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HM Courts & Tribunals Service

LEASEHOLD VALUATION TRIBUNAL

Sections 19, 27A and 20C of the Landlord and Tenant Act 1985 (as amended) ("the Act")

Case Number:	CHI/45UD/LSC/2012/0092 and CHI/45UD/LLC/2012/0002
Property:	3 Eastgate Court, The Hornet, Chichester West Sussex PO197JX
Date of Application:	29 June 2012
Applicant:	Eastgate Court Residents Company Limited
Respondent:	Nicholas Alexander Jones
Appearances for Applicant:	Mrs Imogen Stewart, Stride & Son (managing agents)
Appearances for Respondent:	Mr Glenn P Jones (father of Respondent)
Date of hearing:	12 December 2012
Tribunal:	Ms E Morrison LLB JD (Lawyer Chair) Mr RTA Wilson LLB (Lawyer Member) Mr B H R Simms FRICS MCIArb (Surveyor Member)
Date of the Tribunal's Decision:	16 January 2013

The Applications

1. The Applicant landlord/management company applied under section 27A (and 19) of the Act for a determination of the Respondent tenant's liability to pay service charges for service charge years 2009-10 to 2011-12.

2. The Tribunal also had before it an application by the Respondent under section 20C of the Act that the Applicant's costs of these proceedings should not be recoverable through future service charges.

Summary of Decision

3. The service charges recoverable by the Applicant are as follows:

Year	£
2009-10	12036.00
2010-11	7378.00
2011-12 (on account only)	8575.00

The proportion recoverable from the Respondent is 9.97% of the above sums. In respect of 2009-10 and 2010-11 the payability of these amounts is subject to the preparation of service charge accounts which have been audited and certified in the manner required by the lease.

4. No order is made under section 20C of the Act.

5. There is no order for costs under Schedule 12 Paragraph 10 of the Commonhold and Leasehold Reform Act 2002, or for reimbursement of fees.

The Lease

6. The lease for the Respondent's flat is dated 9 January 1976 and is for a term of 99 years from 25 December 1973 at an annual rent of £40.00 for the first 33 years and rising thereafter. In addition to the original landlord and tenant, the Respondent management company ("the Company") is a party to the lease. The relevant provisions in the lease may be summarised as follows:

   (a) The Block as defined comprises nine flats, one bungalow and carports, and the Property comprises the Block and the surrounding land.
   (b) By clause 3 the tenant covenants with the landlord and the company to pay and contribute on demand to the company a proportion of a service charge, comprising the company's expenditure in performing and carrying out the obligations set out in Part IV of the Schedule.
   (c) The tenant's share of the overall service charge is based on a rateable value apportionment.
   (d) Part IV of the Schedule sets out the company's covenants with the tenant, which include various maintenance and repairing obligations and insurance of the Property. At the end of each service charge year (30 September) an

account is to be prepared and audited by a qualified accountant who shall certify the overall amount due and the tenant's share of that sum, credit being given for any sums paid on account. Within two months the company is to serve the tenant with a notice stating the amount due.

7. On 20 August 1987 a Deed of Variation was entered into between the Respondent (now the landlord) and the then tenant. The term of the lease was varied to 999 years from 25 December 1973 and the rent reduced to a peppercorn. The provision for on account service charge payments was varied to require payment by monthly instalments.

The Inspection

8. The Tribunal inspected the subject property on the morning of 12 December 2012, immediately before the hearing. Mrs I Stewart, Mr C Lane, Mr N A Jones and Mr G P Jones were also in attendance. Eastgate Court is a purpose built development constructed about 35 years ago in mature grounds. There are nine flats in a three storey block and a separate single storey bungalow. Flat 3 is on the West side of the ground floor. The buildings are of brick with flat roofs and the block has part tile hung elevations. In the grounds are paved areas and visitor parking with a range of six car ports.

9. The tribunal members made a general inspection of the internal common ways and were directed to some sheet material in the floor of a ground floor cupboard. There was an asbestos warning sticker on the cupboard door. The flats and bungalow were not inspected internally. In the grounds the tribunal was shown the car port fascia which had some peeling paintwork and there were leaves in the gutters. On the West side of the site Mr Jones pointed out that a fence had been erected on the boundary to the rear of the block. Also on the West side the tribunal was shown an area of gravel in front of a garage to the adjoining property, Eastgate House, and a row of granite setts and plant pots. The grounds, which included areas of lawn and shrubs, were well-tended and tidy.

The Law and Jurisdiction

10. The tribunal has power under section 27A of the Act to decide about all aspects of liability to pay service charges and can interpret the lease where necessary to resolve disputes or uncertainties. The tribunal can decide by whom, to whom, how much and when a service charge is payable.

11. By section 19 of the Act a service charge is only payable to the extent that it has been reasonably incurred and if the services or works for which the service charge is claimed are of a reasonable standard.

12. By section 20 and regulations made thereunder, where there are qualifying works or the landlord enters into a qualifying long term agreement, there are limits on the amount recoverable from each lessee by way of service charge unless the

consultation requirements have been either complied with, or dispensed with by the Tribunal.

13. Section 20B provides that costs incurred more than 18 months before a demand is made for their payment will not be recoverable unless within that period the tenant was notified in writing that those costs had been incurred and that he would subsequently be required under the terms of his lease to contribute to them by the payment of a service charge.

14. Under section 20C a tenant may apply for an order that all or any of the costs incurred in connection with proceedings before a leasehold valuation tribunal are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.

15. The tribunal may consider, pursuant to regulation 9 of the Leasehold Valuation Tribunals (Fees) (England) Regulations 2003, whether one party should be required to reimburse the tribunal fees incurred by another party in the proceedings.

16. Under Schedule 12 Paragraph 10 of the Commonhold and Leasehold Reform Act 2002, the tribunal may order one party to pay another party's costs in a sum not exceeding £500 in circumstances where the paying party has, in the opinion of the tribunal, acted frivolously, vexatiously, abusively or otherwise unreasonably in connection with the proceedings.

Background

17. Originally the Applicant was the management company, but some time prior to the date of the Deed of Variation in 1987, the Applicant acquired the freehold of Eastgate Court. The Applicant has engaged managing agents. The present agents, Stride & Son, were appointed with effect from 1 December 2010, at which date the Respondent had arrears of £822.06 in respect of service charge demands. These proceedings concern service charges for the period 1 October 2009 – 30 September 2012. Between 1 December 2010 and 30 September 2012 the Respondent has received demands totalling £1952.26. No payments have been made by the Respondent.

18. There is a long-running and unresolved disagreement between the parties. This is centred on the Respondent's contention that the Applicant and/or its managing agents have wrongfully failed to take action against the owners/occupiers of the neighbouring property, Eastgate House, in respect of what the Respondent considers is a clear case of trespass. The Respondent contends that persons at Eastgate House are trespassing on the Eastgate Court common garden area by using part of the gravelled area on the north-west side of Eastgate Court to park a vehicle and to access Eastgate House's garage..

Procedural Background

19. A pre-trial review was held on 10 September 2012 following which directions were given. Direction 2 reads "The Tribunal does not possess jurisdiction to make a

determination on the allegations of alleged trespass and corporate irregularities raised by the parties and the parties are invited to bear this in mind when pleading their cases".

Representation, Evidence, and Procedure at the Hearing

20. Mrs Imogen Stewart from the managing agents, Stride & Son, represented the Applicant and gave evidence on its behalf. Mr Christopher Lane, a director of the Applicant, also attended and gave evidence. Statements from both had been provided in accordance with the Directions.

21. The Respondent was represented at the hearing by his father Mr G P Jones. The Respondent's case was initially set out in his statement dated 15 October 2012. Subsequently both the Respondent and his father provided further statements. There was considerable overlap between the content of all three statements. At the hearing Mr G P Jones made further submissions and gave evidence. The Respondent gave no oral evidence at the hearing (save an occasional comment).

22. All statements, written and oral, have been fully considered by the Tribunal in reaching its decision.

23. At various times during the hearing, it was necessary to remind Mr G P Jones that the Tribunal could not determine the trespass dispute or associated issues, and to limit the evidence to that which was relevant to the subject of the applications and within the Tribunal's jurisdiction to determine.

24. The section 27A application asked the Tribunal to determine the service charges for years 2009-10 and 2010-11, and to determine the payability of on account demands for year 2011-12. By the hearing date the Applicant had produced an account of actual expenditure for 2011-12, the service charge year having ended on 30 September 2012. The parties were asked whether they wished the Tribunal to deal with that year on the basis of actual rather than budgeted expenditure. The Respondent did not wish to do so, stating that the figures had only been made available a few days before the hearing, and accordingly the evidence and argument relating to the final year was dealt with on a budget basis only.

25. The Tribunal first heard the Respondent's objections and challenges to the service charges and then heard the Applicant's case in response. At the conclusion of the evidence, both sides were invited to make final submissions on the service charges, and to make submissions on the application under section 20C and on the issue of costs.

Service charge years 2009-10 and 2010-11

Respondent's proportion of the service charge

26. The Respondent queried how the service charge proportion had been calculated but put forward no alternative calculation. Mrs Stewart told the Tribunal that the

proportions payable by each tenant had been inherited from the previous managing agents, and the Respondent's share was 9.97%. She believed this was based on a rateable value apportionment in accordance with the lease. Although she did not have any underlying calculations, she had no reason to doubt it was correct. Percentage shares for each of the 9 flats and the bungalow appeared on the budget proposal each year.

27. Determination: There was no evidence from the Respondent that challenged the accuracy of the apportionment, and no other evidence from which to conclude that Flat 3's contribution to the service charge of 9.97% is incorrect. It is therefore upheld.

Preparation and certification of accounts

28. In his statement the Respondent contended that the service charges had not been "reconciled" for at least 5 years, and Mr G P Jones referred to a letter (at page 62 of the Respondent's bundle) sent to the accountants in December 2009 querying how the accounts could be said to comply with the lease. In response to questions as to whether the accounts met the requirements of the lease, Mrs Stewart said that the service charge accounts were prepared by qualified accountants, Lewis Brownlee, who also prepared the company's accounts. She accepted that the service charge accounts in evidence for 2009-10 and 2010-11 had not been "audited" in the sense now accorded to that word. However she contended that the word "audited" as it appeared in the lease had to be construed with the meaning it carried at the date of the lease in 1973, namely preparation and certification by an accountant. Mrs Stewart also accepted that the accounts in evidence bore no sign of having been certified by an accountant. However, those accounts accompanied the company accounts which included a report to the board of directors signed by Lewis Brownlee.

29. Determination: The service charge accounts have not been audited or certified as required by the lease as a pre-condition of payment. The meaning of "audit" is that which applied at the date of the original lease. The Applicant/the managing agents may wish to seek guidance from an accountant on this point. The accounts will in any event need to be prepared again in accordance with the requirements of the lease before any monies are payable.

Service charge reserve fund

30. In each of the service charge years 2009-10 and 2010-11 the accounts show that the excess of service charge income over actual expenditure has been retained as a reserve fund. The Respondent stated there was no provision for a reserve fund in the lease. Mrs Stewart accepted this, but said that historically a reserve fund had been maintained to avoid large service charge bills (for large items of expenditure) and the other 9 tenants at Eastgate Court were all happy with the arrangement.

31. Determination: There is no provision in the lease for a reserve fund and therefore this cannot form part of a budget or a head of expenditure in the service charge accounts.

Management Fees

32. In service charge year 2009-10 management fees were £1763.00. In 2010-11 the figure was £1620.00. Mr G P Jones suggested that the lower fee in the second year suggested that the figure in the first year was too high.

33. Mrs Stewart said the change in management fee was probably attributable to the change in managing agent on 1 December 2010. Stride & Co charge on a per unit basis and this charge covers all routine work. She said the charges, inclusive of VAT, were not excessive.

34. Determination: The management fees are upheld, there being no evidence that they were unreasonable. The fees are within the normal range of fees that the Tribunal would expect to see for this type and size of property.

Buildings Insurance

35. The charge was £560.00 in 2009-10 and £1114.00 in 2010-11.The Respondent called for an explanation of this increase.

36. Mrs Stewart explained that the cost of insurance cover had actually been reduced each year since Stride & Co became managing agents, but the basis of showing the cost in the accounts had been changed from a cash basis to a pre-payment basis. Paragraph 22 of her statement set out the relevant figures. In response to Mr Jones's suggestion that the reduction in cost showed it had previously been too high, Mrs Stewart said that the previous managing agents had a different way of arranging the insurance.

37. Determination: As explained by Mrs Stewart, the insurance premiums have decreased. There was no evidence that that premium was excessive and no suggestion that either the level of cover or the risks assured were inappropriate. The insurance charges are upheld.

Directors' liability insurance

38. There is a charge of £263.00 in 2009-10 and £274.00 in 2010-11. The Respondent said this cost was excessive but did not put forward an alternative figure.

39. Mrs Stewart produced figures at paragraph 23 of her statement showing the cost of the premiums and demonstrating how the change from cash to prepayment basis affected the figures in the accounts. In answer to questions from the Tribunal, she accepted that the lease did not provide for recovery of these costs but said the alternative was for the company to raise funds from the shareholders (who are the tenants) under Article 17 of the Articles of Association. That would lead to an overall increase in costs to achieve the same result.

40. Determination: The lease does not provide for the recovery of the management company's directors' liability insurance through the service charge. These charges are therefore to be removed from the service charge accounts. The Tribunal

recognises that such charges (and any other costs disallowed by the Tribunal) may be recoverable by other means but that is not a matter for the Tribunal to take into consideration.

Garden maintenance

41. This was charged at £1395.00 in 2009-10 and £1368.00 in 2010-11. The Respondent's statement stated that "No gardening is done on the western side of the property – i.e. the Respondent's outlook – and therefore all monies spent on gardening should be deleted". There was also specific objection to paying Green Thumb for lawn treatment. At the hearing Mr G P Jones said that the outlook of Flat 3 had been ignored for a decade. There had been a grassed area outside the flat, but this had been changed to gravel. Flat 3 should not have to pay for that. The gardeners had not done a good job. He referred to green moss on the driveway leading to the carports, and said the carport gutters had not been cleaned. He "was not sure if we are being asked to pay for a second rate job, or a first rate job not being done properly".

42. Mrs Stewart said the grounds were all communal. The gardening contractor had been appointed before Stride & Co took over the management, but the costs were well within what she would expect to see for this type of property. The installation of the gravel pre-dated her involvement. The pots on the gravel outside Flat 3, intended to provide a screen for Flat 3's benefit, were watered by other residents.

43. Determination: The garden areas appeared generally well-tended, and the Respondent is not entitled to dictate the type or method of landscaping or lawn maintenance. There was no evidence that the charges were unreasonable and the costs are within the normal range that the Tribunal would expect to see for this type and size of garden area. They are therefore upheld.

Repairs and Maintenance

44. The total cost of repairs and maintenance in 2009-10 was £6480.00, of which £5628.00 was the cost of re-roofing the bungalow and had been met from the reserve fund. Mr GP Jones said that there was no obligation to contribute to a reserve fund and therefore the figure should be nil. In his written statement he queried why the contract had not been awarded to the cheapest contractor, and also said that renewal of the roof was unnecessary. Mr Pilcher owned the bungalow and was also a director of the Applicant at the time, so there may have been a conflict of interest.

45. Mrs Stewart provided documents showing that a building surveyor's report which noted that the roof was showing signs of ageing and was possibly already beyond its normal life expectancy. While patch repairs would be possible they were not recommended. The section 20 procedure had then been followed. Three firms had submitted estimates, ranging from £2980.00 to over £14000.00. The second section 20 notice providing details of the estimates to the tenants had recommended the middle estimate at £5628.00 as the firm was known to the then managing agents to work to a high standard.

46. Determination: Any issue about Mr Pilcher's involvement in the decision to re-roof is not a matter for the Tribunal. As to whether the roof should have been simply repaired rather than renewed, the lease provides renewal as well as repair. So long as the work is reasonable, a landlord required to carry out works may choose the method of repair and a tenant cannot insist on cheaper or more limited remedial works or a minimum standard of repair: *Plough Investments Ltd v Manchester City Council* [1989] 1 EGLR 244 (Ch. Div). Given the surveyor's reservations about patch repairs to an ageing roof, and the lack of any alternative expert evidence put forward by the Respondent, the Tribunal finds no evidence that the scope of the work or the cost was unreasonably incurred and the charges are upheld.

47. In 2010-11 the repairs and maintenance figure was shown at £1341.00 in the accounts but Mrs Stewart accepted that a charge of £348.00 (relating to another property) had been included in error. Mr G P Jones suggested this error cast doubt on Stride & Co's general competence. He queried a payment of £524.00 paid to Stephen Bromley. He also challenged a cost of £146.87 inc. VAT for an asbestos re-inspection and report and a cost of £110.00 paid to a maintenance man for applying coating and paint to the asbestos and fixing warning stickers. In his statement he suggested it would be cheaper to remove the asbestos altogether and accused the Applicant and Stride & Co of failing to disclose the report. In his cross-examination of Mr Lane, Mr Jones stated that he had found a report "by my own endeavours" and that in 2008 it recommended removal from the ground floor. However he did not refer the Tribunal to a copy of this report.

48. Mrs Stewart said Mr Bromley was the surveyor the surveyor who had inspected the bungalow roof, and overseen the repairs the previous year. He had simply been late in submitting his invoice, which is why it was charged in 2010-11. She said there is a small amount of asbestolux in some electrical meter cupboards and that she had emailed a copy of the report to Mr G P Jones. Mr Lane said he relied on the advice of the managing agents regarding what was required in connection with the asbestos.

49. Determination: The charge of £348.00 should be removed from the accounts for this year. Mr Bromley's invoice was satisfactorily explained and will be allowed. As to the asbestos-related costs, the Applicant/managing agents have a responsibility to monitor asbestos products at the property. There was no evidence before the Tribunal establishing that the asbestos should have been removed at an earlier date, and the costs incurred in regard to the inspection and subsequent precautions are modest. There is no evidence that these costs were unreasonably incurred and they are allowed.

Accountancy fees

50. In 2009-10 there is a charge of £757.00 for accountancy fees and a £294.00 additional charge. In 2010-11 there is a charge of £756.00 for accountancy fees. The Respondent challenged the £294.00 additional charge. The supporting invoice refers to both services in connection with the accountancy and taxation affairs of the Applicant and additional time spent in connection with correspondence received from the Respondent but does not apportion the charge. The correspondence is set

out at pages 58-62 of the Respondent's bundle. Mr G P Jones said the accountants had taken the party line and refused to do anything and the Respondent should not have to pay their fee. Mr Jones also said the routine fees were "pretty opportunistic". He queried whether any accountants were needed at all, and asked if Stride & Co could not prepare the accounts.

51. Mrs Stewart said the routine charges were for preparation of the service charge accounts and company accounts based on information provided by the managing agents. The work on the company accounts was about £100.00 of the annual cost. There had been an additional charge when Mr Jones approached the accountants direct with queries. Paragraph 8 of Schedule IV of the lease permitted recovery of accountancy fees via the service charge. She said that the managing agents could not prepare the accounts themselves and this would not be fulfilling the requirement of an independent check.

52. Determination: Dealing first with the additional charge of £294.00 the supporting invoice refers only to dealing with the accountancy and tax affairs of the Applicant and to dealing with correspondence with Mr Jones. The lease provides only for payment of an "audit fee" in connection with the preparation of the service charge accounts. There is no provision in the lease for other accountancy charges to be collected through the service charge. Therefore this invoice is disallowed.

53. The other invoices are supported by a brief narrative of the work carried out, which cover preparing the company's accounts, preparing the service charge accounts, and dealing with other (unspecified) correspondence and meetings. The Tribunal cannot accept Mrs Stewart's suggestion that only £100.00 of the annual cost was attributable to the company accounts. Looking at the available documentation, most of this consists of those accounts. There was no evidence before the Tribunal suggesting how the charge should be apportioned, and the Tribunal took the view that an adjournment to obtain further evidence on this point would be disproportionate. As the charge relates to work the nature and complexity of which is fairly straightforward, and within part of many people's broad knowledge and experience, the LVT is entitled to apply a robust, common sense approach and make appropriate deductions based on the available evidence such as it is: *Country Trade Limited v Marcus Noakes and Others* [2011] UKUT 407 (LC). Based on the service charge accounts and the company accounts which were in evidence, the Tribunal finds that an appropriate charge for the work on the service charge accounts is £294.00 for 2009-10 and £300.00 for 2010-11 (£250 + VAT in each year). These are the only accountancy fees allowed for those years.

Legal and professional fees

54. In 2009-10 there is a charge of £881.00 inc. VAT for legal and professional fees represented by an invoice from CK Solicitors for work in relation to the Respondent from October 2009 – May 2010 including lengthy correspondence and a meeting in April 2010. Mr GP Jones said that whatever had been incurred on legal expenses was wrong and the amount payable should be zero. (He also referred to a letter from another firm of solicitors advising on the trespass dispute and other legal costs, including Counsel's fees, but these costs were incurred in 2012.)

55. Mrs Stewart said the 2009-10 fees were incurred in respect of a previous dispute with the Respondent.

56. The Respondent's bundle contained documentation relating to proceedings in the Chichester County Court which were disposed of in May 2009 and then copy correspondence between the Respondent and CK Solicitors between December 2009 and April 2010.

57. Mrs Stewart was unable to refer the Tribunal to any provision in the lease which permitted recovery of legal fees as part of the service charge.

58. Determination: As the lease does not permit recovery of legal fees through the service charge, they are disallowed.

Bank charges

59. In 2009-10 bank charges were £82.00 (and bank interest earned was £2.00). In 2010 -11 the bank charges were £16.00 (and interest £1.00). The Respondent contended there should be no bank charges as the service charge account had always been in credit. The figures had to be either wrong or evidence of complete incompetence by the managing agents.

60 Mrs Stewart said that the previous managing agents had run two accounts, one a deposit account with the very small balance earning £2.00 interest, and a current account which attracted charges for services such as cheques written and statements of £82.00. Stride & Co had a different arrangement with Barclays, with one account that earned a small amount of interest but there were no bank charges.

61. Determination: The Tribunal accepts that different banks have different types of accounts on offer and different charging structures. There was no evidence that any of the banking arrangements were uncommercial or otherwise unreasonable and these charges are allowed.

Service Charge Year 2011-12

62. The overall budget for this year is £9341.00 for expenditure plus a reserve collection of £1939.00, making a total of £11330.00. Mr G P Jones had elected to deal with this year on a budget basis only (see paragraph 24 above) but then referred to items of actual expenditure during the year as proof that some of the budget provisions were wrong. He noted that total expenditure (before reserve provision) in the previous year was £8722.00 and suggested £8500.00 would be the correct figure for this year.

63. Mrs Stewart said the budget was prepared in August/September for the forthcoming year. It was discussed with the board of directors of the Applicant and then sent out to the tenants before the start of the year to provide an opportunity for comment. The budgeted costs were based on experience in the previous year.

64. Determination: It follows from the matters already decided that the budgeted sums for Directors' and Officers' insurance, Professional fees (which appeared to be legal costs) and Reserve fund collection must be deleted. The remaining budgeted heads of expenditure are allowed as there was no evidence that any of them was unreasonable. The accountancy fees figure is higher than has been allowed for the previous two years but the accountants will now have to deal with the service charge accounts in accordance with the lease, which may well attract higher charges. The amount allowed for the budget is therefore £8575.00.

Other matters

65. Various other matters were raised in the Respondent's written statements and/or by Mr G P Jones at the hearing. However they are not dealt with here as they either related to earlier service charge years, or actual expenditure in 2011-12, or were related to the issues of trespass and/or corporate mismanagement in respect of which the Tribunal has no jurisdiction.

Section 20C Application

66. In deciding whether to make an order under section 20C a Tribunal must consider what is just and equitable in the circumstances. The circumstances include the conduct of the parties and the outcome of the proceedings. As the Respondent has paid no service charges at all for some time, these proceedings were clearly justified. Although a number of heads of expenditure in the service charge accounts have been disallowed, many of the points raised by the Respondent were either not accepted or were irrelevant to the application. Taking everything in account, including the fact that the Applicant is a lessee-owned entity, the Tribunal determines that it would not be just and equitable for an order to be made under section 20C. It must be emphasised, however, that the Tribunal is not making any finding as to whether the Applicant is in fact entitled to recover the costs of these proceedings under the terms of the lease.

Costs and Fees

67. Although the Respondent persisted in raising certain issues that he had already been informed were outside the scope of the application, which was unreasonable conduct, he raised other points which turned out to have merit and which were allowed by the Tribunal. Taking everything into account, the Tribunal finds it reasonable for each party to bear its own costs and fees.

Chairman: Elizabeth Morrison

E Morrison LLB JD

Dated: 16 January 2013