SOUTHERN LEASEHOLD VALUATION TRIBUNAL

In the matter of section 24 of the Landlord & Tenant Act 1987 and in the matter of Admiral's Court, The Quay, Lymington, Hampshire

Case number: CHI/24UJ/NAM/2003/0003

BETWEEN:

Mr & Mrs P Madge and others	Applicants
and	
Mr W F Stone	Respondent

AND BETWEEN

Mr W F Stone	Applicant
and	
Mr & Mrs P Madge and others	Respondents

Hearing: 9th and 10th November 2004

Appearances:

Miss E Haggerty of Counsel and Mr C L Beamish FRICS MBA for the residential lessees

Mr Philip Glen of Counsel for the lessor

Decision

Date of Issue: 4 January 2005

Tribunal:

Mr R P Long LL B (Chairman)
Mr A J Mellery-Pratt FRICS
Mr P R Boardman MA LL B

DECISION

1. The tribunal has determined:

   a. that the residential leases at Admiral's Court shall be varied in the manner set out in paragraph 28 below so that each residential flat shall in future pay by way of service charge a one ninth part of forty-two point five per cent of the expenditure there mentioned;

   b. that none of the amounts of expenditure incurred in the period 1990 to June 2004 is of itself unreasonable. There are however numerous items of expenditure within that period that should have been the subject of the notification procedure under section 20 of the Landlord & Tenant Act 1985. In respect of each of those items the landlord is entitled to recover only the statutory maximum of £1000 unless he obtains retrospective waiver from the County Court in respect of each of the expenditures affected. The lessor is entitled to recover only forty-two point five per cent of the amount of the expenditure (subject to any limitation on recovery as aforesaid) in each year in that period from the residential lessees;

   c. that, subject to any representations upon the terms of the proposed Order of the sort mentioned in paragraph 53, Mr Beamish be appointed the manager and receiver of Admiral's Court on the terms set out in the draft Order annexed to these reasons for a period of two years; and

   d. that it appears to the tribunal that the lessor is not entitled under the terms of the residential leases to recover his costs of these proceedings as part of the service charges, but in case it is wrong about that, and to deal with any argument that such costs might theoretically be capable of being added to the service charge, the tribunal would not in any event have been prepared to exercise its discretion in the matter to permit such costs to be regarded as relevant costs to be taken into account for that purpose.

REASONS

Applications

2. There were four applications before the tribunal. In the order in which they are considered in this note they were:

   a. an application by the landlord for the variation of the leases of the flats at Admiral's Court pursuant to sections 35-39 of the 1987 Act;
   b. an application by the lessees at Admiral's Court to determine their liability for service charges for the years from 1990 to the present pursuant to section 27A of the Landlord and Tenant Act 1985 ("the 1985 Act");
   c. an application by the lessees for the appointment of a manager and receiver of Admiral's Court pursuant to sections 21-24 of the Landlord and Tenant Act 1987 ("the 1987 Act"); and

d. an application by the lessees that the landlord's costs of 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 lessees.

Evidence

3. The tribunal heard evidence from Mr Michael Walton FRICS, who had until recently been the manager of Admiral's Court, about the management of the block between 1990 and the present time. He explained in particular how he had been advised that he must apportion service charges fairly after 1990, and gave evidence of his many contacts with the lessees in order to ascertain their requirements. Mr Colin Wetherall BSc FRICS gave evidence in the terms of his report with the papers before the tribunal about possible alternative means of apportioning service charges in the block. He favoured the use of comparative floor area. Mr Beamish gave evidence in accordance with his report with the papers

Factual Background

4. The tribunal first considered the factual background to the matter in order to establish the basis upon which its decisions in respect of the several applications before it were to be made. It did so in the light of the inspection of the block that it had made in 2003 at the earlier hearing of the matter, of the information to be derived from the papers provided to it and of the evidence that had been given to it. Although that background is not materially disputed, it is convenient first to set out the facts of the matter as it found them to be in the light of the evidence presented to it.

5. Admiral's Court is a mixed development, partly of flats and partly of commercial premises, that stands opposite the quay in Lymington. It was built around 1970 and is constructed of brick over a steel and concrete frame. There are three shops on the ground floor as well as the communal garage. A restaurant on the first and second floors is located towards the centre of the building. It forms a complete division between the two sets of flats. Five of those flats are on the left as one looks at the building from the front. They have a separate entrance and are exclusively served by a lift as well as having their own staircase and light well. The remaining four flats are on the right of the building and are served by their own staircase and light well. Part of one of these flats is on two floors, its upper floor (the fourth in the building) being in the form of a penthouse.

6. Although the divisions between the shops have shifted occasionally so that the shop units have not been of a consistent size since 1971, there has been no transfer of any part of the property from commercial to residential, or from residential to commercial, use. The only variation to the respective parts of the building used for either purpose has been that a small area of the ground floor, previously used for neither purpose, was taken into one of the shop units some years ago.

7. The leases of the flats were all granted around the year 1972. The copy provided was that of the lease of flat 1 that belongs to Mr & Mrs Madge. The tribunal understands that all of the leases are in similar form (except as to the provisions for the use of the lift in the case of those flats that are not served by it). The lease is dated 31st July 1972, and was made between McCarthy & Stone Ltd of the one part and Mr & Mrs R T North of the other part. It demised flat one and one garage space to Mr & Mrs North for a term of ninety nine years from 31st August 1971 at an annual rent of £50 during the first ten years of the term, and has provision for rent increases of not more than ten per cent of the preceding amount for each subsequent period of ten years of the term.

8. The provisions relating to service charge are governed by paragraph 3. Paragraph 3(2) states that the tenant is to pay the lessor a fair and proper proportion of the expenses and outgoings incurred by the lessor in the repair maintenance renewal and management of the Building (defined in the lease as Admiral's Court) and the provision of services therein and the other heads of expenditure (except as provided in it) incurred by the lessor in the performance of his covenants, including the fees of his managing agents. Paragraph 3(3) specifically excludes from those expenses and outgoings the cost of repair renewal and maintenance of the fronts of the shops and the fittings fixtures and appurtenances of the interiors of the other premises comprised in the building.

9. Paragraph 3 then sets out provisions for a certificate of the lessor's expenditure and outgoings for each year from which the service charge for the individual flats is to be calculated. Paragraph 3(2)(f), which was extensively discussed at the hearing, provides:

> "The annual amount of the service charge payable by the tenant as aforesaid shall be calculated by dividing the aggregate of the said expenses and outgoings incurred by the lessor in the year to which the certificate relates by the aggregate of the rateable values (in force at the end of such year) of all the premises in the Building the repair maintenance insurance or servicing whereof is charged in such calculation as aforesaid and then multiplying the resultant amount by the rateable value (in force at the same date) of the flat".

10. The difficulties that the parties have experienced stem largely from this paragraph. It was not suggested that the paragraph caused any difficulties before 1990 either as to its fairness or as to its operation, but in that year domestic rating was abolished for residential properties in favour of Council Tax. The rating system, of course, continues to the present time for commercial property. It is also within our collective knowledge that rateable values are still in use for residential property. They are for, example, used in the calculation of water rates and sewerage charges.

11. Mr Walton's evidence was that he was the manager of the property at the time. He was advised by or on behalf of the landlord that clause 3(2)(f) was no longer workable and that he must, in accordance with clause 3(2) apportion the service charge costs in future on a 'fair and proper' basis. That was what

he had sought to do. No service charge accounts were produced for many years after 1990, although accounts have since been prepared, and were before the tribunal for the purposes of these proceedings. The lessees' contention that they are still waiting to see vouchers in respect of many of the items in those accounts was not challenged, and the lengthy failure to make them available appears to the tribunal at first sight constitute an infringement of section 22 of the 1985 Act.

12. In or about 1995 the landlord granted new leases of the commercial parts of the property. As to the cost of services, those leases, of which copies were made available, provided that the respective lessees would pay a proportion of the costs of maintenance repair rebuilding renewal and reinstatement of the building, and of the decoration of those parts for which no other tenant is responsible, including the foundations, load bearing elements, roof, common parts, car parking area, pipes and the exterior. The proportion of these costs is to be such sum as the lessor's surveyor shall determine having regard to (inter alia) the nature of the individual demise and the services it uses. There appears to be no provision for the payment of any contribution towards management fees, nor any arrangement for the payment of estimated sums in advance towards the cost of the expenses mentioned.

Variation of the Leases

13. Counsel for the parties asked to deal with this application first, and their arguments over the service charge aspects then stemmed from the arguments advanced concerning the possible variation.

14. Mr Glenn pointed out that the application fell into two parts, first the resolution of the dispute over construction of clause 3(2)(f) of the residential leases, and secondly the lessor's application for variation of the leases, upon the basis, set out in clause 35(2)(f) of the 1987, Act that the residential leases failed to make satisfactory provision for the computation of the service charge payable under them.

Construction of Clause 3(2)(f)

15. Mr Glenn argued that the provisions in the residential leases relating to the computation of service charges became inoperable after the time in April 1990 when domestic rating ceased and was replaced by Council Tax. There was no longer a rateable value "in force" for the purposes of the clause. Accordingly it was appropriate to fall back on the concept of the 'fair and proper proportion' introduced at the beginning of clause 3(2). Clause 3(2)(f) was merely the mechanism introduced to establish that fair and proper proportion, and because it failed in 1990 it was incumbent upon the lessor thereafter to establish what was a fair and proper proportion and to manage in that way. That was what Mr Walton had done.

16. Miss Haggerty argued that clause 3(2)(f) was not inoperable after April 1990. The reference to rateable values was merely a mechanism for establishing a proportion. That could be done by reference to historic rateable values. The

importance of using rateable values for a particular year was simply to ensure comparison of like with like. The tribunal must ascertain from the lease as a whole what was the intention of the parties (Billson v Tristrem [1999] L&TR 220). It might also ascertain that from the surrounding circumstances and the object of the contract so far as it was agreed or proved, and should adopt an objective approach. It might consider the commercial purpose of the contract, and may be aided by their own experience of contracts similar to that under consideration. She derived these propositions form Lewison's "The Interpretation of Contracts" (paragraphs 2.04 to 2.06).

17. In Miss Haggerty's submission, it followed that the intention of the parties when the contract was made was that the area with the greater rateable value (the commercial element) would pay the greater service charge, and that a proportion calculated on that basis would be fair. They had not chosen some other method of apportionment, as for example floor area. If clauses that based apportionment on rateable value failed in 1990, then one might have expected much authority to have arisen on the point since that date, but little was to be found.

18. The tribunal preferred Miss Haggerty's argument upon this aspect of the matter. It is apparent that when the leases were granted in the early 1970's the parties chose to deal with the question of apportionment by means of reference to rateable value. There was no suggestion made before it that this method created any problem between the time of grant and 1990. The valuers appointed by the parties agreed (paragraph 1.18 on page 192 in the lessor's bundle) that when domestic rating ceased on 31st March 1990 the rateable value figures at that time required the lessees to pay 42.5% of the expenses and outgoings to which clause 3(2) relates.

19. Accordingly, it appeared to the tribunal that when the parties made their respective agreements in the early 1970's that was the procedure by which they elected to determine what was to be regarded as a fair and proper proportion of the expenditure and outgoings referred to in clause 3(2) for the lessees of the residential flats collectively to pay. Until 1990 there was no suggestion that this was inappropriate. For some years after 1990 the lessees were unaware of the way in which their service charges were being apportioned because they were given no accounts. Apparently accounts were produced by a Mr D'Arcy, but for some reason they were not circulated to the lessees. No explanation was offered for this failure. The lessees seem to have assumed that Mr Walton was dealing with the matter appropriately. In 1998 or thereabouts they became uneasy about these matters and thereafter protested when they found that matters had not been conducted as they had expected.

20. The tribunal accepted Miss Haggerty's argument that the arrangements in clause 3(2)(f) did not become inoperable in 1990. All that happened was that the mechanism that had been designed to accommodate changes in the property became petrified, and the 1990 proportion of 42.5% attributable to the residential part of the property became fixed. There has been no material change in the proportions of the properties used for residential and for commercial purposes since that time (if anything the commercial element is

now marginally bigger) and there has been no reason accordingly for the proportions that were fair in 1990 to have become unfair since that date.

21. The fact that the lessor has since 1990 granted leases of commercial premises in Admiral's Court upon the assumption that he can apportion the overall service charges on the basis of a subjective assessment of what may be a fair and proper proportion of the relevant expenses and outgoings is not a matter that the tribunal should properly take into account. It would be wrong in its judgement if his unilateral actions relating to the commercial elements were allowed to influence the possible variation of the residential leases in a way that would be detrimental to the residential lessees. It is satisfied that any variation of the sort that the lessor proposes in his application would be detrimental to them. Indeed, the lessor's proposed draft in its judgement merely represents a list of what he would now like to achieve to regularise his own position in the light of the events that have, largely as a result of his own choices, happened since 1990.

22. The tribunal considered the fact that the application is made under the ground contained in section 35(2)(f) of the 1987 Act, that the leases fail to make satisfactory provision for the computation of a service charge now payable under the lease. It was argued before it that the effect of section 35(4) of the 1987 Act is that a lease can only fail to make satisfactory provision for such computation if the aggregate of the amounts that would be payable by reference to the proportions of expenditure incurred by the lessor to be repaid by the lessees would be either greater or lesser than 100% of the expenditure.

23. Mr Glenn says that would probably be so in this case because the lessor may not be able to recover all the balance of the expenditure from the commercial lessees. It is a peculiarity of this case that, if that is so, then it arises only by virtue of a unilateral act of the lessor, namely the subsequent grant of the commercial leases with service charge provisions that differ from those in the residential leases.

24. In any event, it is clear that the tribunal also has jurisdiction to order variation of the leases under section 35(2)(e) of the Act upon the ground that the disputes that have arisen make it plain that the leases do not make satisfactory provision for the recovery by one party to the lease from another of expenditure 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.

25. The tribunal considers that it would be preferable for a fixed proportion to be established at this juncture that reflects the original intention of the parties. There is no reason to suppose that the proportion of 42.5% of the expenditure does not remain the appropriate sum for the residential lessees to pay in the light of their original bargain. Such a course loses the flexibility that the original scheme was intended to create, but if at a future date circumstances arise that would justify an alteration in that proportion there is nothing to prevent the parties coming back to the tribunal then to seek to alter it. It follows that the tribunal does not consider that it would be appropriate to vary the lease in the way that the lessor asks.

26. Similarly the tribunal takes the view that the lessor is not prejudiced if the lease is varied in this way. Such a variation merely gives specific form to the position that has, in its judgment, obtained since 1990. Thus neither the limitation upon the making of such an order contained in section 38(6) of the 1987 Act nor the question of compensation contained in section 38(10) of the same Act arise.

27. The tribunal has accordingly determined that it would be appropriate to order the amendment of the residential leases in such fashion as would require the residential lessees collectively to pay 42.5% of the expenses and outgoings addressed in clause 3(2)(f) of the residential leases. Although the table of rateable values supplied to us by Mr Beamish (pages 10 to 12 in his bundle) suggests some variation in the proportion of that sum that each flat might pay, the lessees have asked that each flat be required to pay 1/9 of that amount and, the tribunal is content to accede to that request.

28. Accordingly the tribunal orders, pursuant to section 38(8) of the 1987 Act, that the residential leases shall each be varied by replacing the words

"calculated by dividing the aggregate of the said expenses and outgoings incurred by the lessor in the year to which the certificate relates by the aggregate of the rateable values (in force at the end of such year) of all the premises in the Building the repair maintenance insurance or servicing whereof is whereof is charged in such calculation as aforesaid and then multiplying the resultant amount by the rateable value (in force at the same date) of the flat"

that appear in clause 3(2)(f) with the words

"an amount equal to a one ninth part of 42.5% of the said expenses and outgoings incurred by the lessor in the year to which the certificate relates"

Liability for service charges

29. The application required the tribunal to determine liability for service charges from 1990 to the present time. It first enquired whether it was submitted by either party that there were limitations issues that might circumscribe the scope of its jurisdiction, and was informed by Counsel that both parties wished it to proceed to determine the service charge liability for all of the years in question without reference to the arguments that might be raised as to the applicable limitation period, or indeed as to whether or not limitation period may apply at all.

30. The tribunal has done as the parties requested, and heard no argument upon the point. It must however make plain as a result that its determination in this respect takes no account of that possible issue. It adds only, although the point is not necessary to this decision and was not in any case fully argued, that it was not convinced that the decision in Re 3, 12, 23 and 29 St Andrews Square

(LON/00AW/LSL/2003/0027) that was mentioned by Counsel, attractive as it is, represents a correct analysis of the limitations position.

31. The lessees had paid service charges until 1998. Since that date negotiations have been in course about the level of service charges and about possible variations to the lease. Some payments have been made since that time, but the lessees have taken the view that because they contest the basis upon which they are being charged it has been inappropriate to pay all that has been asked of them. The two primary issues for or determination were presented to the tribunal as, first, the proper interpretation of paragraph 3(2)(f) of the residential leases, and secondly the extent to which any expenditure by the landlord of a level that invoked the notice procedures in section 20 of the 1985 Act was irrecoverable beyond the statutory maximum for lack of those procedures having been followed. The tribunal sought, and obtained, confirmation that it was not suggested that any of the costs that had actually been incurred were themselves unreasonable in terms either of extent or amount.

32. The tribunal concluded, for the reasons set out in connection with the variation application referred to above (see in particular paragraph 20), that the service charge provisions of the lease had not become inoperable after the end of domestic rating in 1990, but that the provisions for apportionment had simply, as Miss Haggerty argued, become petrified. Mr Glenn quite properly abandoned his original assertion that the tribunal could now dispense with the requirements of section 20 of the 1985 Act as they apply to the various expenditures before the tribunal. That is because those expenditures were incurred before the operative date from which the tribunal acquired the jurisdiction so to do under the Commonhold & Leasehold Reform Act 2002 (Commencement No. 2 and Savings) (England) Order 2003 (No. 1986 of 2003), and so the discretion to dispense in those cases still rests with the County Court.

33. It follows from the conclusions that the tribunal reached over the effect of the lease following the end of domestic rating that it is satisfied that the proportion of 42.5% of the costs and expenditure mentioned in paragraph 3(2)(f) of the lease is all that is recoverable by the lessor for the period from 1990 to June 2004 (which is the last date for which figures are available and the date that was agreed at the hearing as that to which the tribunal should make this decision). The actual amounts of expenditure over the whole period have not been challenged, and for the avoidance of any doubt we record that none of them of itself appears unreasonable.

34. Where the section 20 procedure has not been followed, the 1985 Act clearly states that no more than a fixed maximum amount is recoverable by way of service charge from the lessees collectively unless the County Court subsequently grants a dispensation from the requirements of that Act. In this case that amount is £1000. The evidence before us was that in many of those cases Mr Walton consulted with the residential lessees, and in some cases took instructions from them as to the steps that they wished to be taken. Equally, it is not clear from the information before what part of the sums were

contributed by the residential lessees, what works they may have paid for entirely and what payments related to the residential or to the commercial parts of the building.

35. The tribunal concluded from all of this that it would be appropriate for the residential lessees together to bear 42.5% of the payable expenditure from 1990 to June 2004 in the proportions that the 1990 rateable values of their flats bear to one another. That is because the variation referred to above, in which those proportions are reduced by agreement between the lessees to one ninth each, cannot take effect retrospectively. If the residential lessees choose to agree to share the retrospective costs on that basis there is nothing, of course, to stop them making an informal agreement to that effect if all of them are willing so to do, although such an agreement would not bind the lessor (unless he were a party to it) in the event that any lessee then did not pay any sums due from him or her.

36. It would be quite unfair in the tribunal's judgment to visit some higher proportion on the residential lessees than that for which they originally contracted just because the landlord has unilaterally created a situation by means of the new commercial leases granted in 1995 that may result in him being able to recover less than 100% of his total expenditure on all of the block. There may within the collective knowledge and experience of the members of the tribunal be perfectly good commercial reasons why a landlord granting such leases may be content to accept such a situation. An example is the ability on such occasions to achieve a higher 'headline' rent.

37. It follows that 57.5% of expenditure is either payable by the commercial lessees, or to the extent that it is irrecoverable from them is payable by the landlord. That is how the block was set up initially, there was as previously mentioned no problem about such an arrangement until 1990 as far as the evidence given shows, and there is no apparent reason why that situation should not continue until and unless another event shows it to be unfair for some novel reason.

38. There were a number of specific items that were argued before the tribunal upon which it is appropriate to state individual conclusions. These are set out in paragraphs 39 to 46 below.

39. In the matter of the removal of asbestos cladding to main beams carried out in 2001 at a cost of £2506-67 (page 223 in the Respondent's bundle) the tribunal concluded that this was properly to be regarded as work to the structure of the building. The removal was occasioned by a leak that affected the cladding. Such cladding is used in order to protect the structural steel in the case of fire. Its removal (without replacement) would constitute a breach of building regulations and so if it is removed it must be replaced to protect the integrity of the building. Because the removal was occasioned by a leak the replacement might have been covered by insurance. In such a case the cost would not have fallen upon the lessees generally, but no evidence was adduced to show that such insurance cover had been effected. Unless an insurance claim could have been made, therefore, the cost falls to be paid as to

42.5% by the residential lessees subject to any limitation on recovery imposed by section 20 of the 1985 Act.

40. A licence fee has been paid each year to the owners of the property at the rear of Admiral's Court, access over whose land was required to enable work to be carried out to the back of the building. The amounts have been fairly small, and range between £250 in earlier years to £80 and £173 in more recent years. The lessees argued that they should not be required to contribute to this payment, as the expenditure was not recoverable under the terms of the lease. The tribunal accepted Mr Glenn's argument that the expenditure was a necessary ancillary cost to the carrying out of the work, which could not be done without the access granted. As with the other elements of cost, it was not suggested that the amount paid was unreasonable. Accordingly it is appropriate for the residential lessees to contribute 42.5% of the total of that cost.

41. The lessees had argued that a number of items for bank charges totalling £1344-44 and a charge of £130-00 for negotiating an insurance claim were not recoverable because they were not allowed for in the lease. Again the tribunal accepted Mr Glenn's argument that these were, in the context of the management of Admiral's Court, all costs that were necessarily a part of the expenses and outgoings necessarily incurred in the running of the building in the terms set out in clause 3(2)(f) of the lease. Accordingly the lessees should pay 42.5% of these amounts. The same reasoning applied to charge for £ 83-87 for secretarial services appearing in the 2003 accounts. One might have expected such charges ordinarily to be subsumed in the overall management fee and their sole appearance on this occasion suggests that they were an item over and above the usual requirement.

42. The tribunal were however unable to accept that the sums of £2001-38 for 'accounting adjustments' appearing in the 20 accounts were recoverable. No explanation was offered for these adjustments and there was nothing to show that they arose from expenditure for which the residential lessees should be responsible, or even why they arose.

43. The accounts for each year show substantial sums for management fees. The accounts indicated that the charges were for management of the residential part of the property only. In 1993 the management fee for the flats was £2203, that is to say a gross sum of approximately £208 plus VAT per flat. In 1999 the charge was £2500, and after that it seems to have settled at £2350 in each succeeding year.

44. This was poor management. The tribunal accepts that Mr Walton did his best to be fair within the instructions he told us that he had received, and he achieved reasonable costs for the work that was done at the property. However, the management was carried out with little apparent regard for the statutory requirements relating to it. No section 20 notices were given where they were required (although there was often consultation). Service charge demands seem to have been made over many years with no supporting accounts.

45. The management was, on Mr Walton's own account of it, reactive rather than proactive. It follows from all of this that the management fell short of the requirements in the RICS code for management of properties subject to service charges, authorised in accordance with section 87 of the Leasehold Reform, Housing and Urban Development Act 1993. On the other hand, it is apparent from the accounts that have now been produced that work was carried out that lay outside that covered by the usual standard management fee.

46. Within the tribunal's collective knowledge and experience a reasonable management fee in 1993 may have been of the order of £80-90 plus VAT per flat. By 2003 that figure may have risen in the Lymington area to £150 plus VAT. Doing the best it may with all of that the tribunal has determined that a reasonable management fee over the period with which we have been concerned, taking into account both the deficiencies of management and the additional work that was done would be £120 per flat plus VAT in each year. That amounts to a total fee of £1080 plus VAT for each of those years. It appears that the residential lessees are responsible for 42.5% of that sum plus 42.5% of the fee for managing the commercial premises. We do not know the amount of that latter sum.

The Application to Appoint a Manager

47. The lessor consents to the appointment of a receiver and manager of the property pursuant to sections 21-24 of the 1987 Act. Consequently there is no need to enter upon a detailed examination of the evidence that might support one of the grounds set out in section 24(2) of that Act. The tribunal has jurisdiction to make an appointment where other circumstances render it just and convenient so to do under section 24(2)(b), and is content that the surrounding circumstances of the present matter, coupled with the landlord's consent, satisfy that ground. The only issues for determination therefore are the identity of the manager and the terms of the Order for appointment.

48. As to the appointment of a manager and receiver, there was no dispute that the Mr Beamish might be appointed. Whilst the tribunal had reservations about the level of fees that he originally proposed, and expressed them in its interim decision, Mr Beamish's proposed fees have now been modified to a point where the tribunal considered them reasonable. It has no other reservations about his appointment at the level proposed, and has reflected that in the draft order attached.

49. An unusual factor in this case is that having resolved the other matters in dispute there should then be no 'problem' of the sort that managers and receivers are usually appointed to resolve. The position here is that Mr Walton has withdrawn from the management and there is no one in his place. However, the disputes between the parties have generated some heat and an independent manager and receiver will be able to help to restore normality to a building that has been gripped by this dispute for the last six years.

50. That being so, the tribunal consider that an appointment for a period of two years is appropriate. At the end of that time the parties may feel content to proceed without a further appointment. If there is still a problem of any sort, however, it is open to them or any of them to come back to the tribunal to request an extension whether on the present or on some other terms.

51. The lessees presented a very detailed form of order of appointment of a manager that they wished the tribunal to make. It is no doubt intended to provide for every eventuality, but there is in the tribunal's experience a risk that such detailed lists can of themselves cause problems when, as can quite readily happen, it proves that a power that is needed is either omitted or insufficiently granted. In such cases it is not ordinarily practical to infer that the order intended the additional power that may be required. Thus the draft order that is attached adopts the broad approach ordinarily used by tribunals in this Panel for that reason.

52. This case however requires a major departure from that usual form in order to deal with the commercial property. We have concluded that it is not appropriate to leave Mr Beamish simply to ask the landlord for the balance of service charge over and above what he collects from the residential flats. In our judgement the appropriate course is that Mr Beamish as manager of the building as a whole should invoice each commercial lessee for his or her appropriate share of the service charge in the landlord's name, although the amount of the charge should be specified as being payable through Mr Beamish. At the same time he should invoice the landlord for the total of those charges, but the landlord will only be required to pay any shortfall between the amount charged to the commercial lessees by Mr Beamish and the amount he is able to recover from them.

53. The order is in draft as attached to this notice. We are minded that it should come into force four weeks after it is finally settled. We are not prepared to entertain representations as to why we should adopt some other form of order because we have decided that point, but we are prepared to entertain representations upon any matters of detail that either party considers the order should encompass. Those representations should be sent to the tribunal in writing within 21 days of the issue of this decision, and a party who submits representations should both copy them to the other party and confirm to the tribunal in writing that this has been done. The tribunal will not consider any further representations beyond those mentioned above unless it specifically requests them.

54. The representations may include representations from either party upon the amount of the annual fee of £1000 expressed in the draft Order to be payable to the manager for the management of the commercial parts of Admiral's Court, upon which matter no detailed representations were made at the hearing.

55. For the avoidance of doubt the date by which application for leave to appeal this decision as a whole, or any part of it, must be made is extended to such

date as may fall twenty-one days after the date of the issue of the tribunal's completed order for the appointment of Mr Beamish.

The Section 20(C) Application

56. Finally, the lessees apply for an Order under section 20(C) of the 1985 Act that the landlord's costs of dealing with these applications should not be regarded as relevant costs to be taken into account in determining the amount of any service charges payable by them.

57. There is first a question whether or not such charges could, within the definition in clause 3(2) of the residential leases, be recovered as service charge. There are no specific words permitting the recovery of legal and other costs, and the tribunal accordingly concludes that clause 3(2) is not wide enough in its wording to enable such a recovery.

58. However, in case it is wrong about that, and to deal with any argument that such costs might theoretically be capable of being added to the service charge, the tribunal would not in any event have been prepared to exercise its discretion in the matter to allow the lessor to do so.

59. The original difficulties came about, in its judgement, because the landlord acted arbitrarily first in terms of the way in which he decided to have the property managed after 1990, and secondly in the manner of the grant of the commercial leases. He granted them without having taken into account the possible effect of the terms he offered either on the residential lessees or alternatively upon the amount of the service charges that he might have to meet out of the commercial rents. He has still not produced the vouchers that he has been required to produce under section 21 of the 1985 Act. As a result, both parties have had to go to very considerable expense to resolve the matter. It would not, in the tribunal's view, be just to permit him to recover his costs of this matter in the light of those facts.

Robert Long
Chairman
31st December 2004

DRAFT/

SOUTHERN LEASEHOLD VALUATION TRIBUNAL

Case number: - CHI/24UJ/NAM/2003/0003

Re: Admiral's Court Lymington ("the Property")

Between

The lessees at Admiral's Court Applicants

and

Mr W G Stone Respondent

Order for the Appointment a Manager and Receiver of the Property

1. That Christopher Beamish FRICS of 60 Leigh Road Eastleigh Hampshire ("the Manager") be appointed Manager and Receiver of the property with effect from 2005 pursuant to the provisions of section 24 of the Landlord & Tenant Act 1987.

2. Any reference in this Order to the respondent is a reference to the respondent or other the freeholder(s) of Admiral's Court from time to time

3. That the Manager shall manage the property in accordance with:

a. the respective obligations of the landlord and the lessees under the various leases by which the flats and the commercial premises at the property are demised and in particular, but without prejudice to the generality of the foregoing, with regard to the repair decoration provision of services to and insurance of the property and

b. (so far as the same are relevant) in accordance with the duties of a manager set out in the Service Charge Residential Management Code ("the Code") published by the Royal Institution of Chartered Surveyors and approved by the Secretary of State pursuant to section 87 of the Leasehold Reform Housing and Urban Development Act 1993.

4. That the manager shall receive all sums whether by way of ground rent insurance premiums payment of service charges or otherwise arising under the leases of the residential flats at the property

5. So that he shall have the requisite funds from time to time on order to enable him to manage the property he shall collect the service charges and insurance premiums in the manner set out in this paragraph to the intent that it is for the respondent to meet any shortfall in the combined recoverable service charges and insurance premiums, namely:

(a) if so requested by the respondent the manager shall collect and pay to the respondent the rack rents arising from the commercial premises at

Admiral's Court (but for the purposes of this sub paragraph the sums to be paid over by the manager shall not include the sums (if any) payable as rent for insurance premiums or as payment of service charges of any sort payable under the said leases); and

(b) invoice the respondent for 57.5% of the service charge expenditure payable in respect of the property; and

(c) simultaneously invoice the lessees of the commercial premises at the property in the name of and as agent for the respondent for their respective due shares of all the service charge expenditure payable in respect of their respective properties. The invoices sent to the commercial lessees shall require payment to be made to the manager as the respondent's agent. The manager shall set any sums received from the commercial lessees in respect of the invoices sent to them in accordance with this sub-paragraph against the amounts due to him by the respondent under the invoices raised in accordance with the preceding sub-paragraph against the respondent, and shall be entitled to recover from him any balance of the amount of the invoice he has sent to the respondent that is not actually recovered from the commercial lessees or otherwise held by the manager on the respondent's behalf within a period of three months after the date of the manager's invoice to the respondent.

6. That the manager shall also account forthwith to the respondent for the payments of ground rent received by him in respect of the residential flats and shall apply the remaining amounts received by him (subject as mentioned in this paragraph and in paragraph 5 and other than those representing his fees hereby specified) in the performance of the covenants of the landlord's covenants contained in the said leases

7. That the manager shall make arrangements with the present insurers of the building to make any payments under the insurance policy presently effected by the respondent to him

8. That the manager shall be entitled to the following remuneration (which for the avoidance of doubt shall be recoverable as part of the said service charges in accordance with Clause 3(2) of the said leases) namely:

a. a basic annual fee of £150-00 per flat (that is to say a total annual fee of £1350-00) for performing the duties set out in paragraph 2.5 of the Code;

b. a basic annual fee of £150 per unit (that is to say a total annual fee of £600-00) for managing the commercial part of Admiral's Court; and

c. such amount as may be reasonable (as to which the parties have leave to apply to the tribunal to determine what is reasonable in the case of any dispute) for performing duties additional to those set out in paragraph 2.5 of the Code and not otherwise provided for in this Order

d. in the case of works of a net cost of greater than £1000-00 the manager shall further be remunerated at the rate of 10% of the net cost of the said work for preparing any schedule of works, supervising the works and giving any necessary notices

e. the respective fees mentioned in paragraphs (a) and (b) above may each be increased during the second year of the appointment hereby made by such percentage of the net fee in question as does not exceeding the percentage increase in the national earnings index, but there shall be no further fee increase of any kind without the express permission of the tribunal.

9. Value Added Tax shall be payable where appropriate in addition to the remuneration mentioned in the preceding paragraph.

10. This Order shall remain in force until [2007 (two years after date of appointment)]

Dated 2005

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Chairman