SOUTHERN RENT ASSESSMENT PANEL
LEASEHOLD VALUATION TRIBUNAL

Case No. CHI/00HP/LSC/2006/0048

REASONS

Application : Section 27A and section 20C Landlord and Tenant Act 1985 as amended ("the 1985 Act")

Applicant/Leaseholder : Mr Denis Anthony Valentine Hicks

Respondent/Landlord : J M Harding & Partners Limited

Premises : 3A Haven Road, Poole, Dorset, BH13 7LE

Building : the building comprising the Premises and the ground floor shops 3 and 5 Haven Road, Poole, Dorset, BH13 7LE

Lease : the lease dated the 30 November 1987 and made between the Respondent/Landlord (1) and James Joseph Curran and Mary Teresa Wakefield (2), as varied by the Deed of Variation

Deed of Variation : the deed of variation dated the 23 September 1988 and made between the Respondent/Landlord (1) and Fosse Investment & Development Limited (2)

Extended Lease : the lease dated the 11 July 2005 and made between the Respondent/Landlord (1) and the Applicant/Leaseholder (2)

Date of Application : 24 May 2006

Date Hearing : 16 October 2006

Venue : Room 48, Bournemouth Town Hall, Bourne Avenue, Bournemouth

Appearances for Applicant/Leaseholder : Mr Hicks

Appearances for Respondent/Landlord : Mr Adrian Falck of Preston Redman

Also in Attendance : Mr William Geoffrey Maxted of the Respondent/Landlord; Mr Dean Stuart Bennett of Towergate Risk Solutions; Mr Martin of Preston Redman; and Mr and Mrs Lane of 5 Haven Road

Members of the Leasehold Valuation Tribunal : Mr P R Boardman JP MA LLB (Chairman), Mr P E Smith FRICS, and Mr J Mills

Date of Tribunal's Reasons : 24 October 2006

Introduction

1. This application by the Applicant/Leaseholder is under sections 27A and 20C of the 1985 Act

2. The Tribunal issued directions on the 7 July 2006

3. In those directions the Tribunal recorded the following matters as being agreed between the parties
   a. the only items of service charge in dispute before the Tribunal were the insurance premiums for each of the years starting in 2003, 2004, 2005, and 2006
   b. the sums which the Respondent/Landlord had used for the calculation of service charge in respect of insurance premiums for the Building for each of those years were :

2003-2004	£899.37
2004-2005	£951.97
2005-2006	£1108.26
2006-2007	£1153.27

   c. the service charge payable by the Applicant/Leaseholder in respect of insurance premiums pursuant to paragraph 17(a) of Part II of Schedule 4 to the Lease was "one half of the full cost of insuring the Building"
   d. the sums which the Respondent/Landlord had demanded from the Applicant/Leaseholder by way of service charge in respect of insurance premiums were:

2003-2004	£449.69
2004-2005	£475.99
2005-2006	£554.13
2006-2007	£576.64

4. The Tribunal also recorded in the directions that the following matters were identified as issues for the Tribunal to determine at the substantive hearing of this application :
   a. whether the sum which the Respondent/Landlord had used for the calculation of service charge in respect of insurance premium for the Building for each of the years in question was the sum actually paid by the Respondent/Landlord for insurance premiums for each of those years
   b. whether service charges paid or payable for insurance premiums for the years in question were reasonable
   c. 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/Leaseholder

Section 19(1) of the 1985 Act

5. Section 19(1) provides as follows :

> (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

Paragraph 8 of the Schedule to the 1985 Act

6. The material parts of paragraph 8 are as follows :

> (1) This paragraph applies where a tenancy of a dwelling requires the tenant to insure the dwelling with an insurer nominated or approved by the landlord
>
> (2) The tenant or landlord may apply to a county court or LVT for a determination whether-
>
> (a) the insurance which is available from the nominated or approved insurer for insuring the tenant's dwelling is unsatisfactory in any respect, or
>
> (b) the premiums payable in respect of any such insurance are excessive

Documents

7. The documents before the Tribunal are :
   a. the Applicant/Leaseholder's bundle
   b. the Respondent/Landlord's bundle pages 1 to 177
   c. the Respondent/Landlord's supplementary bundle comprising pages 178 to 191, and case-law
   d. the Applicant/Leaseholder's opening submissions submitted at the hearing
   e. the Applicant/Leaseholder's closing submissions submitted at the hearing

8. Unless the contrary appears, in these reasons :
   a. references to item numbers are references to items in the Applicant/Leaseholder's bundle
   b. references to page numbers are references to pages in the Respondent/Landlord's bundle and in the Respondent/Landlord's supplementary bundle

Inspection

9. The Tribunal inspected the Building on the 16 October 2006, on the morning of the hearing. The Building forms part of a terraced block. The block comprises shops and other commercial premises on the ground floor, and residential accommodation on the first floor, and, in the cases of the parts of the block with dormer windows, residential accommodation on the second floor. It appeared to have been built in about the 1920's

10. The Building itself comprises numbers 3 and 5 Haven Road on the ground floor, and the Premises on the first and second floors, above both 3 and 5 Haven Road. There is a tiled pitched roof at front and back. At the back there are also 3 extensions to the ground floor and the first floor. All the extensions have flat roofs

11. The Building is adjacent to the property at the end of the terrace. There are indications that numbers 1A and 1B Haven Road are on the first and second floors of the property at the end of the terrace, and that both the ground floor of the property at the end of the terrace and 3 Haven Road are joined together as an estate agents known as "Berkeleys", and that Berkeleys accordingly consists of numbers 1 to 3 Haven Road, although the Tribunal was unable to discern any number "1" on the ground floor of the property at the end of the terrace

12. 5 Haven Road is a hairdressers known as "Blu"

13. The Premises have their access at the rear of the Building

14. There are photographs at pages 36, 37, and 128

Lease

15. As already recorded, the service charge payable by the Applicant/Leaseholder in respect of insurance premiums pursuant to paragraph 17(a) of Part II of Schedule 4 to the Lease is "one half of the full cost of insuring the Building"

16. Neither the Deed of Variation nor the Extended lease make any alteration to that provision

Statement by Mr Bennett 8 August 2006 (Respondent/Landlord's bundle pages 35 to 96)

17. Mr Bennett stated that he was an Institute Registered Insurance Broker, working for Towergate Risk Solutions. The majority of Towergate's business was placed with 5 of the leading insurers, Allianz Cornhill, AXA Insurance, NIG, Norwich Union, and Royal & Sun Alliance. Towergate specialised mainlyin commercial insurance

18. He was instructed to act as the Respondent/Landlord's insurance broker on the 1 July 2004. He arranged insurance for the Premises and 5 Haven Road with Norwich Union with a policy starting on the 4 March 2005, and for 3 Haven Road with a policy starting

on the 3 June 2005. The cover was under a block policy in the name of the Respondent/Landlord covering the Building and other properties. Under the policy, each property insured had an individual schedule. The Premises and 5 Haven Road had one schedule, and 3 Haven Road had a different schedule. The policy was on the following basis :

a. Building description : 2-storey [sic] building with loft conversion; mid-terraced; built about 1920; brick walls; tiled pitched roof to front elevation; rear 2-storey and single-storey extension with 100% flat roof; flat roof representing about 35% of the total roof area; estate agents' office (3 Haven Road) and hairdressers' shop (5 Haven Road) on ground floor; flat (the Premises) above, extending across both 3 and 5 and on 2 floors
b. claims : none in the last 3 years
c. cover : day 1, all risks including subsidence but excluding terrorism, with 30% inflation provision
d. Building declared value : £374,313
e. capital additions : automatically included up to £2m for newly built or acquired properties and £500,000 for alterations to existing properties
f. loss of rent : 24 months (£43,500) under a business interruption wording (ie cover up to occupation after reinstatement) rather than the conventional material damage wording (ie cover up to reinstatement only)
g. alternative accommodation costs : automatically included up to 20% of the buildings sum insured
h. trace and access for leaks etc : included up to £50,000
i. property owners liability : £5m
j. excess : subsidence £1,000; all other claims nil
k. claims : 24 hour/365 days a year claim line
l. total premium for the Premises and 3 and 5 Haven Road : £1,663.24

19. Matters affecting the rate of premium included :

a. age and construction : the Building was regarded as non-standard construction, having about 35% of the roof area flat and/or felt on timber, and some insurers would load the rates by up to 200% and others would not insure at all
b. nature of use and occupation : the fire rate for a low-risk trade like an estate agent or hairdresser could be as low as 0.08%, whereas for a woodworker or plastics trade it could be 0.60%
c. the Premises formed part of the Building, but without a vertical division from the other parts of the Building, and could be insured only with another part of the Building

20. Mr Bennett had obtained the following alternative quotations for the current year, each including 5% IPT and Towergate's administration fee of 5% :

a. Allianz Cornhill : £1,156.09, but with subsidence excess of £2,000 and other claims excess £100
b. AXA Insurance : £1,732.62, with subsidence excess of £1,000, but with other claims excess £100

c. NIG : £1,575.00, but with claims excess of £200 for many perils, and £500 for claims for storm and tempest on the flat roof, and with a condition for annual inspection of the flat roof

d. MMA Insurance : £703.25, but on condition that the flat roof was less than 20%

21. Premiums paid by the Respondent/Landlord for the years in question included 5% IPT throughout, and Towergate's administration fee of 5% for the period 2005-2007, and were as follows :

a. 2003-2004

Premises and 5 Haven Road	£899.37
3 Haven Road	£463.34
total	£1,362.71

b. 2004-2005

Premises and 5 Haven Road	£951.97
3 Haven Road	£545.41
total	£1,497.38

c. 2005-2006

Premises and 5 Haven Road	£1,108.26
3 Haven Road	£478.75
total	£1,587.01

d. 2006-2007

Premises and 5 Haven Road	£1,153.27
3 Haven Road	£509.97
total	£1,663.24

22. The Norwich Union policy was reasonably priced. The Allianz Cornhill premium quotation was cheaper, but involved a higher claims excess

Statement by Mr Maxted 13 September 2006 (pages 97 to 104)

23. Mr Maxted stated that he had been employed by the Respondent/Landlord as office manager since September 2001. He was responsible for the management of the Building

24. Before the 2005 insurance renewal the Building had been insured through the Norwich Union agency of John Sydenham Whitelock. In early 2004 it became apparent that Mr Whitelock's agency could not comply with the new insurance industry regulations. A compliance officer alone would have cost about £35,000 a year. Mr Whitelock therefore discontinued his agency and Towergate were instructed to deal with future insurance matter and renewals

25. No commission received by Towergate was shared with or paid to either Mr Whitelock of the Whitelock Group of companies

26. The sums insured for the Building in each of the years in question were as follows :

a. 2003-2004

Premises and 5 Haven Road	£236,321
3 Haven Road	£84,036
total	£320,357

b. 2004-2005

Premises and 5 Haven Road	£245,900
3 Haven Road	£87,391
total	£333,291

c. 2005-2006

Premises and 5 Haven Road	£262,812
3 Haven Road	£93,406
total	£356,218

d. 2006-2007

Premises and 5 Haven Road	£276,162
3 Haven Road	£98,151
total	£374,313

27. The sums insured for loss of rent in each of the years in question were as follows :

a. 2003-2004

Premises and 5 Haven Road	£15,600
3 Haven Road	£15,700
total	£31,300

b. 2004-2005

Premises and 5 Haven Road	£15,600
3 Haven Road	£15,700
total	£31,300

c. 2005-2006

Premises and 5 Haven Road	£22,000
3 Haven Road	£21,500
total	£43,500

d. 2006-2007

Premises and 5 Haven Road	£22,000
3 Haven Road	£21,500
total	£43,500

28. The premiums paid were as follows :

a. 2003-2004

Premises and 5 Haven Road	£899.37
3 Haven Road	£463.34
total	£1,362.71

b. 2004-2005

Premises and 5 Haven Road	£999.58
3 Haven Road	£545.31
total	£1,544.89

c. 2005-2006

Premises and 5 Haven Road	£1,108.25
3 Haven Road	£478.75
total	£1,587.00

d. 2006-2007

Premises and 5 Haven Road	£1,153.27
3 Haven Road	£509.98
total	£1,663.25

29. The premiums charged accidentally omitting the 5% IPT (£47.61) from the premiums charged to the Premises and 5 Haven Road in 2004-2005, were as follows :

a. 2003-2004

Premises	£449.68
5 Haven Road	£449.69
3 Haven Road	£463.34
total	£1,362.71

b. 2004-2005

Premises	£475.99
5 Haven Road	£475.98
3 Haven Road	£545.31
total	£1,497.28

c. 2005-2006

Premises	£554.13

	5 Haven Road	£554.12
	3 Haven Road	£478.75
	total	£1,587.00
d.	2006-2007	
	Premises	£576.64
	5 Haven Road	£576.64
	3 Haven Road	£509.98
	total	£1,663.26

30. **Valuation by James & Sons 21 September 2006 (pages 129 to 130)**

31. James & Sons reinstatement valuation of the Building for insurance purposes was £339,000, excluding VAT, on the basis of their measurement of the total gross internal floor area of 3,297 square feet, of which 1,471 square feet was attributable to the ground floor

Authorities

32. In **Viscount Tredegar v Harwood** [1929] AC 72 (copied in the Respondent/Landlord's supplementary bundle), the tenant was obliged to insure her house in the Law Fire Office or in some other responsible insurance office to be approved by the landlord. The tenant insured instead with another company. The landlord had a very large number of other houses and insisted that for estate management reasons it was essential that all his tenants should insure in the same office

33. The House of Lords held that the primary obligation on the tenant was to insure with the Law Fire Office; that the landlord had an absolute right to withhold his approval of an alternative office without giving reasons; and that, in any event, the grounds of the landlord's disapproval were reasonable

34. Lord Shaw of Dunfermline stated that with so many properties the difficulty for the landlord was to check for failure of renewals, and the point would become very complex if they were insured in many different offices. With a simple working arrangement with one office simplicity and accuracy were promptly secured

35. In **Berrycroft Management Company Limited v Sinclair Gardens Investments (Kensington) Limited** [1996] EWHC Admin 50 (pages 165 to 177) the landlord, by virtue of provisions in the lease, required the tenants' management company to insure a residential block of flats with Commercial Union, whose premium were about double that of another insurer

36. However, the Court of Appeal held that the question was not whether the insurance was

the cheapest available but whether the insurance was arranged in the normal course of business and whether the expenditure was reasonably incurred, and the Court of Appeal decided, on the facts of the case, that the amounts quoted by Commercial Union were neither unreasonable nor excessive and were negotiated in the ordinary course of business, and the Court of Appeal dismissed the tenant's appeal

37. In **Forcelux v Sweetman** [2001] 2 EGLR 173 (copied in the Respondent/Landlord's supplementary bundle) the landlord insured a house which had been converted into 2 flats. The tenants were liable to pay the premiums by way of service charge. The landlord used a broker, and insured all its properties under one policy. The tenants produced quotes for similar cover at premiums which were about half the price

38. The Lands Tribunal held that :
    a. the relevant question under section 19 of the 1985 Act was not whether costs were "reasonable" or the expenditure the cheapest available, but whether the costs were "reasonably incurred"
    b. in order to answer that question it had to be decided :
        - whether the landlord's actions were appropriate and properly effected in accordance with the lease, the RICS Code, and the 1985 Act, and
        - whether the amount charged was reasonable in the light of that evidence, because if that did not have to be considered it would be open to any landlord to plead justification for any particular figure on the ground that the steps taken by the landlord justified the expense without properly testing the market
    c. cover for commercial landlords was more expensive than that available for owner-occupiers
    d. however, the lease required the landlord to insure and the landlord's block policy was competitively obtained in accordance with market rates
    e. the cost of the premiums was reasonably incurred
    f. there was no evidence that the costs were excessive
    g. the quotes obtained by the tenants were not on a like-for-like basis, and, while the cover might have been comparable, the tenants were in a different category from a commercial landlord, and a direct comparison was not appropriate

The Applicant/Leaseholder's case as summarised on pages 1 to 8 of the Applicant/Leaseholder's bundle

39. Correspondence formed items 1 to 29

40. Miscellaneous documents formed items 30 to 47b

41. Policy terms from Fortis, Zurich, AXA, NIG, Cliftonside, Royal and Sun Alliance, Legal and General, together with Google "Homeserve" search results formed items 48 to 75

42. Policy terms from Norwich Union, Fortis and NIG relating to glass formed items 76 to 78

43. Documents relating to the flat roof formed items 79 to 82

44. Policy terms from Cliftonside formed item 83 and showed a "Flat Roof Warranty" of 2-yearly inspections

45. A letter from JBA Public Relations dated the 4 August 2006 forming item 84 stated that Fortis Insurance House Guard Extra product covered properties with up to a 33% flat roof, and that Fortis Commercial covered up to a 30% to 40% non-standard construction (eg asphalt or felt on timber) flat roof area

46. A letter from Dibben & Sons dated the 12 September 2006 forming item 85 stated that the roof was in good sound condition and would be expected to remain in sound condition for at least 10 years

47. A policy term from City Insurance Group forming item 86 was that the felt-on-timber portion of the roof be inspected annually

48. A letter from City Insurance Group dated the 20 September 2006 forming item 87 stated that in the light of the letter from Dibben & Sons dated the 12 September 2006 NIG would not include any additional excess for the flat roof, and their policy did not include a specific exclusion against asbestos

49. The Applicant/Leaseholder stated that a quotation from Fortis dated the 21 June 2004 forming item 88 showed a sum insured for the premises and 5 Haven Road of £245,900, a 25% day one uplift, and a total premium of £567.82

50. The Applicant/Leaseholder stated that an early quotation from NIG forming item 89 showed a premium of £402.02 for the premises and 5 Haven Road, with terms as with Fortis

51. The Applicant/Leaseholder stated that the Higos quote dated the 26 April 2005 from Royal and Sun Alliance showed a premium of £575.88 forming item 90 on a buildings cover of £245,900 for the premises and 5 Haven Road looked too high compared with the later Royal and Sun Alliance quote on the premises and 3 and 5 Haven Road

52. The Applicant/Leaseholder stated that the letter from Stuart Alexander dated the 12 May 2005 and forming item 91 contained quotes of £525 from AXA and Zurich, and that Stuart Alexander were part of the Norwich Union scheme

53. The Applicant/Leaseholder stated that the Cliftonside letter dated the 5 May 2006 forming item 92 quoted £467.33 for a buildings sum insured of £245,000

54. The Applicant/Leaseholder stated that the Anglo-Pacific quote dated the 8 August 2006 forming item 93 quoted £564.42 for a buildings sum insured of £276,000

55. The Applicant/Leaseholder stated that the Heath Lambert quote dated the 21 August 2006 forming item 94 quoted an unchanged figure from NIG of £637.39 for a buildings sum insured of £276,000 and a construction date of 1920, despite previous quotes of the same figure on the basis of construction dates of 1960 and 1900

56. The Applicant/Leaseholder stated that the quotes in the City Insurance letter dated the 24 August 2006 forming item 95 for the premises and 3 and 5 Haven Road with a buildings figure of £505,323 (declared value £374,313) were £721.85 and, from NIG, £609.33; the NIG quote no longer had an excess for the flat roof and allowed 40% more for the flat roof area, and seemed to be the best all-rounder

57. The Applicant/Leaseholder stated that the A-Plan quote dated the 1 September 2006 forming item 96 quoted £687.40 from NIG for the premises and 5 Haven Road with buildings cover of £414,000

58. The Applicant/Leaseholder stated that the Heath Lambert quote dated the 5 September 2006 forming item 97quoted £771.21 from NIG for buildings cover of £376,000 plus 50% day one uplift

59. The Applicant/Leaseholder stated that the City Insurance letter dated the 13 September 2006 forming item 98 quoted £851.05 from NIG for the premises and 3 and 5 Haven Road with buildings cover of £746,754, which was well in excess of reinstatement value

60. The Applicant/Leaseholder stated that a further reduction in premiums from the same major companies might be conceivable together with a further relaxation of conditions and a few amendments to exclusions

61. The Applicant/Leaseholder stated that the RIAS document dated the July 2006 forming item 99 presented a great choice for a freeholder, less than one fifth of the Applicant/Leaseholder's present premium; RIAS was part of the Fortis group

62. The Applicant/Leaseholder's comments on Mr Bennett's statement were as follows :
    a. the Respondent/Landlord's previous insurance agency was Mr Whitelock
    b. the NIG quote forming item 94 showed that the age of the property was not vital
    c. the AXA quote was dearer than the Norwich Union premium
    d. the single sheet 2006 Norwich Union schedule sent by the Respondent/Landlord's solicitors contained a slight reduction on the real figure
    e. the NIG quote of £1,575 must be for a building sum insured of about £2m
    f. the NIG £500 roof excess had now gone
    g. annual roof inspections were not cast in stone

h. everybody in insurance offered a 24 hour/365 days a year service

i. almost all insurers used day one, business interruption wording, and alternative accommodation costs

j. capital additions hardly affected tenants

k. virtually all major insurance companies gave adequate trace and access coverage, but no insurance company would pay if wear and tear were involved, and £50,000 cover was unnecessary, and far higher than any other insurance company's cover

l. to argue that increased premiums saved claims excesses was a smokescreen : the Applicant/Leaseholder had made only 2 insurance claims in 15 years, but had paid years of oppressive premiums

m. the AXA quote was obscene, and the sum of £505,323 (with the 35% cost free) for the premises and 5 Haven Road was absurd, whereas the quote forming item 95 showed that for the same sum insured, which was most adequate for the premises and 3 and 5 Haven Road, the premium could be halved

n. so far as property under repair etc was concerned Mr Bennett said that it was all unacceptable, whereas Fortis disagreed (document 31)

o. Mr Bennett said that any property which was (part) vacant or unoccupied was unacceptable, whereas AXA, Fortis, and NIG had reservations about that (items 33A to 36)

p. Mr Bennett said that any risk that included holiday lets was unacceptable, whereas Fortis was prepared to discuss it when presented with a large portfolio (item31)

The Applicant/Leaseholder's oral evidence

63. The Applicant/Leaseholder read out a typed statement, of which he produced copies for the Tribunal and the Respondent/Landlord, and in which he said that :

a. Mr Whitelock was a director of the Respondent/Landlord; through his agency with Norwich Union and its predecessor General Accident the Respondent/Landlord or associated companies had received an agency fee and were now, through Towergate, receiving a large commission at the expense of the Applicant/Leaseholder who was having to pay a ridiculous premium

b. the change to insuring through Towergate was in fact only after the Applicant/Leaseholder's notice

c. the Respondent/Landlord did not give the Applicant/Leaseholder advance warning of the authorities they intended to rely on

d. the Applicant/Leaseholder had bought the Premises in 1991

e. the Respondent/Landlord had throughout opted for just one insurance company without ever researching the market for another until recently during the course of these proceedings

f. the quotes now put forward by the Respondent/Landlord no doubt reflected the instructions and recommendations given to the other insurance companies

g. even if it was too expensive for Mr Whitelock to register with the General Insurance Standards Council, the Respondent/Landlord could still do so after these proceedings were over, although no doubt commission arrangements were more than adequate

h. the AXA quote at page 107 offered Towergate 45% commission

i. Stuart Alexander worked with Norwich Union and said at item 91 that the Norwich Union premium for the Premises and 5 Haven Road in 2005/6 would be very similar to that of AXA and Zurich, ie £525 as opposed to Norwich Union's then £1,108.26

j. the age of the property had no bearing, unless it was built recently or in, say, 1800, as proved by the NIG quotes at item 94 remaining the same despite the date of construction being given as 1900, 1920, and 1960

k. the Respondent/Landlord was powerful enough to have negotiated an allowance of 50% for the proportionate area of the felt on timber flat roof; at item 93 the flat roof was put at 50% asphalt on wood; at item 84 Fortis went to 40% asphalt or felt on wood; and at item 98 even NIG went to 40%

l. the NIG excess of £500 for a flat roof was academic, and was set aside at item 87, and no doubt the annual inspection requirement could be set aside too

m. the 24 hour a day service was academic, because the Applicant/Leaseholder would have to claim through the Respondent/Landlord who only worked 5 days a week

n. the Applicant/Leaseholder had not come across a "subject to survey" requirement

o. the Allianz Cornhill quote specified that the flat roof had to be no more than 25 square metres

p. most big insurers quoted on a day-one basis, some of them up to 50%, whereas Norwich Union was up to 30%

q. Norwich Union loss of rent cover was no different from the other major insurers

r. the £50,000 trace and access cover was not needed and would not cover wear and tear

s. every insurer offered a 24 hour a day claims service

t. Norwich Union did not cover certain risks such as glass shattered by vandals (item 76) and offered worse cover for unoccupied property and boiler explosion

u. the Respondent/Landlord had only sent a single sheet policy schedule for the current year, compared with the 4-page schedule for 2004

v. Mr Bennett had omitted to obtain alternative quotes from major companies like Royal and Sun Alliance and Fortis, but had put forward quotes from Allianz Cornhill and MMA

w. the AXA quote at page 103 was £1,732.62, but £1,600 at page 107

x. the NIG quote at page 103 was £1,575, but £1,500 at page 108

y. in contrast, the AXA quote at item 91 was £525 for the Premises and 5 Haven Road, and the NIG quote at item 95 was £609.33 for 3, the Premises and 5 Haven Road, with the £500 roof excess removed at item 87, and the 35% flat roof percentage raised to 40% at item 98

z. Berkeleys at 1-3 Haven Road, who were a large estate agents, and who acted for the Respondent/Landlord, were paying £509.97 (item 97), which was less than number 5, which was a smallish hairdresser

aa. James & Sons' valuation at page 129 did not set out the respective floor areas of numbers 3 and 5

bb. the figure for 2006/7 was presented as £1,098.35, compared with Mr Maxted's figure of £1,153.27, Mr Bennett's NIG quote of £1,500, and the AXA quote of

£1,600

cc. 3, the Premises and 5 Haven Road formed a block, and should not have to shoulder the burden of other properties in the Respondent/Landlord's portfolio

dd. apart from the question of commission, the Respondent/Landlord should be able to put pressure on the insurance companies to reduce premiums, not to increase them

64. In cross-examination the Applicant/Leaseholder said that the Fortis quote dated the 21 June 2004 (item 88) was the first alternative quote he had obtained. It was from the same broker as the NIG quote. He had explained to them the whole situation about the property. The second page of the "property owners risk details" showed the roof construction as "standard", but he had not realised at that time that there was a difference between "standard" and "non-standard". He had told the broker that the flat roof was felt on timber, but in any event it would have made no difference to the quote because all terms were open to negotiation

65. The Premises were over both 3 and 5 Haven Road, so that number 3 was just as important as 5 to the Premises. The Fortis quote was for the Premises and 5, but not for 3. The Building had to be insured with one insurer, but could be under different policies, as at present. He had quotes for the Premises and 5 Haven Road and for 3, the Premises and 5 Haven Road, and the indication was that he was being overcharged

66. The NIG quote at item 89 was clearly discounted, but the Applicant/Leaseholder did not know whether the discount was only for the first year to attract the business. The Fortis and NIG quotes were subject to excesses of £250 and £200 compared with a nil excess for the Norwich Union policy, but those excesses could have been reduced in the same way that he negotiated the removal of the NIG £500 flat roof excess

67. The fourth page of the Fortis "property owners risk details" in item 88 stated that the quote was subject to survey, but no survey had been done in relation to any of the quotes

68. The Higos quote at item 90 said that the property was standard construction, but in relation to each of the quotes he had supplied the same information, namely that the Building had a felt-on-timber flat roof. He had not used the expression "standard construction" because he had not heard of the expression or the distinction between "standard" and "non-standard construction" until mentioned recently on behalf of the Respondent/Landlord. He had not mentioned the size of the flat roof in the early stages, but had just said that it was a fair size. He had only stated that it was about 35% when mentioned recently on behalf of the Respondent/Landlord. No-one he had approached had been particularly bothered about its size, provided that it did not exceed 40%, although one said 50%. NIG had now gone to 40% at his request, and the same could have been negotiated in previous years

69. The AXA and Zurich quotes from Stuart Alexander at item 91 were on the basis of an excess of £250 whereas the Norwich Union policy had none, but the excess was minor compared with the difference in premium, and the number of claims was low compared

with the number of premiums paid. The quotes were for the Premises and 5 Haven Road, not for 3

70. He knew nothing about Great Lakes Insurance mentioned in the Cliftonside quote at item 92. He did not think they were major insurers, or that Cliftonside were big. The quote was for the Premises and 5 Haven Road. He accepted that the quote was on the basis that cover for 5 Haven Road was restricted, and would not, for example, cover flooding

71. In the Anglo Pacific quote at item 93, the first page of the proposal form was wrong when it stated that the roofs had been built entirely of non-combustible materials, but it would not have made any difference because this was merely an estimate and could have been corrected, and even if another £100 had then been added to the premium it would still have been half that of Norwich Union. He did not know that "20% Co-insurance" (under "conditions" at the foot of the first page of the quote) meant that the insured paid 20% of any claim, nor did he know whether the Premises and 5 Haven Road had any composite panels

72. He did not have any more pages for the Keelan-Westall quote than appeared at item 95. He accepted that the reference to the Building having 2 storeys was wrong. The Premises had 2 storeys, but the Building had 3 storeys

73. Some of the NIG quotes at items 94, and 96 to 98 were for the Premises and 5 Haven Road, and some were for 3, the Premises and 5 Haven Road. One quoted premium was £609.39, another was £637.39, and another was £687.40, but they were all half the cost of the Norwich Union premiums

The Respondent/Landlord's supplementary bundle

74. Mr Falck submitted the supplementary bundle. The Tribunal indicated that there would be a break for an early lunch to enable the Applicant/Leaseholder to consider the bundle, so that the Tribunal could consider whether to admit the bundle at such a late stage in the proceedings

75. After the break, the Applicant/Leaseholder confirmed that he had read the bundle and had no objection to its being admitted

76. The Tribunal decided to admit the supplementary bundle

77. In examination-in-chief Mr Bennett said that the regulation of insurance had passed from the General Insurance Standards Council to the Financial Services Authority on the 14 January 2005. More compliance had then been needed. There was now a huge amount more work to do for an individual with a sole agency. Towergate had 49 staff and one member of staff who just dealt with compliance

78. The age of a property did affect premiums. The construction dates mentioned by the Applicant/Leaseholder of 1900, 1920 and 1960 would have no effect, because the rates would be the same, but a property built after 1980 would probably attract cheaper premiums, whereas a property built before 1850 would probably attract higher premiums

79. The method of roof construction also affected premiums. Insurers referred to standard and non-standard construction. Standard construction was brick or stone walls, with slate or tile roof. Anything else needed to be declared, together with the proportion of the building involved

80. A flat roof also affected premiums, particularly if it was a felt-on-timber flat roof. Typically a flat roof had a life-span of about 15 to 20 years. A slate or tile roof lasted much longer

81. The policy schedule at pages 50 to 51 was the complete Norwich Union schedule for the Premises and 5 Haven Road. There was no other schedule, and there were no other pages. Similarly, the schedule at pages 52 to 53 was the entire schedule for 3 Haven Road

82. Insurance companies provided an on-line quotation system for individual customers (ie customers insuring 5 or less properties) for properties with standard risks. The NIG quotes were for a customer with no more than 5 properties. The Respondent/Landlord had more than 5 properties and would not be able to use the on-line quotation system

83. He had obtained the NIG quote for £1,500 including IPT at page 72. It differed considerably from the Applicant/Leaseholder's NIG quotes varying from £609.33 for £374000 cover (item 95) to £851.05 for £497,836 cover (item 98). He had referred back to NIG. They had said in their letter dated the 13 October 2006 (at page 178) that on-line quotes varied from office to office in a "soft" market. They would not give an on-line quote if the property had a flat roof exceeding 50 square feet or so. The local NIG office would then make a decision whether to continue with an on-line quote on that basis. Towergate dealt with NIG's Bristol office, who would not allow Towergate to use the on-line quotation system because of the number of properties insured by the Respondent/Landlord, which was at least 33, bearing in mind that the schedule for the Premises and 5 Haven Road was schedule 25, and the schedule for 3 Haven Road was schedule 33

84. He had nevertheless obtained an on-line NIG quote of £897.92 for £374,313 cover and £5m property owners liability (at page 185), which could be reduced by 30% to £628.55 (page 188) if a suitable business case could be given to underwriters, which meant that they might give a competitive quote on this property if there was a hope of additional business

85. The 30% reduction was only for the first year's premium. In the second year it would revert to £897.92 plus index linking of say 5%

86. He had also obtained an on-line NIG quote of £803.42 for £374,313 cover and £2m property owners liability (at page 189), which could be reduced by 30% to £562.40 (page 191) on a similar basis

87. However, the Respondent/Landlord could not obtain these quotes because they were only for owners of 5 or less properties. If the Respondent/Landlord changed insurers to NIG then an underwriter would look at the properties manually, and NIG would not give an on-line quote

88. On-line quotes could be cheaper because there was no expense of an underwriter being involved. It was the same with insuring cars. An individual on-line quote for car insurance was likely to be cheaper than the cost of a company insuring each car in a fleet

89. The reason why the Norwich Union schedule at page 50 showed a premium for this year of £1,098.35 whereas the table at page 100 showed a premium for the Premises and 5 Haven Road of £1,153.27, was that the latter figure included the addition of Towergate's 5% administration charge. The Respondent/Landlord had indeed paid Towergate £1,153.27, as confirmed in Towergate's letter dated the 6 June 2006 at page 89

90. Berkeleys now occupied 1 to 3 Haven Road. However, no part of 1 Haven Road was insured on the policy covering 3, the Premises and 5 Haven Road, and no part of the Premises was over 1 Haven Road

91. In cross-examination Mr Bennett said that he had not been involved in 2004 and did not know why there had been 4 pages to the 2004 policy schedule, but only 2 (of which the second page was blank for any endorsements) to the 2006 schedule. It might be because some of the matters previously in a schedule had now been included in the Norwich Union policy booklet. He did not know why the Applicant/Leaseholder's name had not been mentioned on the schedule, but he could arrange it. The new policy included £5m property owners liability as standard

92. He had now clarified in examination-in-chief how the age of a property could affect a premium. He apologised for not making it clear in paragraph 4.1 at page 44

93. He confirmed his statement in paragraph 4.2 at page 44 that loading for non-standard construction could be up to 200%, and that some insurance companies would not quote at all

94. The Applicant/Leaseholder had been able to get an on-line quote because he was an individual with one property. If he had said that he had had 20 properties he would have had to make a presentation to an underwriter. The individual owner's on-line quote would then be cheaper than the manual quote from an underwriter, as was clear from the difference between the recent NIG on-line quotes to Towergate at pages 181 to 191, and the NIG underwriter's quote to Towergate of £1,500 at page 73

95. Quotations were often subject to survey, as was the Applicant/Leaseholder's quote from Fortis at item 88, although he accepted that the NIG quotes did not require a survey

96. The quote from Allianz Cornhill was cheaper than Norwich Union, but had a higher excess

97. The difference between the figures for the NIG quote at pages 45 (£1,575) and 72 (£1,500) was Towergate's 5% administration fee of £75. Some of the difference between the figures for the AXA quote at pages 45 (£1,732.62) and 71 (£1,600) was, again, Towergate's 5% administration fee of £80, but he was unable to account for the balance of the difference

98. The day-one cover was a cost option with NIG on-line, and some insurers did not give it as an option

99. Norwich Union had revamped their policy in 2005 with business interruption wording instead of material damage wording. None of the Applicant/Leaseholder's quotes stated that they were on a business interruption basis

100. The £50,000 trace and access cover was more appropriate for a larger property than the Building, but was included as standard at no extra cost

101. Not all insurers gave 24 hour a day claims service. For example, Allianz Cornhill did not

102. His choice of insurers for quotes was to achieve a spectrum from top-10 insurers such as AXA and Allianz Cornhill to MMA, which was not a top-10 insurer. There was no reason not to go to Royal and Sun Alliance for a quote too. He had just picked a few insurers as examples. He did not agree that Allianz Cornhill was a bad insurer. They were a top-10 insurer with whom he had had very good experience

103. The Respondent/Landlord received no commission on the insurance of the Building. The Respondent/Landlord was obliged to insure under the Lease, but received no commission. Mr Whitelock had given up his agency because the cost of compliance with the new rules would have exceeded any commission he would have received

104. AXA's quote included 45% commission to Towergate

105. In re-examination Mr Bennett said that his instructions to act as an expert witness had included a copy of the Part 35 court rules, the Practice Direction, and the Guidance Notes for the Protocol for expert witnesses. He was not instructed which insurance companies to approach for quotes. The choice was entirely his. Norwich Union's reference at page 55 to 200% loading for non-standard construction had come from Norwich Union without any prompting from him. With the exception of MMA all the other quotes had been manually underwritten following a presentation from Towergate

with all material facts. A manually underwritten quote was the most accurate method of calculating a premium because it was not just a question of ticking standard on-line boxes. It was a quote, whereas the on-line "quotes" were really estimates. At page 181 was the question "if your client requires 'DAY ONE' inflation provision please state the % required", which was an indication that not all quotes were on a day-one basis. Under the trace and access provision, the insurer would pay for the trace and access even if the fault was found to be one such as wear and tear for which the insured would pay

106. In answers to questions from the Tribunal Mr Bennett said that Towergate did not have a tied agency. Their instructions on taking over the Respondent/Landlord's business was to take over and deal with the renewal of the Respondent/Landlord's Norwich Union policy. Towergate were not asked to go to the market for alternative quotes. Towergate were happy that Norwich Union were reputable and that the premium was competitive, but agreed that the position would be reviewed after 3 years. His brief to AXA and Allianz Cornhill for the alternative quotes was to give them each a presentation with all the information about the Building. The AXA commission of 45% would be deducted by Towergate out of the premium paid by the Respondent/Landlord. Towergate would retain the full 45% and would not share any of it with the Respondent/Landlord. It was normal for the whole of the commission to go to the broker, although sometimes the broker would share some of the commission with the insured. The 5% administration charge would be paid in addition

107. The NIG quote of £1500 for the Building was on the basis that the Respondent/Landlord had more than 5 properties, the Building was of non-standard construction, and the on-line quotation system was not available. The underwriter would advise whether Towergate could use the on-line system, and would do so if possible, as confirmed in the NIG letter dated the 13 October 2006 at page 178. Towergate could obtain a quote on-line for a single property if it was of standard construction but could not do so if there were 33 properties

108. The Respondent/Landlord's portfolio was a mix of mostly flats above shops, but with some residential and some commercial. There were no developments under construction covered by the policy

109. Towergate's commission from Norwich Union for this policy was 32% in addition to their 5% administration fee, making a total of 37%, but they handled all claims for no extra fees or commission

110. Tenants could use the insurers 24 hour claims service, but it was more convenient for them to report claims through Towergate

111. In further re-examination, Mr Bennett said that each property covered by the Respondent/Landlord's policy with Norwich Union was assessed individually. If another property covered by the policy represented a greater insurance risk, that would not affect the premium for the Building

Mr Maxted's oral evidence

112. In examination-in-chief Mr Maxted said that Mr Whitelock was a director of the Respondent/Landlord. Mr Whitelock had no plans to re-open his agency with Norwich Union after these proceedings

113. 3 Haven Road was fundamental to the Premises. The Building was a 3-storey building with each part dependent on the others. They were reviewing the split in values between 3, the Premises and 5 Haven Road and now had the valuation from James & Sons at page 129. Those figures did not include VAT. To rebuild the whole property would be zero-rated, but to rebuild up to 95% would attract VAT at the standard rate

114. In cross-examination Mr Maxted said that they had thought that a 3-year review of the Norwich Union policy was reasonable. Cost was important, but not all-important

115. The Respondent/Landlord had not responded to the Applicant/Leaseholder's earlier letters about alternative quotes, but had had confidence in Towergate. Mr Maxted did not accept that they were paying double the proper rate. The Norwich Union product was a quality product at a competitive price. In respect of 80% of the Respondent/Landlord's properties they paid the Norwich Union premiums themselves and could not re-charge them to tenants. The Respondent/Landlord would not continue to insure through Norwich Union if the Respondent/Landlord did not think the rates were competitive

116. It was right that the Applicant/Leaseholder should pay half the premium for the Building because the rate was calculated by floor area and the Applicant/Leaseholder had more than 50% of the floor area of the Building

117. Number 3 Haven Road was smaller than number 5, although Berkeleys' combined premises at numbers 1 and 3 were larger. Berkeleys' headed notepaper showed their address as "1 to 3 Haven Road". Berkeleys leased number 1 Haven Road from a different landlord

118. The Whitelock Group of Companies owned about 80 properties. They counted the Building as 3 of those properties, although as one for insurance purposes. Each property was rated independently for insurance purposes. Insurers rated differently for owners of more than 5 properties, and for non-standard properties. The Respondent/Landlord could not use the Applicant/Leaseholder's quotes because they did not take account of the fact that the Respondent/Landlord owned far more than 5 properties or of the fact that the Building was of non-standard construction

119. The Respondent/Landlord received no commission from the insurance of the Building. The Respondent/Landlord paid the premiums referred to in Mr Maxted's statement. The question whether other insurers might give a better quote by paying less commission did not enter into it. The Respondent/Landlord received no commission

120. It was not true that the Respondent/Landlord was interested in having only one insurer rather than testing the market. The Respondent/Landlord had instructed Towergate who had advised that Norwich Union offered excellent service at competitive rates, and that it would be appropriate to review after 3 years

121. In re-examination Mr Maxted said that some managing agents charged 10% for managing a property. The Respondent/Landlord charged the Applicant/Leaseholder no management fee for insuring the Building. The premiums for 3, the Premises and 5 Haven Road were assessed independently of, and were unaffected by, the other properties owned by the Respondent/Landlord and insured under the Norwich Union policy. The Respondent/Landlord had a 3-year agreement with Norwich Union, but the Respondent/Landlord could withdraw from the agreement if Norwich Union raised the premiums by more than the increase in the retail prices index

122. In answers to questions from the Tribunal Mr Maxted said that property owners liability cover had been increased from £1m to £5m on Towergate's advice

123. The Respondent/Landlord had not been aware of Towergate's commission rate when they had instructed Towergate to act for them

124. He would not have expected to obtain a better rate of premium for 80 properties than for one. It was like car insurance. The rate of premium was worse for each car in a fleet than for an individual car insured separately

125. The 3-year agreement with Norwich Union might make them think twice before increasing the premium

126. They had consulted Towergate in 2004. The first renewal date for the insurance of the Building after Towergate's appointment was in 2005

127. In answer to a further question from the Applicant/Leaseholder Mr Maxted said that he did not know the relative floor areas of numbers 3 and 5 Haven Road

Mr Falck's submissions

128. Mr Falck submitted that :
   a. in respect of the premiums for the year 2003 to 2004, the Applicant/Leaseholder had produced no alternative quotes, and the premiums charged should be regarded as fair and reasonable
   b. in respect of the quotes for the premiums for the year 2004 to 2006, the Applicant/Leaseholder had not appreciated the effect on premiums of the size of the flat roof or the of the fact that the Building was of non-standard construction
   c. in respect of the premiums for the year 2004 to 2005, there were 2 quotes. A 60% discount had been offered by NIG. The premiums charged should be regarded as fair and reasonable

d. in respect of the premiums for the year 2005 to 2006, the premiums charged were fair and reasonable. If the Tribunal was minded to make any reduction, the 5% IPT, which had been omitted in error, should be added before any reduction

e. in respect of the Applicant/Leaseholder's quotes for the year 2006 to 2007 :
   - Great Lakes were a small insurer
   - the Anglo Pacific quote was on the erroneous basis that the Building was built entirely of non-combustible materials
   - the Keelan Westall quote for Royal and Sun Alliance was incomplete
   - the NIG quotes were :
     - inconsistent with each other
     - obtained using the on-line quotation system, which was inappropriate because the Respondent/Landlord owned more than 5 properties, and because the Building was of non-standard construction

f. the evidence from Mr Bennett had explained why the Respondent/Landlord's premiums would not be as cheap as the quotes obtained by the Applicant/Leaseholder, and why the Respondent/Landlord could not take advantage of the cheaper quotes available to an individual insuring a property of standard construction

g. the premiums were reasonably incurred for the purposes of section 19 of the 1985 Act, even though not the cheapest : **Forcelux**

h. it was reasonable for the Respondent/Landlord to insure all the Respondent/Landlord's properties through one insurer having transferred the agency from Mr Whitelock to Towergate and having taken advice from Towergate about the choice of insurer : **Viscount Tredegar v Harwood**

i. the Respondent/Landlord had insured through Norwich Union in the normal course of business : **Berrycroft Management Company Limited v Sinclair Gardens Investments (Kensington) Limited**, in which reference was made to **Havenridge v Boston Dyers**

j. the Respondent/Landlord received no commission from the insurance of the Building

The Applicant/Leaseholder's submissions

129. The Applicant/Leaseholder read out a typed statement, of which he produced copies for the Tribunal and the Respondent/Landlord, and in which he submitted that :

a. in **Havenridge v Boston Dyers** [1994] 2 EGLR 73, of which the Applicant/Leaseholder did not have a copy for the Tribunal or the Respondent/Landlord, it was acknowledged that even though the landlord did not need to shop around, he still needed to show that there were no special features leading him to insure outside the normal course of business

b. in **Forcelux v Sweetman** the Lands Tribunal held that the LVT should focus on why the landlord elected to incur the costs concerned; the landlord should keep proper documentation for his reasons for doing so; and the Lands Tribunal accepted that the insurance was unreasonable

c. in **Veena v Cheong** [2003] 1 EGLR 175, of which the Applicant/Leaseholder did not have a copy for the Tribunal or the Respondent/Landlord, it was held that there was a 2-stage test, namely whether the action taken by the landlord was reasonable and whether the costs were too

d. in **O'Sullivan v Regisport** LVT/INS/027/003/00, of which the Applicant/Leaseholder did not have a copy for the Tribunal or the Respondent/Landlord, the LVT held that a mechanistic application of **Havenridge v Boston Dyers** to cases under section 19(1) of the 1985 Act would largely emasculate the protection offered to leaseholders under that section, and that on the facts of the case the premiums were wholly excessive, the likely reason for which was the commissions received by the landlord and broker were cumulatively excessive

e. in **Maryland Estates v Ayton** LVT/SC/CR/123/166/01 the landlord was a commercial landlord. The property was insured under a portfolio policy, namely a policy where each property was looked at individually, as opposed to a block policy where there was a fixed rate to cover all the properties insured. The particular property had to be specifically negotiated with the insurer by the broker. The broker received a 20% commission, and the landlord received a further 20%. The tenants had obtained quotes for like-for-like cover, and said that they were paying about double that of other properties in the road. The LVT said that **Berrycroft Management Company Limited v Sinclair Gardens Investments (Kensington) Limited** was not intended to defeat the clear and literal meaning as well as the obvious intention of section 19, and did not require the LVT in every case to decide that where the landlord had selected an insurer of repute and the transaction was at arms' length the premium could not be considered excessive. The premiums were high because they had to accommodate 40% commission. The landlord could be reasonably incurring the premiums only if the figure demanded was not so dramatically divorced from the market rate for insuring the property by subsidising the landlord's "mixed bag" of properties or his broker's excessive commission

f. in **Khatum v Newham LBC** [2004] 1 WLR 417, of which the Applicant/Leaseholder did not have a copy for the Tribunal or the Respondent/Landlord, the Court of Appeal held that the Unfair Terms in Consumer Contract Regulations 1999 applied to contracts relating to land, including contracts of tenancy

g. section 19(1) of the 1985 Act ran in parallel with paragraph 8(2) of the Schedule to the 1985 Act

130. In addition, the Applicant/Leaseholder submitted that :

a. the James & Sons report did not set out the relative floor areas of numbers 3 and 5 Haven Road

b. it should be possible to insure the Building separately, irrespective of any other properties owned by the Respondent/Landlord

c. the Applicant/Leaseholder agreed that the Building had to be insured with one insurer for the whole Building

d. Mr Maxted claimed that it had only come to light in these proceedings that the

Applicant/Leaseholder was being charged for half the premiums for the Premises and 5 Haven Road, rather than half the premiums for 3, the Premises and 5 Haven Road, whereas it had come to light earlier, and this adversely affected Mr Maxted's credibility

e. the Applicant/Leaseholder did not accept Mr Bennett's assertion that the Respondent/Landlord received no commission from the insurance of the Building

f. Mr Bennett's report was misleading

g. insurers were not concerned about the construction of the Building or the proportion of the roof which was flat, although the Applicant/Leaseholder agreed that about 35% of the roof was flat

h. the Applicant/Leaseholder had spoken to insurers about the trace and access provision, and they had told him that they would not pay for trace and access if the fault was found to be wear and tear, and the Applicant/Leaseholder did not accept Mr Bennett's assertion to the contrary, particularly as his assertion had been given hesitatingly and unpersuasively

i. the 24 hour a day claims service was illusory because the Applicant/Leaseholder would have to claim through the Respondent/Landlord who only worked 5 days a week, and because the Applicant/Leaseholder's name was not endorsed on the policy schedule

Costs

131. So far as the claim by the Applicant/Leaseholder under section 20C of the 1985 Act was concerned, Mr Falck conceded that there was no provision in the Lease for the Respondent/Landlord to include any costs of these proceedings in any service charge payable by the Applicant/Leaseholder

132. However, each party made an application at the hearing for an order for costs against the other pursuant to paragraph 10 of Schedule 12 to the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act")

133. Each party claimed that the other had acted unreasonably during the course of the proceedings. Mr Falck submitted that the Applicant/Leaseholder had failed to comply with directions

THE TRIBUNAL'S DECISION AND REASONS

134. The Tribunal finds that the premium for each of the years in question, as set out in paragraph 21 of these reasons, was reasonably incurred, and that the Applicant/Leaseholder's proportion of each premium under the Lease was payable to the Respondent/Landlord by the Applicant/Leaseholder

135. In making that finding the Tribunal has considered the whole of the evidence in the round, and has taken account of the decided authorities, and has taken careful note of all the parties' submissions, but in particular has taken account of the following findings

Nature and extent of the Building for insurance purposes

136. The Tribunal finds that the Building has a significant area of flat roof, and the Tribunal notes that the Applicant/Leaseholder accepts that the flat roof is constructed of felt on timber, and that its area is about 35% of the total roof area of the Building

137. The Tribunal accepts Mr Bennett's evidence that insurers use the terms "standard construction" and "non-standard construction"; that by "standard construction" insurers mean brick or stone walls, with slate or tile roofs; and that by "non-standard construction" insurers mean any other type of construction

138. The Tribunal also accepts Mr Bennett's evidence that insurers regard the Building as being of non-standard construction, in view of the construction and extent of the flat roof

139. The Tribunal also finds that the Building comprises only the Premises, 3 Haven Road, and 5 Haven Road, and that no part of the insurance of the Building or of the premiums in question relates to 1 Haven Road

Premiums paid by Respondent/Landlord in respect of the Building

140. The Tribunal has taken into account the Applicant/Leaseholder's submission that Mr Maxted's credibility has been undermined by his statement that it had only come to light in these proceedings that the Applicant/Leaseholder was being charged for half the premiums for the Premises and 5 Haven Road, rather than half the premiums for 3, the Premises and 5 Haven Road, whereas, according to the Applicant/Leaseholder it had really come to light earlier

141. However, the Tribunal accepts Mr Maxted's evidence that the Respondent/Landlord has paid each of the premiums for the years in question as set out in the exhibit to his statement. The Tribunal finds Mr Maxted's evidence in that respect to be straightforward and persuasive, and corroborated by the letters from Norwich Union in Appendix 6 to Mr Bennett's statement

142. The Tribunal also accepts Mr Bennett's explanation that the reason why the Norwich Union schedule at page 50 showed a premium for 2006/7 of £1,098.35 whereas the table at page 100 showed a premium for the Premises and 5 Haven Road of £1,153.27, was that the latter figure included the addition of Towergate's 5% administration charge

Commission

143. The Tribunal notes Mr Bennett's evidence that Towergate receives commission of 32% from Norwich Union for this policy in addition to receiving Towergate's 5% administration fee, making a total receipt of 37%

144. However, the Tribunal accepts the evidence of Mr Maxted and Mr Bennett that the Respondent/Landlord receives no commission in respect of the insurance of the Building. Again, the Tribunal finds their evidence in that respect straightforward and persuasive

145. The Tribunal also accepts Mr Maxted's explanation for the reasons for changing from insuring through Mr Whitelock's agency to insuring through Towergate's brokerage because of the cost of compliance with the FSA regulations, even though commission was no longer received, to be plausible and persuasive

Other properties owned by the Respondent/Landlord

146. The Tribunal accepts Mr Maxted's evidence that the Respondent/Landlord is part of the Whitelock Group of Companies and that the Whitelock Group of Companies owns about 80 properties, and that those properties are all insured through Norwich Union

147. The Tribunal also accepts Mr Maxted's evidence that in respect of about 80% of the properties owned by the Respondent/Landlord, the Respondent/Landlord is unable to pass on the cost of the insurance premiums to the Respondent/Landlord's tenants, and that in those cases the Respondent/Landlord bears the total cost of the premiums

Arrangements between Respondent/Landlord and Towergate

148. The Tribunal finds that Towergate is a reputable and responsible broker; that the Respondent/Landlord instructed Towergate in the normal course of business; and that it was reasonable to do so, particularly in the light of Mr Maxted's explanation for the reasons for changing from insuring through Mr Whitelock's agency to insuring through Towergate's brokerage

Arrangements between Respondent/Landlord and Norwich Union

149. The Tribunal has taken account of Mr Bennett's evidence that Towergate did not trawl the market at that stage before giving that advice, and of Mr Maxted's evidence that before 2005 the Building had been insured through Mr Whitelock's tied agency with Norwich Union

150. However, having considered all the evidence in the round, including Mr Bennett's evidence that Towergate has no tied agency with Norwich Union, the Tribunal finds that it was reasonable for the Respondent/Landlord to seek Towergate's advice about whether to continue insuring the Respondent/Landlord's properties through Norwich Union, and to take Towergate's advice that the Respondent/Landlord should do so because Norwich Union was a reputable insurer, and Norwich Union's rates were competitive, but that there should be a review after 3 years

151. The Tribunal has noted the Applicant/Leaseholder's submission that the Respondent/Landlord is powerful enough to put pressure on the insurance companies to reduce premiums, not to increase them

152. However, the Tribunal accepts Mr Maxted's evidence that the large number of properties in the portfolio does not necessarily result in a decrease in premiums, but rather can have the opposite effect, which the Tribunal finds is in accordance with the comments of the Lands Tribunal in **Forcelux v Sweetman** in that respect

153. The Tribunal also accepts that the Respondent/Landlord finds the premiums charged by Norwich Union to be generally competitive throughout the Respondent/Landlord's portfolio of properties, in the light of Mr Maxted's evidence that in respect of about 80% of the properties owned by the Respondent/Landlord, the Respondent/Landlord is unable to pass on the cost of the insurance premiums to the Respondent/Landlord's tenants, and that in those cases the Respondent/Landlord bears the total cost of the premiums

154. The Tribunal also accepts Mr Bennett's evidence that each property covered by the Respondent/Landlord's policy with Norwich Union is assessed individually, and that if another property covered by the policy represented a greater insurance risk, that would not affect the premium for the Building

Insurance cover

155. The Tribunal finds that the current cover for the Building includes buildings £359,010 (the Premises and 5 Haven Road – reinstatement £276,162) and £127,596 (3 Haven Road – reinstatement £98,151), rent receivable £22,000 (the Premises and 5 Haven Road) and £21,500 (3 Haven Road), and property owners liability £5m (in each case). The Tribunal finds that Mr Maxted's evidence in that respect is corroborated by the Norwich Union schedules in Appendix 1 to Mr Bennett's statement

156. The Tribunal considers these figures reasonable, and, so far as the reinstatement buildings figures are concerned, in line with the figures in the report of James & Sons

Other terms of the Norwich Union policy

157. The Tribunal accepts the evidence of Mr Bennett that the Respondent/Landlord's Norwich Union policy in respect of the Building covers the benefits mentioned in paragraph 5.2 of his statement

158. The Tribunal has also noted all the Applicant/Leaseholder's comments about each of those benefits, and the Tribunal accepts that the trace and access cover may be unnecessarily high for the Building, and that other insurers may provide some, if not all, of the benefits referred to

159. However, the Tribunal finds that the relevant question in this respect under sections

19(1) and 27A of the 1985 Act is not whether the cover for those benefits under the Norwich Union policy for the Building is too high, or whether benefits are unique, but whether the amount of the premium payable is affected by any of those benefits. In this respect, the Tribunal accepts Mr Bennett's evidence that each of those benefits is included in the Norwich Union policy cover for the Building as standard, and that no extra or increased premium is payable by the Respondent/Landlord or the Applicant/Leaseholder as a result of those benefits being included in the cover

The test to be applied by the Tribunal in assessing payability of the premiums for the years in question

160. The Tribunal finds that :

a. the test for payability of the premiums by way of service charge under the Lease and under section 27A of the 1985 Act is whether they have been reasonably incurred : section 19(1)(a) of the 1985 Act

b. the test under Schedule 8 of the 1985 Act is not "parallel" with the test under section 19(1)(a), as submitted by the Applicant/Leaseholder, or even relevant to the present proceedings, because Schedule 8 applies only to cases where the *tenant* is obliged to insure with an insurer nominated or approved by the landlord, not to cases like the present proceedings where the *landlord* is obliged to insure

c. the relevant question under section 19 of the 1985 Act is not whether costs are "reasonable" or the expenditure the cheapest available, but whether the costs have been "reasonably incurred" : **Forcelux v Sweetman**, and whether the insurance has been arranged in the normal course of business : **Berrycroft v Sinclair** (a test which the Tribunal finds to have been applied to section 19 of the 1985 Act by the Lands Tribunal in **Forcelux v Sweetman** despite **Berrycroft v Sinclair** itself being a case concerning, on the facts, the nomination of an insurer by the landlord in that case)

The application of the test to the facts in this case

161. The Tribunal finds that :

a. the insurance of all the Respondent/Landlord's properties, including the Building, through one insurer, namely Norwich Union, has been in the normal course of business, as was the landlord's choice of insuring through only one insurer in **Viscount Tredegar v Harwood**

b. the insurance of the Building for each of the years in question was arranged in the normal course of business

c. on-line quotes are likely to be cheaper than customised underwritten quotes, as is evidence from a comparison of the NIG quotes obtained by Mr Bennett with the NIG quotes obtained by the Applicant/Leaseholder, because on-line quotes do not involve the expense of the personal involvement of an underwriter, they are for "standard" properties, and they are often qualified by such requirements as "subject to survey"

d. on-line quotes for the Building are not available to the Respondent/Landlord

because of the number of properties owned by the Respondent/Landlord, and because insurers regard the Building as being of non-standard construction

e. in any event, the on-line quotes obtained by the Applicant/Leaseholder are not on a "like-for-like" basis with the Norwich Union policy for the Building because the Norwich Union policy takes account of the construction of the Building and the number of properties owned by the Respondent/Landlord, and has no excess for claims other than subsidence claims, whereas :

- the Fortis quote at item 88 is on the basis that the roof construction is "standard", that the quote is "subject to survey", and that there is a £250 excess
- the Higos Royal Sun Alliance quote at item 90 is on the basis that the Building is "standard construction", and that there is a non-subsidence excess of £100
- the Stuart Alexander AXA and Zurich quotes at item 91 are subject to satisfactory completed proposal form, and there is a non-subsidence £250 excess
- the Cliftonside Great Lakes quote at item 92 is from a small insurer, has restricted cover on the shop, and has a non-subsidence excess of £100
- the Anglo Pacific London Company Market and/or Lloyds quote at item 93 is subject to a non-subsidence excess of £250, subject to 20% co-insurance,, and is on the basis that the Building has roofs built of slates, tiles, concrete, and entirely of non-combustible materials
- the City Insurance Keelan Westall Royal Sun Alliance quote at item 95, first page, has a non-subsidence excess of £100
- the Keelan Westall Royal Sun Alliance quote at item 95, third page, has a non-subsidence excess of £100, describes the Building as being of 2 storeys, and the copy supplied has only 2 pages out of the 5 mentioned in the footers
- all the other quotes at items 89, 94, 95, second page, 96, 97, and 98, are from NIG through various brokers, and quote premiums which are different from each other
- all the quotes were obtained using the on-line quotation system, which is unavailable to the Respondent/Landlord because the Respondent/Landlord owns more than 5 properties

f. by contrast, the Tribunal accepts Mr Bennett's evidence that the quotes from Allianz Cornhill, AXA, and NIG referred to in paragraphs 4.6 to 4.8 of Mr Bennett's statement at page 45 were all obtained by a presentation to each insurer of the relevant facts relating to the Building and of the fact that the Respondent/Landlord owns more than 5 properties, and that each of the quotes resulted from the personal involvement of an underwriter

g. in assessing whether the premiums actually paid for the years in question were reasonably incurred, the Tribunal accordingly finds the quotes obtained by Mr Bennett to be more helpful than the quotes obtained by the Applicant/Leaseholder

h. the Tribunal also accepts Mr Bennett's comments about each of the quotes obtained by him at page 45, although the Tribunal also accepts the Applicant/Leaseholder's evidence that the Applicant/Leaseholder has been able to

negotiate the elimination of the NIG £500 flat roof excess

i. the premiums actually paid for the years in question were within a reasonable "bracket" of the alternative quotes obtained by Mr Bennett

j. having considered all the evidence in the round, the Tribunal finds that the premiums actually paid for the year in question were reasonably incurred, and indeed, for the reasons already given, were not excessive, even though they were higher than the on-line quotes obtained by the Applicant/Leaseholder

k. in making these findings, the Tribunal has taken account of all the authorities referred to by the parties, but in particular the following :

- the Lands Tribunal decision in **Forcelux v Sweetman**, which, contrary to the submission by the Applicant/Leaseholder at page 5 of his typed statement of closing submissions, was that on the facts of that case the insurance premiums had been reasonably incurred, despite being about twice as expensive as the quotes obtained by the tenants
- the LVT's comments in the case of **O'Sullivan v Regisport** that a mechanistic application of **Havenridge v Boston Dyers** to cases under section 19(1) of the 1985 Act would largely emasculate the protection offered to leaseholders under that section; however, unlike the findings by the LVT in that case, the Tribunal finds that the premiums in this case are not excessive, and that the Respondent/Landlord receives no commission on the premiums payable
- the LVT's comments in **Maryland Estates v Ayton**; however, unlike the findings by the LVT in that case, the Tribunal finds in this case that Mr Bennett on behalf of the Respondent/Landlord has obtained alternative quotes, that the Tribunal prefers those quotes to the quotes obtained by the Applicant/Leaseholder for reasons already given, that the Respondent/Landlord receives no commission on the commissions payable, and that the premiums are not excessively high

Applicant/Leaseholder's application for an order under section 20(C) of the 1985 Act

162. The Tribunal finds, in accordance with Mr Falck's concession in that respect, that there is no provision in the Lease for the Respondent/Landlord to include any costs of these proceedings in any service charge payable by the Applicant/Leaseholder, and the Tribunal makes no order under section 20(C) accordingly

The parties' applications under paragraph 10 of Schedule 12 to 2002 Act

163. Having considered carefully the submissions by each party, the history of this matter, and the conduct of the parties, the Tribunal is not persuaded that the circumstances are such that an order should be made that either party should pay costs to the other, and the Tribunal makes no order under paragraph 10 accordingly

Dated the 24 October 2006

Signed

.....

P R Boardman
(Chairman)

A Member of the Southern Leasehold Valuation Tribunal
appointed by the Lord Chancellor

SOUTHERN RENT ASSESSMENT PANEL
LEASEHOLD VALUATION TRIBUNAL

Case No. CHI/00HP/LSC/2006/0048

REASONS

Application : Section 35 Landlord and Tenant Act 1987 as amended ("the 1985 Act")

Applicant/Leaseholder : Mr Denis Anthony Valentine Hicks

Respondent/Landlord : J M Harding & Partners Limited

Premises : 3A Haven Road, Poole, Dorset, BH13 7LE

Building : the building comprising the Premises and the ground floor shops 3 and 5 Haven Road, Poole, Dorset, BH13 7LE

Lease : the lease dated the 30 November 1987 and made between the Respondent/Landlord (1) and James Joseph Curran and Mary Teresa Wakefield (2), as varied by the Deed of Variation

Deed of Variation : the deed of variation dated the 23 September 1988 and made between the Respondent/Landlord (1) and Fosse Investment & Development Limited (2)

Extended Lease : the lease dated the 11 July 2005 and made between the Respondent/Landlord (1) and the Applicant/Leaseholder (2)

1993 Act : the Leasehold Reform, Housing and Urban Development Act 1993

Date of Application : 24 May 2006

Date of Hearing : 7 July 2006

Venue : Room 48, Bournemouth Town Hall, Bourne Avenue, Bournemouth

Appearances for Applicant/Leaseholder : Mr Hicks

Appearances for Respondent/Landlord : Mr Falck of Preston Redman

Also in Attendance :

Members of the Leasehold Valuation Tribunal : Mr P R Boardman MA LLB (Chairman), and Mr P E Smith FRICS

Date of Tribunal's Decision : 7 July 2006

Introduction

1. The Application is for the removal of clause 9.2 of the Extended Lease

2. Clause 9.2 provides as follows :

The [Respondent/Landlord] may (a) at any time not earlier than twelve months before the Term Date [of the Lease] and (b) at any time during the 5 years ending on the 29 November 2176 apply to the Court under section 61 of the [1993] Act for an order for possession of the [Premises] on the grounds that for the purposes of redevelopment he intends to demolish or reconstruct or to carry out substantial works of reconstruction on the whole or a substantial part of [the Building] and that he could not reasonably do so without obtaining possession of the [Premises] and the provisions of that section and of Schedule 14 to [the 1993] Act shall apply accordingly

3. The Parties agree that the Extended Lease was granted pursuant to section 56 of the 1993 Act

4. The material parts of sections 57 and 61 of the 1993 Act provide as follows :

57 Terms on which new lease is to be granted.

(1) Subject to the provisions of this Chapter (and in particular to the provisions as to rent and duration contained in section 56(1)), the new lease to be granted to a tenant under section 56 shall be a lease on the same terms as those of the existing lease, as they apply on the relevant date, but with such modifications as may be required or appropriate to take account

(a) of the omission from the new lease of property included in the existing lease but not comprised in the flat;

(b) of alterations made to the property demised since the grant of the existing lease; or

(c) in a case where the existing lease derives (in accordance with section 7(6) as it applies in accordance with section 39(3)) from more than one separate leases, of their combined effect and of the differences (if any) in their terms.

(2) to (6) [...]

(7) The terms of the new lease shall—

(a) make provision in accordance with section 59(3); and

(b) reserve to the person who is for the time being the tenant's immediate landlord the right to obtain possession of the flat in question in accordance with section 61.

(8) to (10) [...]

(11) The new lease shall contain a statement that it is a lease granted under section 56; and any such statement shall comply with such requirements as

may be prescribed by [land registration rules under the Land Registration Act 2002]

61 Landlord's right to terminate new lease on grounds of redevelopment.

(1) Where a lease of a flat ("the new lease") has been granted under section 56 but the court is satisfied, on an application made by the landlord—

(a) that for the purposes of redevelopment the landlord intends

(i) to demolish or reconstruct, or

(ii) to carry out substantial works of construction on, the whole or a substantial part of any premises in which the flat is contained, and

(b) that he could not reasonably do so without obtaining possession of the flat,

the court shall by order declare that the landlord is entitled as against the tenant to obtain possession of the flat and the tenant is entitled to be paid compensation by the landlord for the loss of the flat.

(2) An application for an order under this section may be made---

(a) at any time during the period of 12 months ending with the term date of the lease in relation to which the right to acquire a new lease was exercised; and

(b) at any time during the period of five years ending with the term date of the new lease.

(3) [...]

(4) Where an order is made under this section, the new lease shall determine, and compensation shall become payable, in accordance with Schedule 14 to this Act; and the provisions of that Schedule shall have effect as regards the measure of compensation payable by virtue of any such order and the effects of any such order where there are sub-leases, and as regards other matters relating to orders and applications under this section.

(5) Except in subsection (1)(a) or (b), any reference in this section to the flat held by the tenant under the new lease includes any premises let with the flat under that lease.

5. Sections 35 and 38 of the 1987 Act provides as follows

35 Application by party to lease for variation of lease.

(1) Any party to a long lease of a flat may make an application to [a leasehold valuation tribunal] for an order varying the lease in such manner as is specified in the application.

(2) The grounds on which any such application may be made are that the lease fails to make satisfactory provision with respect to one or more of the following matters, namely

(a) the repair or maintenance of—

(i) the flat in question, or

(ii) the building containing the flat, or

(iii) any land or building which is let to the tenant under the lease or in respect of which rights are conferred on him under it;

(b) the insurance of the building containing the flat or of any such land or building as is mentioned in paragraph (a)(iii);

(c) the repair or maintenance of any installations (whether they are in the same building as the flat or not) which are reasonably necessary to ensure that occupiers of the flat enjoy a reasonable standard of accommodation;

(d) the provision or maintenance of any services which are reasonably necessary to ensure that occupiers of the flat enjoy a reasonable standard of accommodation (whether they are services connected with any such installations or not, and whether they are services provided for the benefit of those occupiers or services provided for the benefit of the occupiers of a number of flats including that flat);

(e) the recovery by one party to the lease from another party to it of expenditure incurred or to be incurred by him, or on his behalf, for the benefit of that other party or of a number of persons who include that other party;

(f) the computation of a service charge payable under the lease;

(g) such other matters as may be prescribed by regulations made by the Secretary of State.

(3) to (8) [...]

38 Orders varying leases.

(1) If, on an application under section 35, the grounds on which the application was made are established to the satisfaction of the tribunal, the tribunal may (subject to subsections (6) and (7)) make an order varying the lease specified in the application in such manner as is specified in the order.

(2) If—

(a) an application under section 36 was made in connection with that application, and (b) the grounds set out in subsection (3) of that section are established to the satisfaction of the tribunal with respect to the leases specified in the application under section 36,

the tribunal may (subject to subsections (6) and (7)) also make an order varying each of those leases in such manner as is specified in the order.

(3) If, on an application under section 37, the grounds set out in subsection (3) of that section are established to the satisfaction of the tribunal with respect to the leases specified in the application, the tribunal may (subject to subsections (6) and (7)) make an order varying each of those leases in such manner as is specified in the order.

(4) The variation specified in an order under subsection (1) or (2) may be either the variation specified in the relevant application under section 35 or 36 or such other variation as the tribunal thinks fit.

(5) to (7) [...]

(8) A tribunal may, instead of making an order varying a lease in such manner as is specified in the order, make an order directing the parties to the lease to vary it in such manner as is so specified; and accordingly any reference in this Part (however expressed) to an order which effects any variation of a lease or to any

variation effected by an order shall include a reference to an order which directs the parties to a lease to effect a variation of it or (as the case may be) a reference to any variation effected in pursuance of such an order.
(9) to (10) [...]

Submissions

6. The submissions on behalf of the Respondent/Landlord, in the letter from Preston Redman dated the 21 June 2006 and by Mr Falck at the hearing were that the Tribunal had no jurisdiction to deal with this application because :
   a. the Extended Lease had been granted pursuant to the 1993 Act
   b. section 61 of the 1993 Act accordingly took effect
   c. clause 9(2) of the Extended Lease was merely declaratory of the Respondent/Landlord's rights under section 61
   d. its inclusion in the Extended Lease was required by section 57(7)(b) of the 1993 Act
   e. if the Applicant/Leaseholder had asked the Tribunal to omit it from the Extended lease before the Extended lease had been granted, the Tribunal would have had no power to do so
   f. in any event, the Tribunal could make an order to vary the Lease only if one of the grounds in section 35(2) of the 1987 Act were established
   g. the grounds in section 35(2) of the 1987 Act all related to repairs, maintenance and service charge
   h. the removal of clause 9(2) fell outside the grounds specified in section 35(2) of the 1987 Act
   i. no regulations had been prescribed under section 35(2)(g) of the 1987 Act
   j. section 38(4) and (8) of the 1987 Act merely defined what orders the Tribunal could make under section 35 of the 1987 Act

7. The submissions by the Applicant/Leaseholder, in his letter dated the 27 June 2006 and at the hearing, were that :
   a. the Tribunal had jurisdiction by virtue of sections 35(1)(d), 35(2)(g) 38(4), and 38(8) of the 1987 Act
   b. section 38(4) was linked to section 35(2)(g)
   c. section 38(4) of the 1987 Act provided for the Tribunal to make such order for variation as it thought fit
   d. the Tribunal had confirmed the Tribunal's power to do so in previous Tribunal decisions, namely 12 The Esplanade, Seaford 16 June 2005, The Hall, 10 Meadows Close, Portishead, and Flat 4, 30 King Edward Road, New Barnet, Herts
   e. in the decision in The Hall, 10 Meadows Close, Portishead, the Tribunal had widened to existing restriction on the choice of managing agents, where the previous restriction had had a financial impact on the leaseholders, and had been imposed when market conditions at the grant of the lease were very different from the current market conditions
   f. in the decision in Flat 4, 30 King Edward Road, New Barnet, Herts, the Tribunal

had lowered the interest rate to a rate more appropriate to the current market conditions

g. clause 9(2) prevented the Applicant/Leaseholder obtaining the benefits of an equity release scheme, which had a far worse financial impact on the Applicant/Leaseholder than the rate of interest payable, or any restriction on the appointment of a manager
h. the requirement for the inclusion of clause 9(2) had been imposed by the 1993 Act, when market conditions, including lack of knowledge of equity release schemes, were very different from the current market conditions, including widening knowledge of equity release schemes
i. the Tribunal also had jurisdiction to make an order pursuant to section 35(2)(d) of the 1987 Act, in that "services" could included financial services or services rooted in finance, to ensure that the Applicant/Leaseholder could enjoy a reasonable standard of accommodation; if the Applicant/Leaseholder needed to take an advantage of an equity release scheme he would be unable to do so because of clause 9(2), so that the Applicant/Leaseholder would be unable to have the benefit of services provided under the Extended Lease, and any buyer would be in the same position
j. the Respondent/Landlord had offered the Applicant/Leaseholder an extended lease outside the 1993 Act, which would not have contained clause 9(2), and the Applicant/Leaseholder could have accepted it, but received no advice, even from the independent legal advice which he obtained at the time, about the impact of clause 9(2) on equity release schemes
k. if the Respondent/Landlord had been willing before to offer an extended lease without clause 9(2), then it was unreasonable now to refuse to agree its removal

The Tribunal's decision and reasons

8. The Tribunal finds that it has no jurisdiction to deal with the application

9. In making that finding, the Tribunal has taken account of all the Applicant/Leaseholder's submissions and the whole of the circumstances in the round, including in particular the Applicant/Leaseholder's concern about not being able to take advantage of equity release schemes, but finds that :
   a. the Tribunal can make an order under section 38 for the variation of a lease only if satisfied that one or more of the grounds set out in section 35 are established
   b. none of the grounds specified in paragraphs (a) to (g) of section 35(2) give jurisdiction to the Tribunal to consider making an order for the removal of clause 9(2) of the Extended Lease
   c. section 35(2)(d) :
      - relates to the provision or maintenance of services
      - does not establish a ground under which the Tribunal could make an order to remove clause 9(2) of the Extended Lease because :
        - the Extended Lease was granted under section 56 of the 1993 Act
        - clause 9(2) records, in accordance with section 57(7)(b) of the 1993 Act,

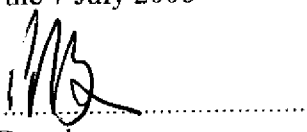
the Respondent/Landlord's rights under section 61 of the 1993 Act
    - clause 9(2) does not itself relate to the provision or maintenance of services as such, whether financial services or otherwise
    - even if, putting the Applicant/Leaseholder's case at its highest, clause 9(2) prevented the Applicant/Leaseholder and any buyer from taking advantage of an equity release scheme, that prevention might amount to a restriction on the Applicant/Leaseholder's (and any buyer's) personal financial position, and might even affect the Applicant/Leaseholder's ability to make payments under the Extended Lease, but it would not amount to a failure by the Extended Lease "to make satisfactory provision" for " the provision or maintenance of any services" to enable the Applicant/Leaseholder to "enjoy a reasonable standard of accommodation", for the purposes of section 35(2)(d)
    - to put it another way, the question whether section 35(2)(d) sets out a ground to vary the Extended lease, is a question about whether the clauses in the Extended Lease satisfactorily provide for the provision or maintenance of any services, and not about whether clause 9(2) prevents the Applicant/Leaseholder from paying for those services

d. the Tribunal is unaware of any regulations having been published under section 35(1)(g) of the 1987 Act
e. subsections (4) and (8) of section 38 of the 1987 Act :
    - give wide powers to the Tribunal in relation to the contents of any order which may be made once one or more of the grounds set out in section 35 of the 1987 Act are established, but
    - do not themselves give the Tribunal additional grounds upon which to decide whether or not to make the order
    - are not of themselves "such other matters as may be prescribed by the Secretary of State" for the purposes of section 35(2)(g) of the 1987 Act because :
        - they are both subsections *of* a substantive Act of Parliament, not "regulations" made *under* an Act of Parliament
        - the use of the word "may" in section 35(2)(g) of the 1987 Act implies that the regulations referred to had not yet been prescribed when the section 35(2)(g) of the 1987 Act was enacted
        - both subsections were enacted in 1987, whereas section 35(2)(g) was added by the Commonhold and Leasehold Reform Act 2002
        - the only amendments to those subsections, namely the substitution of the word "tribunal" for the word "court" in each case, did not affect the substance of those subsections, and did not amount to the prescription of "such other matters" for the purposes of section 35(2)(g) of the 1987 Act
f. the previous Tribunal decisions referred to by the Applicant/Leaseholder were cases in which decisions were made to vary the leases either under the specific paragraphs of section 35(2) of the 1987 Act referred to (Flat 4, 30 King Edward Road, New Barnet, Herts), or where the decisions did not record any dispute between the parties about the specific paragraphs of section 35(2) of the 1987 Act

under which the variation orders were made (the other 2 decisions)

10. The Tribunal accordingly finds that it has no jurisdiction to deal with the Applicant/Leaseholder's application under section 35 of the 1987 Act

Dated the 7 July 2006



Peter Boardman
(Chairman)

A Member of the Southern Leasehold Valuation Tribunal
appointed by the Lord Chancellor