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HM COURTS & TRIBUNALS SERVICE
LEASEHOLD VALUATION TRIBUNAL

Case No: CHI/00HY/LSC/2012/0049

Re: Flats 6-11, Throgmorton Hall, Portway, Old Sarum, Salisbury, SP4 6BQ

Applicant Throgmorton Hall Management Limited

Respondents Major & Mrs Allison Flat 6
 Mr J Graves Flat 7
 Very Revd & Mrs Flegg Flat 8
 Dr & Mrs Verdon-Hodges Flat 9
 Mr & Mrs Hambley flat 10
 Mr Henderson Flat 11

Date of Application 29 February 2012

Date of Inspection 7 December 2012

Date of Hearing 7 December 2012

The Property Flats 6-11, Throgmorton Hall, Portway, Old Sarum,
 Salisbury

Venue Red Lion Hotel, Salisbury

Representing the parties The Applicant: Mrs G Drysdale, Senior Property
 Manager, Napier Management Services Limited
 (Napier) & Mr R Beavis, director of the Applicant

 Mr J Graves & Very Revd Dr Flegg in person

Also present Ms S Ivers & Ms L Cutler (Napier Management Services
 Limited); Mr & Mrs Beavis; Mr & Mrs Ramsey; Mr
 Sampson; Mr J Cooney; Mr B Smith; Mr & Mrs Verdon-
 Hodges

Members of the Leasehold Valuation Tribunal:

M J Greenleaves	Lawyer Chairman
Mrs M Hodge BSc(Hons) MRICS	Valuer Member
Mr M R Cook	Lay member

Date of Tribunal's Decision: 18 March 2013

Decision

- 1) The Tribunal determines in accordance with the provisions of Section 27A (the Section) of the Landlord and Tenant Act 1985 (the Act) that for 2011/2012 the estimated service charges sums set out in Columns 1 and 2 of the table below are reasonable sums to the extent shown in column 3 and are payable by the Respondents to the extent shown in column 4 in accordance with the provisions of Clause 9(v) of the lease and, if payable, by virtue of the other provisions referred to in column 5:

Head of charge	Sum claimed	Reasonable sum	Payable/not payable	Lease payability provision
Estate 1/15th				
Accountancy	720	720	Not payable	None
Insurance	4,310	500	Payable	Fourth Schedule Part II para 6 only
Electricity	1,875	1,875	Payable	Fourth Schedule Part II para 1
Gardening	9,500	9,500	Payable	Fourth Schedule Part II para 1
Management fees	4,224	4,224 but subject to cap	Not payable	Clause 5(xii) and Fourth Schedule Part I para 5
Miscellaneous	50	50	Payable	Fourth Schedule Part II
Repairs general	5,000	5,000	Payable	Fourth Schedule Part II paras 1-4

Head of charge	Sum claimed	Reasonable sum	Payable/not payable	Lease payability provision
Reserve fund contribution	1,000	Nil	Not payable	None
Tree surgery	5,000	4,000	Payable	Fourth Schedule Part II paragraph 1
Water rates	300	300	Not payable	None
Building costs 1/15th				
Boiler repairs	4,100	3,800	Payable	Fourth Schedule Part II paras 2 and 4
Cleaning	1,747.20	1,500	Payable	Fourth Schedule Part II para 1
Electricity	625	625	Payable	Fourth Schedule Part II

				para 1
Gas	1,500	600	Payable	Fourth Schedule Part II para 1
Repairs general	1,500	1,500	Payable	Fourth Schedule Part II para 1
Reserve fund	600	Nil	Not payable	None
Lift costs 1/4th				
Insurance	220	Nil	Not payable	Clause 3(ii)(b)
Lift phone	157	157	Payable	Clause 3(ii)(b)

Reasons

- 2) This was an application by Throgmorton Hall Management Company Limited for a determination that services charges on account for the accounting year ending 30 September 2012 were payable. The relevant charges are set out in the budget for the year ending 30 September, 2012 divided as between estate costs, building costs and lift costs.
- 3) Of the 6 Respondents to the original application, the Very Revd Dr and Mrs Flegg and Mr Graves filed representations in accordance with directions given. The other Respondents did not take an active part. By letter dated 3 October 2012 Mr and Mrs Verdon-Hodges said "we do not intend to contest the amount claimed by the Applicant on account of the service charge for the year ending 30th September 2012."

Inspection

- 4) Prior to the hearing the Tribunal inspected Throgmorton Hall (the Property) in the presence of Mr Beavis, Mrs Drysdale Mr Groves and the Very Revd Dr Flegg and others. The Property was constructed about 80 years ago as military married quarters and officers mess. It is a very substantial property laid out in extensive grounds. Apart from garages, other outbuildings and recreational areas, the residential building, built in a U-shape as just one building, is constructed largely of brick under a sloped tiled roof although the entrance door to the flats, in the middle section, lies beneath a flat roof. This entrance door leads into a substantial ground floor hallway. On this ground floor are flats 6, 7 and 17 (formerly the warden's flat) and there is also a services room containing meters, washing machine, shower and WC. A lift and stairs lead to the first and second floors on each of which there are 2 flats: on the first floor flats 8 and 9 and on the second floor flats 10 and 11.
- 5) On either side of the section of the building containing the flats (the flats section), the building comprises two wings containing 9 freehold terraced houses.
- 6) The freehold properties have the benefit of their own lawned areas within a bounding estate road. Outside that estate road are communal lawned areas with shrubs and trees in addition to the tennis and other courts, playground facilities, garages and other facilities. There is a further development to the south-east which has permanent access along the estate road of the property for a fixed annual sum of £250. The whole estate is secured by electrically operated security gates. The buildings appear to be in good condition for their age and character and the grounds maintained to a reasonable standard.

- 7) Flat 17, unlike the other flats, is not let on a long lease but was originally set aside as the warden's flat retained with the freehold of the flats section. It is no longer used as such: it is let on short term tenancies deriving a rental income for the Applicant. It may be noted that each of the living units, other than Flat 17 has one share in the Applicant.

Hearing, Representations & Consideration

- 8) A hearing was held on the same day as the inspection, those attending being noted above. The Tribunal heard submissions and evidence by or on behalf of the parties and so far as material to the Tribunal's consideration of the issues, they are referred to below.
- 9) The issues for determination by the Tribunal were whether the budgeted charges payable on account were reasonable as budgeted figures; secondly, how those charges were properly apportioned according to the terms of the leases of the flats; and thirdly whether they are payable.
- 10) In relation to the flats, other than flats above ground floor sharing between them the cost of the lift, it was understood that for the purposes of the application the leases were in a common form. The Tribunal accordingly considered the lease of plot 13 (flat 9), first floor, the lease being dated 1 June, 2001 and made between Westward Investment Management Services (UK) Ltd and the Applicant and Gemma Trudie Verdon and Colin Mark Hodges by which the flat as defined was demised for a term of 125 Years from 31 December 1999. References below to the lease are to this lease.
- 11) The Tribunal heard submissions on behalf of the Applicant as to reasonableness and payability of the estimated charges. Those submissions are largely reflected in the witness statement of Mrs Drysdale commencing at page 75 of the trial bundle and are therefore not set out in detail in these reasons. Those Respondents who had made submissions relied substantially on them.
- 12) The Tribunal also heard submissions from the Applicant to the effect that the lease does contain some ambiguity; applying common-sense it is easy to distinguish liabilities; it is relatively easy to distinguish proportions payable. Dr Flegg had always understood that he would only have to pay 1/15 part of the cost of all services. In relation to the words "attributable" and "proportionate part", the Applicant submitted they were not the same; that what is *attributable* to a flat could depend on where it is in the building. Mr Beavis thought the Fourth Schedule Part 1 charges should in fairness be 1/7 each, but 1/6 by interpretation. Mr Graves said that the warden's flat should bear its share.

The Terms of the Lease

- 13) The lease is very poorly drafted. Some words and phrases are defined, but others used are not. Some provisions are unclear. To try to assist in interpretation, the Tribunal also considered the terms of a Land Registry transfer of the freehold of plot 11, being one of the houses, and also a deed of covenant relating to the same house.
- 14) In outline, the lease defines the flat, the lessees covenant to pay service charges and other matters, sets out the landlord's covenants the cost of which are largely due to be provided by service charge contributions and set out other provisions which, in very general terms but disregarding the actual drafting, one would normally expect in a lease of this nature.
- 15) In respect of the lessee's covenant to pay... in accordance with the provisions of Clause 9 a service charge, the service charge provisions provide that the lessee will pay (*italics are those of the Tribunal*):

- a) "3(ii)(a) such *proportion as shall be attributable to the flat* of the expenses and outgoings incurred by the lessor or the company in the repair and maintenance renewal and insurance of the buildings and the other heads of expenditure set out in the first part of the Fourth Schedule hereto."
 - b) "b) one quarter share of the expenses and outgoings incurred by the lessor or the Company in the repair service maintenance and replacement of the lift serving the flat." (Note that this provision appears only in leases of flats above ground floor level).
 - c) "(c) One fifteenth of the expenses and outgoings incurred by the lessor or the company in respect of the heads of expenditure set out in the second part of the Fourth Schedule hereto".
- 16) The heading to the entirety of the Fourth Schedule includes the following words "expenses and outgoings and other heads of expenditure in respect of which the lessee is to pay a *proportionate part*".
- 17) Clause 3(ii)(a) and the Fourth Schedule Part 1 raise questions:
- a) is "proportion attributable to" different from a "proportionate part"?
 - b) In what way is any proportion attributable to a flat? Does it depend on the size of a flat, the number of occupants, the amount of usage of a particular service? Or is it to be a fair proportion?
 - c) Does the use of "proportionate part" affect the terms of the covenant?
- 18) A lease will normally provide for a *fair* proportion, a specific proportion or a calculable proportion. In this lease, in relation to Schedule 4 Part 1 items, there is no provision. The Tribunal accordingly considered interpretation of Clause 3(ii)(a) and the Fourth Schedule Part 1.

Further representations

- 19) Having given preliminary consideration, the Tribunal decided that, although the question had been raised at the hearing, the parties should have an opportunity of making further representations. The Tribunal therefore wrote to the parties on 8 January 2013:

"As you are aware, the Tribunal is meeting again on 26 February to make decisions on the issues arising in this case. The Tribunal has asked me to write to all parties as below.

One of the significant issues is, as you know from the hearing, the meaning of Clause 3(1)(a) and the Fourth Schedule Part 1 of the lease. It appears to the Tribunal that, while it has not yet come to any conclusion on the point, one possible decision could be that because of ambiguity as to the proportion payable under those provisions, it is not possible to find, as a matter of law, that any proportion is payable and it could follow from that that the lessee had no obligation to make any payment under or in respect of those Part 1 items.

It is appropriate that the parties should all have a fair opportunity to make representations on the point before the Tribunal makes any decision. If you wish to make any representations they must be made in writing and 4 copies sent to the office to be received by me no later than 8 February 2013. Any such representations will be considered by the Tribunal on 26 February.

- 20) The Tribunal received replies which may be summarised:

- a) Mr Graves: that the Tribunal appeared to consider the leases flawed and asking for advice as to how the terms should be rectified;
- b) Dr Flegg: that the indication from the Tribunal was the same as the Company had originally used but which had been changed to accord with solicitors' advice so that a proportion of 1/15th should be used which, other than in relation to lifts, he had been advised was correct when he purchased;
- c) Mr Beavis on behalf of the Applicant:
 - i) enclosed an analysis of the leases that appeared to the Tribunal to have been carried out prior to the present proceedings with a view to leaseholders and freeholders agreeing a way forward.
 - ii) Particular points from Mr Beavis' letter and analysis:
 - (1) The analysis is stated to be "based on a 'business' approach to defining obligations of the Company and how these costs are recovered": that freeholders have no obligation to pay for costs associated with leases and vice versa.
 - (2) The leases should be amended to reflect their intent and asking for the Tribunal's recommendation on the basis of the intention of the parties and "what is the norm in similar properties";
 - (3) That where there is ambiguity, the company should refer to "best practice and common understanding";

Applicant's legal advice

- 21) The present managing agents took over management in about October 2010 and evidently found interpretation of the lease difficult. They obtained legal advice and they produced the advice letter from Coles Miller dated 2 March, 2011. Those solicitors considered:
 - a) each of the 6 flats pays 1/6 of the cost of maintaining and insuring the building containing the flats other than costs relating to the lift;
 - b) each of the 4 lessees with flats above ground level pay 1/4 of the costs in connection with the lift;
 - c) each of the 6 flat lessees and the 9 house owners pay 1/15 of the cost of services common to all.
- 22) They give their reasons, but, in the Tribunal's opinion, adopted a somewhat simplistic view in referring to sensible interpretation, drafting errors, what cannot have been the intention of the parties. They appear to be endeavouring to find a pragmatic solution for management reasons. In the penultimate paragraph of their letter they say "as part of the process of construction and interpretation, the court has power to correct obvious mistakes in the written expression of the intention of the parties. The law is not such an ass as to compel the court to hold the parties to the actual words used where it is clear that such words were used by virtue of the draftsman's blunder."

Clauses 3 and 9 of the lease

- 23) It will be noted that Clause 3 refers to payment towards "expenses and outgoings incurred...". Had there been no other provision in the lease, the use of the word "incurred" would require payment only towards costs for which the Respondent had actually accepted liability, whether or not paid. That would exclude advance payments on account

of estimated future expenses to be incurred. However Clause 9(v) of the lease is a covenant on the part of the lessee "on the first days of January April July and October in each year pay to the Company such sum in advance and on account of the Service Charge as the Company shall specify at its discretion to be a fair and reasonable interim payment." In view of that provision the Tribunal is satisfied that Clause 3 provisions can properly be construed to include payments on account of estimated expenditure to be incurred.

The relevant law

- 24) The Tribunal's jurisdiction is limited, subject as below, by statutory provisions. The present application is made under the Section of the Act which is set out in full in the Appendix to these reasons. Essentially that Section gives the Tribunal power to determine the reasonableness of and payability of service charges. It does not give it power to vary a lease. The Tribunal makes this point particularly as the parties submissions suggest that the Tribunal should either vary or at least advise how the leases should be varied. The Tribunal is a judicial body: it is not an advisory body. It does have power, on an appropriate application, to vary leases under Sections 35 to 39 of the Landlord and Tenant Act 1987 but this is not such an application. Accordingly, in exercising its jurisdiction under the Section of the Act the Tribunal is limited to interpretation of the lease with the benefit of judicial guidance.
- 25) In the Supreme Court case of Multi-Link Leisure Developments Limited v North Lanarkshire Council [2011] 1 All ER 175, Lord Hope said: "the court's task is to ascertain the intention of the parties by examining the words they used and give them their ordinary meaning in their contractual context. It must start with what it is given by the parties themselves when it is conducting this exercise. Effect is to be given to every word, so far as possible, in the order in which they appear in the clause in question. Words should not be added which are not there, and words which are there should not be changed, taken out or moved from the place in the clause where they have been put by the parties. It may be necessary to do some of these things at a later stage to make sense of the language. But this should not be done until it has become clear that the language the parties actually used creates an ambiguity which cannot be solved otherwise."
- 26) Further, it is settled law that if a lessee's liability is uncertain from the wording of the lease, even read as a whole, the construction of the allegedly applicable service charge clause will be against the party seeking to enforce it. This principle was applied, for instance, in *Gilje v Charlegrove Securities Limited* [2001] EWCA Civ 1777.

Consideration

- 27) The Tribunal accepts that it has power to correct obvious mistakes but only if it is *clear* how they should be corrected.
- 28) In applying the words of Lord Hope, as above, the Tribunal examined the words used by the parties to try to discover their intentions. The Tribunal found nothing in the actual words used in clause 3(ii)(a) or the Fourth Schedule Part 1 to lead it to answer the questions at paragraph 17) above. And the Tribunal cannot add words to make sense of the language. Simply, the words used are very vague and in some respects conflicting.
- 29) Is it possible to ascertain the meaning of the words by reading the lease as a whole? The Fourth Schedule Part II contains heads of service charge to which a lessee is liable to contribute 1/15th by virtue of Clause 3(ii)(c) of the lease. It would seem very unlikely therefore that contribution to Part I items would be made in that same fraction. But from

the wording of different paragraphs of the Fourth Schedule, that proposition is questionable:

- a) For example, as noted above, Clause 3(ii)(a) refers to "... repair maintenance renewal and insurance of the *buildings*...". Clause 1 (i) defines the *buildings* to mean "the block of flats and houses and the garages constructed on the estate"
 - b) The definition is clear, but it is the definition of *buildings* in the plural.
 - c) Noting that Clause 3(ii)(a) refers to contribution to repair, maintenance and insurance of the buildings as defined, the Fourth Schedule Part I Paragraphs 1 and 2 refer additionally to contribution for the same heads of charge in respect of "the building of which the flat forms part.." There is evidently duplication in respect of these items, whatever the latter phrase actually means (and this is but one example) and it would seem logical that clause 3(ii)(a) *might* be referring to one unidentified fraction for the buildings and, under the Fourth Schedule Part I, a different fraction. That, too, is ambiguous.
- 30) So, applying the steps set out by Lord Hope, the Tribunal first found it impossible to determine from the words used what the parties intended. Secondly the Tribunal should then not add or move words unless necessary to make sense of the language to resolve the ambiguity. If the Tribunal were to add words for that purpose the Tribunal would need to be sure what those words should be to properly express the parties' intention. There is, however, no clear means of ascertaining their intention.
- 31) The Tribunal does not accept all the opinions expressed by Coles Miller. While it is obvious that mistakes have been made, it is by no means obvious how they should be remedied and the Tribunal does not have jurisdiction or power to hazard a guess at the parties' true intentions or indeed whether their intentions were actually the same.
- 32) Nor does the Tribunal consider it can, in law, adopt any of the approaches suggested by the Applicant in its written submissions as outlined above. The Tribunal found that what the Applicant seeks goes beyond mere interpretation, but into making significant changes to produce an intelligible lease. That is not within the power of this Tribunal in this application. It may be a matter for a Court; or an application to the Tribunal under Sections 35 to 39 of the Landlord and Tenant Act 1987; or indeed it might require agreement of all parties. In any event, the Tribunal found it could not interpret Clause 3(ii)(a) so as to define what part of reasonable charges were payable by each of the flats in respect of Clause 3(ii)(a) or Fourth Schedule Part 1 items
- 33) In coming to its conclusions, the Tribunal found no other documents on which the Tribunal would be entitled to rely to assist in its consideration. Nevertheless, the Tribunal did note the terms of Clause 5.15 of the deed of covenant (which does not affect the terms of the lease but relates to freehold houses) at page 150 in the bundle as it refers to "the share of the Service Charge *attributable* to the Property and then finally defines that expression as a calculable fraction. In the case before us the Tribunal does not have any such definition. It seems to the Tribunal that this is symptomatic of very poor drafting.

Conclusion concerning Clause 3(ii)(a) and Fourth Schedule Part I costs.

- 34) For the reasons set out above, the Tribunal concluded that costs falling potentially within the terms of Clause 3(ii)(a) are not payable by the Respondents.

35) There are many other issues as to interpretation of other words or phrases in the lease. The Tribunal sets these out below so far as necessary to reach its conclusions on particular clauses and heads of charge.

Heads of estimated charge

36) Although the Tribunal has determined that some of the service charges are not payable, the Tribunal nevertheless determined the reasonableness of each of the estimated charges set out in the Estimated Service Charge Budget Calculation dated 08/11/2011 at page 169 in the bundle. In doing so, the Tribunal has taken into account all the written and oral evidence and submissions before it.

37) Estate costs

38) Accountancy £720. The estimate is based on a quotation (bundle page 297) from accountants for the previous year. The Tribunal considered that because of the complex nature of the Property and the provisions relating to them, the estimate is reasonable for preparation of service charge accounts. However they are not payable since, as conceded by the Applicant, there is no provision in the lease requiring any contribution by the Respondents at all to their cost.

39) Insurance £4,310. In view of the decisions as above, the only insurance costs payable are recoverable under Fourth Schedule Part II paragraph 6 "the cost of effecting insurance of the common parts and the leisure and sporting facilities and equipment against such risks including third party liability and in such sum as the Company shall determine."

a) "Common parts" are defined in Clause 1(viii) of the lease as "the accessways pathways entrance halls and lobbies corridors landings stairways stores lawns and gardens hedges and boundaries and all other parts (if any) of the buildings or the estate which are intended to be for the use and enjoyment of the Lessee in common with all others similarly entitled."

b) The property and risks covered therefore exclude structure, foundations and roofs. It is evident that the estimated costs include buildings and other parts of the estate. For the parts falling within paragraph 6 the Tribunal considered a reasonable sum to be £500.

40) Electricity. A total of £2,500 for the estate and building electricity was based on the previous two years with an uplift for anticipated increases in cost of supplies. The Company apportioned 75% of this to estate costs i.e. £1,875 largely for external lighting and supply for the security gates. The Fourth Schedule Part II paragraph 1 provides for the cost of maintenance and repair, etc of such installations. That does not necessarily include electricity (which would normally be referred to for clarity). However the Tribunal decided that the reasonable interpretation was to include electricity costs as without it, costs of maintenance and repair would plainly be wasted and that cannot have been the intention. The apportionment appears reasonable and the apportioned sum is reasonable and is payable

41) Freeholder loan - not a service charge item.

42) Gardening expenses £9,500. The estimate is based on an estimate received of £9000 plus £500 for any unplanned garden maintenance. The Tribunal considered the sum to be reasonable for the nature and extent of the grounds at the Property. It is payable under Fourth Schedule Part II paragraph 1.

- 43) Management fee £4,224. The estimated fee including VAT calculates to about £281 per unit on the Property. It is calculated on the time spent, and was based on a similar development. The Tribunal considered the sum to be reasonable but notes first that it is not payable as it could only be recovered under Fourth Schedule Part I and secondly that it is subject to the cap provisions of clause 5(xii) "that such fees shall not in any event exceed a percentage of Fifteen per cent of the total sum of moneys collected under the provisions of this lease".
- 44) Miscellaneous £50. This is a reasonable sum as an estimate and could apply to any Fourth Schedule Part II item so is payable.
- 45) Repairs general £5,000. This is estimated and is based on figures for the previous two service charge years. For the nature and extent of the property, other than aspects covered by the gardening and tree surgery charges, the sum is reasonable and payable under Fourth Schedule Part II paragraphs 1 to 4
- 46) Reserve Fund contribution £1000. The lease contains no provision for contribution to a reserve fund so the sum is neither reasonable nor payable.
- 47) Tree surgery £5,000. Three quotes had been obtained and adding a further £1,000 for additional work anticipated to be required, the sum of £5000 was estimated. The quotations are at pages 307-311 of the bundle and the lowest totals £3,840 inc. VAT. The Tribunal did not find sufficient evidence to justify an additional allowance so found £4,000 to be a reasonable sum and payable under Fourth Schedule Part II paragraph 1.
- 48) Water rates £300. This was estimated on the basis of the previous year. The sum is reasonable but there is no provision in the Fourth Schedule Part II providing for payment towards this item. It is not payable.

Building costs.

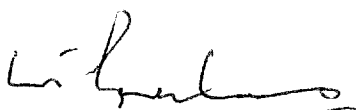
49) Preliminary.

- a) In the estimated budget, this section of charges is intended to relate to the section of the buildings containing the leasehold flats and Flat 17.
- b) It appears that the Fourth Schedule Part I of the lease was intended, though very poorly drafted, to relate largely (but not exclusively) to costs affecting only this section. Logic would suggest that if costs fall within Part I, they would not also fall within Part II. Because of the very poor drafting the Tribunal does not consider that to be the case:
- i) The Tribunal first refers to Clause 3(ii)(c) of the lease: "(c) One fifteenth of the expenses and outgoings incurred by the lessor or the company in respect of the heads of expenditure set out in the second part of the Fourth Schedule hereto".
- ii) Paragraph 1 of Part II refers, in terms, to costs relating to "the Company's Land" and features of it.
- iii) Clause 1(iii): "the company's land" means "the part of the estate other than the properties to be transferred to individual purchasers".
- (1) Does this reference to transfers mean freehold transfers of houses rather than grant of leases of flats?
- (2) Recital (2) of the lease (bundle page 84) would support the proposition that the definition of "company's land" refers only to Freehold transfers of houses, since that recital refers to grant of leases *and* transfers of houses.

- (3) Whatever the answer to that question, "Company's Land" as defined does not exclude the leasehold section save to the extent that flats are let on long leases.
- (4) That conflicts, *for example*, with the Fourth Schedule Part 1 Paragraph 1 (in respect of which the lessee might pay an unidentifiable proportion) which refers to "the cost of maintaining repairing redecorating and renewingthe main structure of the building of which the flat forms part".
- (5) Therefore there are two (if Part I items were payable) separate obligations to contribute probably to some of the same expenses.
- c) It follows that even though The Tribunal found that no costs are payable in respect of Part I items, some of the "building costs" in the budget are payable under Part II as set out below.
- d) The Tribunal emphasises that in respect of building costs items (as opposed to lift costs) referred to below, the liability is only 1/15th per flat, so there is a substantial shortfall in the sum recoverable by the Applicant.
- 50) Boiler repairs £4,100. It had been intended to replace the boiler serving the common parts of the leasehold flats section of the buildings and Flat 17 (the warden's flat). This was the estimated cost. In the event, this was deferred pending these Tribunal proceedings. A quote was received in September 2011 (document 315) for £3,180 plus VAT, totalling £3,816. The Tribunal considered therefore that a reasonable estimated amount was £3,800. It is payable under Fourth Schedule Part II paragraphs 2 and 4.
- 51) Cleaning £1,747.20. This is based on an estimate of Scott's Contract Services Limited in July 2011 in that sum. The Tribunal considers that as an estimate, the sum of £1,500 is reasonable and is payable under Fourth Schedule Part II paragraph 1 as being necessary to the condition of property.
- 52) Electricity £625. The same considerations apply to this electricity heading as relate to electricity referred to at 40) above. The tribunal considered the sum reasonable and payable under Part II paragraph 1.
- 53) Freeholder loan. Not a service charge item.
- 54) Gas £1,500. This is for central heating of the flats' section common parts. It was based on the previous two years' expenditure which were, between them, vastly different. The Applicant accepted the estimate was unreasonable and the Tribunal concurred with its revised figure of £600. The same considerations apply to this gas heading as relate to electricity referred to at 40) above and it is therefore payable.
- 55) Repairs general £1,500. While the figure was based on the last two years' expenditure, that expenditure had not been apportioned between the building and the estate so the Applicant based the figure on Napier's experience of similar sized properties. For the size and nature of the property, the Tribunal considered the sum to be reasonable and payable under Fourth Schedule Part II paragraph 1.
- 56) Reserve fund contribution. The lease contains no provision for contribution to a reserve fund so the sum is neither reasonable nor payable.

Lift costs

- 57) Lift insurance £220. This was provided for lift maintenance because Napier did not know that such cover was already in place. Napier accepted they ought to have know about it. So this provision was unreasonable and not payable.
- 58) Lift phone £157. This was based on previous expenditure. The Tribunal considered this was reasonable and Dr Flegg was unsurprised at the amount. On the basis that the phone is an integral part of the lift, it is payable under Clause 3(ii)(b) of the lease
- 59) The Tribunal made its decisions accordingly.



M J Greenleaves

Chairman of the Leasehold Valuation Tribunal
appointed by the Lord Chancellor

Note (not forming part of the reasons to the above decision).

- a) In the Tribunal's view there are many more problems with the lease terms than are referred to above. They are not set out above as they are not material to the issues that had to be decided.
- b) It is common ground that there are problems. It is evident that this present application was made in the hope that the Tribunal would either resolve all the issues or at least guide the parties as to what amendments should be made to it. The Tribunal only has a judicial function so is only able to determine issues as far as it has done. It is not an advisory body so the parties may wish to obtain specialist advice as to future steps needed to resolve all the problems with the lease. This is complicated by the obvious fact that there are freehold houses and provisions relating to them need to fit with those of the leases.
- c) Although a tribunal does have power to vary leases on an application made specifically under Sections 35 to 39 of the Landlord and Tenant Act 1987, it can only do so in limited circumstances and to a limited extent and any variation does not have retrospective effect.

APPENDIX

S27A Liability to pay service charges: jurisdiction

- (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.
- (6) An agreement by the tenant of a dwelling (other than a post-dispute arbitration agreement) is void in so far as it purports to provide for a determination—
 - (a) in a particular manner, or
 - (b) on particular evidence,of any question which may be the subject of an application under subsection (1) or (3).
- (7) The jurisdiction conferred on a leasehold valuation Tribunal in respect of any matter by virtue of this section is in addition to any jurisdiction of a court in respect of the matter