 September 2011 (page 230). The letter stated *"The cost of 12 months' cover is £4588.19 (on £6,894,784 sum insured) and your quotation is enclosed".*

64 Mr Lister produced the quotation referred to in that letter. Mr Miller confirmed that the Respondent did not object to its late production. The quotation was from NIG Residential Landlords Insurance. It included an excess figure of £200. It was for a figure of £4,588.19 based upon a valuation of £6,894,784.

65 Mr Heasman said that the excess figure of £200 appeared to relate to every potential claim, and that the Allianz premium (page 130) was provided upon the basis of an excess of £250 but on only one peril, namely the escape of water. There was no excess on the Allianz policy in relation to other perils.

66 Mr Lister fairly said he accepted that in obtaining the quote from NIG Residential Landlords he had been unable to provide a claims history. The quote was based upon what he called a 'ballpark figure'.

67 Mr Miller made the point that the quotation from NIG Residential Landlords' Insurance was subject to satisfactory completion and acceptance of a proposal form.

68 Mr Lister said he accepted that. Mr Lister said that he also accepted that he did not know if the valuation contained in the NIG Residential Landlords' Insurance quote of £6,894,784 was exclusive or inclusive of the one day uplift.

69 Upon questioning from the Tribunal, Mr Heasman said that he did know whether or not the brokers had sought a quote from NIG.

70 **The Tribunal's Decision**

71 The Tribunal takes into account the contents of the letter from A-Plan Insurance at page 230. The Tribunal has also considered the quotation from NIG Residential Landlords' Insurance that was handed up. The Tribunal takes account of the fact that the NIG quote provided for a £200 excess for every peril claimed, but that the Allianz figure provided for an excess of £250 on just one peril, and that the Allianz policy did not provide for an excess on other perils. The Tribunal takes account of Mr Lister's acceptance that the NIG quote was a ballpark figure. The Tribunal also notes that although there was no evidence before it as to the amount of premium per £1000 of cover, the rate of premium for the year commencing 22 August 2011 (page 130) when measured against the declared value figure of £5,107,247 was consistent with the rate of premiums when measured against the declared value figures for previous years namely those commencing 22 August 2009 (page 110) and 22 August 2010 (page 120).

72 It follows that having accepted that the valuation figure of £5,107,247 is reasonable, the Tribunal finds that the premium of £5,433.63 for the year commencing 22 August 2011 is reasonable and thus in line with the interim budget figure of £5,420 (page 96).

73 **Cost of Insurance/Commission**

74 Upon being questioned by the Tribunal, Mr Heasman confirmed that each form of lease contained an identical provision in respect of the expense of insurance that the Landlord could recover from the Lessees by way of service charges. In each lease, that was set out at paragraph 5 of the 4th Schedule (costs, expenses, outgoings and matters in respect of which the Lessees are to contribute) and is stated as *"5. The cost of insurance".* Mr Heasman said that, accordingly, the Landlord could recover as part of the service charge the cost of insurance incurred by the Landlord.

75 Upon being questioned by the Tribunal, Mr Heasman confirmed that the renewal insurance schedules for the years commencing 22 August 2009 (page 110), 22 August 2010 (page 120) and 22 August 2011 (page 130) were all in the name of the Respondent Landlord.

76 The Tribunal referred Mr Heasman to page 194. Mr Heasman explained that this was, to the best of his knowledge, produced by the Managing Agents, Foxes Property Management Ltd, and was a copy of its agency account with A1 Insurance, the Insurance Brokers. Mr Heasman confirmed that the account showed in relation to the Building for the year commencing 22 August 2011 a premium figure of £5423.63, a commission rate of 25%, a commission sum of £1,279.16 and an amount stated as 'Amount Due' of £4,144.47.

77 Upon questioning from the Tribunal, Mr Heasman confirmed that the sum of £4,144.47 was the amount to be paid by the Managing Agents, Foxes Property Management Ltd, on behalf of the Respondent, to the insurance brokers A1 Insurance.

78 The Tribunal referred Mr Heasman to an invoice dated 21 September 2011 from Foxes Property Management Ltd addressed to Mr K Clarke for *"commission due re Conifers building insurance renewal 22 August 2011 £639.58"*, (page 195). Mr Heasman explained that Mr K Clarke was a director and shareholder of the Respondent Landlord.

79 Upon being questioned by the Tribunal, Mr Heasman said that the cost of insurance to the landlord was the amount of the premium of £5,423.63. Mr Heasman said that that was the amount of the premium under the terms of the insurance policy. He said that if the cost were the figure of £4,144.47 shown as the amount due on the schedule at page 194, then in effect there would be no commission paid.

80 The Tribunal put it to Mr Heasman that the cost to the Landlord of insurance was the amount that the Landlord had to pay. Mr Heasman said that the amount the Landlord had to pay was £5,423.63 and that commission was paid out of that amount.

81 Upon being questioned by the Tribunal, Mr Heasman accepted that Foxes Property Management Ltd were acting as agents for the Landlord. The Tribunal put it to Mr Heasman that therefore the actual cost to the Landlord was the sum of £4,144.47. Mr Heasman disagreed. He said even if that were correct, as half of the commission was being paid to Mr Clarke, the Landlord was only getting half of the amount of commission.

82 Mr Miller said that the Landlord was Stour Developments Ltd, the Respondent. That the payment of half the commission to Mr K Clarke was payment to a different legal entity, that the cost of insurance to the landlord was the higher

figure before deduction of commission of £5,423.63, and that the payment of commission was a matter between the insurers and the insured. What an insurance company chose to do with the commission was a matter between the insurance company and its insured. Mr Miller said that the lease did not say that the cost of insurance meant the net cost of insurance, and that as such, the cost of insurance was the figure of £5,423.63.

83 Mr Miller said that the fact that the payment was made to the insurers net of commission was purely an accounting exercise. They could alternatively pay the gross figure of £5,423.63 and then be repaid commission back of £1,279.16 as shown in the schedule at page 194.

84 Mr Lister said that in effect the Lessees were paying commission to the Respondent on top of managing agent's fees.

85 **The Tribunal's Decision**

86 The Tribunal finds that the Respondent paid for the year commencing 22 August 2011 the sum of £4,144.47 for buildings insurance, but that the Respondent seeks to recover from the Lessees the premium without deduction of commission (as per the budget at page 96 of £5,420), and that the effect is that the Respondent seeks to make a 'profit' in round terms expressed as commission of £1,279.

87 The Tribunal finds that the cost of insurance (as per paragraph 5 of schedule 4 to each form of lease) is the actual cost to the Landlord, that the cost to the Landlord is the figure shown on the schedule at page 194 as the premium net of commission of £4,144.47, and that by seeking to recover from the Lessees a figure which is the amount of premium without deduction of commission, the

Respondent is seeking to recover from the Lessees a total figure which exceeds the cost to the Landlord.

88 The Tribunal finds that a reasonable sum for the purposes of the 2011/2012 interim budget (page 69) is £4,144.47.

89 **Section 20C Application**

90 Mr Miller referred the Tribunal to paragraph 10 of the 4th Schedule to each form of lease. In each lease the 4th Schedule sets out costs, expenses and outgoings in respect of which the Lessee is to contribute. In each case, paragraph 10 of the 4th Schedule provides:

"10. The Landlord's expenditure and the expenditure or fees incurred with any third party acting on the instructions of or as agent for the Landlord in connection with the carrying out of the Landlord's obligations under this Lease in connection with the maintenance, management and repair and preparation of accounts and for this purpose the Landlord may add the cost thereof to the charges incurred by the Landlord under the terms hereof".

91 Upon being questioned by the Tribunal, Mr Miller accepted that there was no provision in any of the forms of lease which directly made reference to proceedings before a Court or Tribunal.

92 Mr Miller contended that legal costs incurred by the Respondent fell within the definition of fees in paragraph 10 of the 4th Schedule.

93. Mr Miller further contended that costs incurred by reason of these proceedings were costs incurred in connection with the management of the Building and the preparation of accounts, that the Respondent was required to respond to the

challenge made by the Applicants to the interim service charge budget which was the subject matter of these proceedings, that the management of the property, in particular the preparation of accounts, could not be completed until the matters before the Tribunal were resolved or determined upon, and that the preparation of an interim service charge budget formed part of the preparation of accounts and as these proceedings addressed the interim service charge budget, the Respondent's costs incurred by reason of these proceedings formed part of the Respondent's costs in the preparation of accounts.

94 Mr Boulsover contended that the correspondence in the bundle demonstrated a failure by the Respondent to address concerns and queries raised by the Applicants. In Mr Boulsover's view, this was not the fault of the Managing Agents Foxes Property Management Ltd because they, he understood, had difficulty in obtaining instructions from their client landlord. He felt that in the circumstances, where legal expenses were incurred by the Respondent, these should not be passed on to the Lessees. Mr Boulsover doubted whether in any event legal fees could be defined as fees incurred in connection with the maintenance and management of the property.

95 Mr Lister said that legal fees incurred by the Respondent did not benefit the Lessees. They were incurred to protect the Respondent Landlord. He said that the Applicant Lessees had spent time in trying to get answers to their questions from the Respondent, that their application to the Tribunal was a last resort to obtain those answers, and that had the Respondent replied to the questions raised by the Lessees, then these proceedings might not have been necessary.

96 **The Tribunal's Decision**

97 The Tribunal finds that the fees, whether they be the fees of Mr Miller, Mr Hill, the Managing Agents or otherwise, incurred by the Respondent in relation to these proceedings are not fees incurred in connection with the maintenance, management, repair and preparation of accounts as set out in paragraph 10 of the 4th Schedule to each form of lease.

98 The Tribunal finds that there is no provision in any of the forms of lease which allow the Respondent to recover from the Applicants costs or fees incurred by the Respondent in relation to or in connection with proceedings before the Tribunal.

99 The Tribunal finds that had it been the intention of the draftsman of the leases to allow the Respondent to recover from the Applicants by way of service charge payments costs and fees in relation to proceedings before the Tribunal either expressly or by implication, it would have been easy for the draftsman in each case to include a provision to that effect.

100 Further, the Tribunal accepts the Applicants' evidence that they brought these proceedings as a matter of last resort and as such even had the Respondent's fees incurred in connection with these proceedings been recoverable under the terms of the various forms of lease, the Tribunal would have made an order in any event that such fees were not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the Applicants.

101 The Tribunal therefore orders that all or any of the costs incurred by the Respondent in connection with these proceedings are not to be regarded as

relevant costs to be taken into account in determining the amount of any service charge payable by the Applicants.

102 Finally, the Tribunal takes note of the fact that the Applicants and the Managing Agents appear to enjoy a positive relationship helped by the good level of communication between them. It is apparent that that might not be the case as regards the Applicants and the Respondent. The Tribunal would encourage the Respondent to adopt the same approach as the Managing Agents in that regard for the benefit of both parties.

103 **Summary of the Tribunal's Findings**

104 The Tribunal finds that a reasonable budget figure in relation to buildings insurance in the 2011/2012 interim service budget proposal (page 96) and accordingly the amount payable to the Respondent there-under is £4,144.47.

105 The Tribunal also finds that all or any of the costs incurred by the Respondent in connection with these proceedings are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the Applicants.

Dated the 26TH day of April 2012

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N P Jutton (Chairman)

A Member of the Tribunal appointed by the Lord Chancellor