SOUTHERN LEASEHOLD VALUATION TRIBUNAL

Case No. CHI/23UB/LSI/2004/0004

Re: 17 Mulberry Court Elm Farm Estate Cheltenham
("The Premises")

Between: Bromford Housing Group

("the Applicants")

and

Miss A Berry

("the Respondents")

Members of the Tribunal: Professor D N Clarke (Chairman)
Mr J Reichel BSc FRICS
Mrs J Playfair

Hearing: 29th July 2004

DECISION OF THE LEASEHOLD VALUATION TRIBUNAL

Introduction

1. This is an application by the applicant, Bromford Housing Group which is a Housing Association. Bromford Housing Group ("Bromford") are the landlords of 85 tenanted properties on the Elm Farm Estate. There are a total of 142 homes on the Estate all of which were originally built for renting but by the process of the exercise of the right to buy 57 of the 142 homes are now home owners rather than tenants. Of these 57, 47 are freeholders and 10 are long leaseholders of flats.

2. The defendant is a representative defendant a Miss Berry of the one of the flats on the estate, 17 Mulberry Court. Unfortunately, Miss Berry, having been selected by the Elm Farm Residents Action Group ("EFRAG") to be the representative defendant for the action subsequently had to go abroad and was not able to appear at the hearing. In her place, were representatives of EFRAG namely Mr Alan Dougal a home owner, Mr Pablo Marchant also a home owner and resident on the estates since 1977 and Mr Rick Jarvis a home owner since 1978. They were representing Miss Berry and were assisted by one of the tenants on the estate who was the ward councillor for the area Miss Linda Bishop.

3. Bromford Housing Group were represented at the hearing by Isabel Graham, the Home Ownership Manager and Helen Williams also a Home Ownership Manager but their main spokesman was Mr Roger Brayshaw, acting on their behalf.

4. The application is under S 27A of the Landlord and Tenant Act 1925 for a determination of the liability to pay service charges and the reasonableness of the

service charges assessed. The years concerned are the financial years April 2002 to March 2003 which have been finalised in accounts, April 2003 to March 2004 which have not yet been finalised with accounts and the current year April 2004 to March 2005. For the latter two years therefore the Tribunal was dealing with the budget for those years rather than the final service charge assessment.

5. The Tribunal was hindered by poor preparation by both parties to the matter. Bromford helpfully tried to simplify the documentation by producing for all parties a revised bundle of documents properly bound and paginated but unfortunately this was produced very late and was not properly produced so that only every other page was available. This necessitated a delayed start while the missing pages were photocopied. EFRAG, despite requests from the Clerk, did not produce their written summary of case until the last 48 hours before the hearing which made it considerably more difficult for the Tribunal and the applicant to fully comprehend the case that the respondent was making. Nevertheless, all parties wished to proceed and the Tribunal did not consider there was a case for postponing the hearing.

6. The Tribunal attempted to inspect the flat 17 Mulberry Court before the hearing but unfortunately the arrangements for us to visit this flat in the absence of Miss Berry broke down but the Tribunal did inspect the estate as a whole.

7. The case for Bromford will appear from the discussion of the concerns of EFRAG below. EFRAG produced a written statement of the grievances that they had and these will be referred to in this statement of reasons. Suffice to say the background to the dispute is a change of owner of the tenanted and long leasehold properties with a transfer of business from a local housing association in Cheltenham to the Bromford Housing Group. Relationships between Bromford and EFRAG do not appear to have been good for some time and this action was brought by Bromford to test the concerns of EFRAG and to see whether the service charge being levied on the home owners was reasonable.

The nature of the dispute

8. The Tribunal had considerable sympathy with the concerns of EFRAG. It was tolerably clear from the paperwork and from what we heard at the hearing that the early years of this development were marked by close relationship with a local housing association. Services were (it was claimed) of a high quality and we were referred to the fact that for many years a gardener lived on site and took considerable pride in his work. We were also told that notwithstanding the power to raise funds for reserves, no reserve fund payments were demanded.

9. When the association was incorporated into Bromford whose offices were outside of Cheltenham those local advantages were lost. It is clear to us that relationships between Bromford and EFRAG have not been good for some time. It is not appropriate for us to comment on the reasons for this as we did not hear full evidence on these matters.

10. We also have sympathy in the sense that it is clear that the total amount of service charge demanded has increased and as one observer on this, Councillor Bishop, commented, this does make things difficult for persons who have bought into the development on fixed incomes hoping this was genuinely affordable housing.

11. One of the repeated grievances that came before us at the hearing and comes out in the paperwork is the fact that the home owners, freeholders and leaseholders alike, feel they are contributing extra costs to cover expenses caused, as they see it, by activities of tenants on the estate. The owners consider, and say they have some evidence, that some of the problems such as abandoned vehicles, graffiti and so forth, are caused by tenants. Their grievance is that they, as owners, find their payments, which are variable, are affected by the work that has to be done to deal with these problems but the tenants who pay a fixed rent and only contribute to fixed charges have no financial incentive to change their behaviour.

12. We understand the sense of grievance on all these matters but these are not issues that we can address within our jurisdiction. In particular, the main grievance arises from the fact that this is a mixed estate, mixed in the sense of having some freeholders and leaseholders who are owners of their properties, originally under the Right to Buy legislation, and a majority of residents who are tenants, whether secure tenants or assured tenants. Our only comment is that the owners all bought knowing this was a mixed estate whether they bought their property under the Right to Buy legislation or bought into the estate from someone who had secured title by Right to Buy. In such mixed schemes very different legislative regimes operate. The Tribunal considered that many of the grievances arose from the nature of such mixed schemes and are not matters that can be properly addressed by the Tribunal.

13. The Tribunal is confined to a decision in the application that has been made by Bromford, namely to determine the legality and reasonableness of service charge payments for year ending March 2003 and the reasonableness for the budgeted sums for the year ending March 2004 and March 2005. In respect of the year ending March 2004 we were told that the final accounts are not yet ready.

14. From the paperwork supplied by EFRAG it seemed clear to the Tribunal, and this was confirmed at the opening of the hearing, that the complaints within the jurisdiction of the Tribunal were the following claims:

1. The overall level of services charges were unreasonable in relation to costs incurred as a result of mismanagement by Bromford, particularly in relation to gardening, the cost of communal lighting, the decision to have a maintenance contract for door entry maintenance, and the failure to pursue wrongdoers for the costs of work on the estate which resulted in owners having to carry the burden of these incurred costs.
2. The service charges for the three years were unreasonable in relation to reserve fund payments. The primary objection here was that, although the owners were required to make reserve fund contributions, Bromford itself did not place into a reserve fund matching contributions in respect of the flats and houses which were tenanted. A subsidiary concern was that the cost estimates

for reserves were very low and the level of reserve funds currently exceed the cost estimates which have been made.

3. The service charge for the year ending March 2003 was unreasonable in that it included a charge for an audit fee which was levied only upon the homeowners. This audit fee had also been included in the budgetary costs for the two subsequent years.

4. The service charge was unreasonable in the way that the management fee had been charged. EFRAG recognised that the increases had been phased in by being capped at 75% in the year ending 2004 but considered that the calculation model was resulting in unreasonable charges.

We consider each of these matters in turn.

Claim for costs arising from mismanagement

15. The first focus of this claim, in both the paperwork and at the hearing, was in relation to the communal gardening charges in the year ending March 2003. Figures showed that in the first 7-8 months of that financial year the charges were quite low. This was because the monies were being paid to a firm called Dove Valley who had put in an extremely competitive quote which had been accepted by Bromford. However, the standard of work was poor and it was accepted by both parties that in their time Dove Valley did not meet the contractual terms of their contract. As a result, Bromford terminated their retainer some seven months into a 36 month contract. Subsequent gardening was undertaken by another firm, GWC Gardening Services. Charges in the period for the remaining five months of the year escalated from Dove Valley's payments of £435.73 a month to as much as £2,800 in March 2003. The claim was these sums were unreasonable because effectively the leaseholders and freeholder were paying twice, firstly for a contract that had not been fulfilled and secondly to a replacement contractor who had to put right what had been unfulfilled in the earlier part of the year. EFRAG argued that the contract should have been terminated much sooner.

16. The view of the Tribunal was that the service charge was not unreasonable in this respect. They accepted Bromfords' argument that they had done everything they could and should do to monitor the situation. They reported that all such invoices have to be accompanied by a certificate of satisfaction signed by a tenant. They accepted that such certificate could have been signed by a "tame" tenant but argued that they had taken action as soon as they should have done on the complaints that were being received, but the only way to terminate Dove Valley's contract was to monitor their work, serve them with written warnings and that this takes some time and that seven months was a reasonable time for the contract to be terminated. This is accepted by the Tribunal and we do not find that the service charge is unreasonable in this respect.

17. The second part of the claim that costs were unreasonably incurred arises from the charge for communal lighting. The submission put in just before the hearing referred to unreliable communal lighting and to replacement works in March 2003. The Tribunal found it difficult at the hearing to understand the nature of the complaint. EFRAG were unable to point within the service charge accounts to any

major expenditure on the lighting system and it seemed to be accepted that the sums themselves were not excessive. The main substance of the complaint appeared to be that total renewal of the lighting will be necessary and perhaps this should have been done instead of the repairs in 2003.

18. The Tribunal could not find any real evidence that Bromford had mismanaged the estate in this respect. It seemed to the Tribunal quite reasonable to do relatively inexpensive lighting maintenance works in 2003. The Tribunal noted the low level of the reserve funds and no doubt the reserve funds can be discussed between the parties for view to plan for the time when the lighting will need to be replaced. Thus we cannot find that the service charges for any of the three years are unreasonable in this respect.

19. The third point made by EFRAG was that the door entry maintenance charge was a 400% increase over the period was disproportionate to projected costs. Bromford explained that the maintenance charge was considered to be a reasonable way of dealing with an increasing problem. If Bromford reacted to door entry problems as they arose this would mean that they were dependent on being able to find the persons willing to be called out at the relevant time and overall Bromford felt that the maintenance charge would give a better standard of service and would not on the whole, across the whole estate, be excessively expensive. Given the relatively small amount per flat that results from this maintenance contract the Tribunal do not consider that this is an unreasonable element of the service charge.

20. The fourth item of complaint under this head related to the fact that Bromford have a zero tolerance on non-payment from owners on the estate whereas EFRAG felt that there was not the same zeal in pursing tenants who had caused damage. They were also concerned that travel costs had been incurred as a result.

21. Bromford assured the Tribunal that no travel costs were passed on to home owners and were absorbed in the general costs of the Association. The Tribunal did not find that there was anything unreasonable about the service charge arising from this complaint.

22. The final head of complaint is not within our jurisdiction. This relates to EFRAG's suggestion that Bromford should seek local authority adoption of the estate roads, gardens and open areas that are currently privately owned and maintained by Bromford. The Tribunal certainly considers that this not a factor that can be taken into account when considering the reasonableness of the service charge.

Reserve fund payments

23. The complaint by EFRAG about the reserve fund primarily rested upon the fact that the leaseholders and freeholders can be obliged to contribute to a reserve fund, and reserve fund levies were included in 2002/03 and 2003/04, but Bromford does not put monies into a reserve fund in respect of the units that are tenanted. The written submission from EFRAG also referred to the fact that the current levels of reserves at £16,000 exceed the current estimates for future work over the next five years (which

are as small as £10,000) yet elsewhere in their submission they refer to the need for increased reserves for such matters as major lighting replacement in the future. The Tribunal noted that Bromford had agreed a reserve fund holiday in the year ending March 2005.

24. The Tribunal could not find that the way Bromford dealt with the reserve fund payments was unreasonable in any respect. The Lease clearly gives power to request reserve fund contributions from the owners on the estate. The Tribunal considered that for an estate of this size and age they would expect a reserve fund far exceeding the total sum of £16,000. Certainly, Bromford cannot be said to be unreasonable in the level of reserve fund levies requested in the two years ending March 2003 and March 2004. We were informed that Bromford is carrying out whole life cost assessments for the estate to consider whether the reserve is sufficient for future expenditure.

25. With regard the reserve fund in respect of units that are tenanted we heard evidence that Bromford, in common with housing associations generally, maintains a single reserve fund to hold all contributions from all owners across their whole housing stock. The contributions from each owner are clearly allocated in the accounts. This is necessary because the Right to Buy may be exercised at different times and therefore reserve fund contributions will therefore come from different years, and the total from each owner may differ across the same estate.

26. Bromford explained that they did not contribute themselves to this reserve fund but did set aside monies from their income for reserves to contribute as and when necessary to capital expenditure on their properties. They considered that as an Industrial Provident Society, the residents could be assured that these funds would be available when capital expenditure was needed for the estate.

27. The Tribunal did not consider that there was anything unreasonable about the service charge in relation to the reserve fund demands.

The audit fee

28. The third main head of claim that the services charges were unreasonable relates to the audit fee charged in the accounts for the year ending March 2003 and budgeted for in the services charges ending March 2004 and 2005. This audit fee is in full but charged in full only to the owners on the estate. The claim of EFRAG was that Bromford should contribute their share of the audit fee in relation to the tenanted properties. EFRAG pointed out that otherwise the fee level per unit would very much reflect the number of owned properties on any particular estate and were Bromford to acquire more of the owned properties when they come onto the market the proportion borne by the remaining owners would rise. At the hearing, Mr Roger Brayshaw informed the Tribunal that the audit was a statutory requirement in relation only to owners. He conceded that under present law, the statutory audit was only necessary at the written request of one or more of the owners. He claimed that a written request had been made. He produced to the Tribunal two letters, which had not been included in the bundle of documents, which were from a Mr P Marchant. Mr Marchant was

actually appearing with EFRAG before us. Those letters were not an unequivocal request for a statutory audit although they did ask for a set of audited accounts. However, the request was for an audited account of the housing association and it was written because, as Mr Marchant explained to us, at the time in October 2002, the figures in the financial statement the owners had then received were not transparent. The owners were having difficulties in working out what was being charged and reconciling the detail that had been sent.

29. The Tribunal decided that these letters were not a clear request for a statutory audit. They considered Bromford should have clarified what exactly was being requested and made it clear that the costs of a statutory audit would be passed on to the owners. The production of the letters at the last minute did indicate to us that it was only as the hearing approached and the need for a written request was realised that these letters were searched out. Mr Brayshaw candidly admitted to us that Bromford had undertaken the statutory audits as a matter of course and that he had advised them fairly recently that, without a written request, the cost of the audit could not be charged.

30. In these circumstances, we decide that this element of the service charge for the year ending March 2003 is unreasonable. We also heard no evidence to suggest that a written request had been made for the budgeted years ending March 2004 and March 2005. Indeed, Mr Brayshaw conceded that the audit fee would have to be removed from the accounts for those years. For the avoidance of doubt, we also hold that it is unreasonable for the audit fee to be charged for those years on the evidence available to us.

Management fee

31. The final element of complaint of EFRAG was that the management fee charged for the two years ending March 2004 and March 2005 was unreasonable. This matter took up a substantial amount of time at the hearing and in the paperwork. Bromford set out in the bundle of documents the basis for the way the management fee should be charged. Prior to year commencing April 2003 the management fee for the Elm Farm Estate was charged as a percentage of service costs. Bromford argued that this method of charging bore no resemblance to the actual cost of the service provision and their accountants and auditors had pointed out that the costs were not being fully recovered. Bromford also argued that the old way of charging a management fee of 20% of service costs plus £15 per property was an out of date method of calculation and no longer in accordance with the National Housing Federation recommended basis of charge. The current recommendation is that there should be a fixed figure based on the actual cost incurred of providing services including overheads and staff costs rather then to charge a percentage of service costs. The paperwork revealed, and this was confirmed at the hearing, that a range of options had been discussed. Time costing was tested on a pilot scheme over a six-month period but was found to be extremely time consuming and very expensive. A flat fee charge regardless of property type for services provided was considered to be unreasonable. Bromford therefore decided to adopt a management fee structure in accordance with the recommendations of the National Housing Federation, namely to introduce a fixed

management fee. This was explained as being based on careful calculation of apportioned staff and overhead costs with a sliding scale of management fees based on the level of service provided. EFRAG in their response supported the recommendation by the housing corporation for a fixed fee because they felt it would complement their wish to ensure that management fees were competitive. They recognise that the old method of charging did not encourage efficient management. Nevertheless, they rejected the calculation model used on the following grounds:

1. They believe that the calculation model was unrelated to estate scheme costs because the management costs from the model are not directly related to the Elm Farm estate.
2. They considered the primary factor within the calculation model was related to team size rather then identifiable leaseholder numbers.
3. They felt that there were excess overhead costs from the diverse business undertaken by Bromford.

32. The Tribunal concluded that there was insufficient evidence for them to hold that it was unreasonable for the management fee to be charged in this way. The Tribunal accepted that Bromford had been professional in the way it approached the changes to the way the management fee was calculated and noted with approval that the first year of the change was cushioned by a discount in the year ending March 2004. Nevertheless, the Tribunal had concerns. There is only a budget for the years ending March 2004 and 2005 but they do reveal that the management charge when related to the overall costs of the service charge to the owners, amounts to a figure of between 20% and 30% of the overall charge. The Tribunal considers that a test of whether the management fee is reasonable in the end result should be to test the charge as a percentage of the overall charge. This is particularly important in a case like this where the owners do not feel that there is any independent assessment that they can see of the efficiency of the management by the housing association, not withstanding the fact that all associations do have outside reviews.

33. Given, however, the final charge has not been fixed as the accounts are not ready for the year ending March 2004 the Tribunal considers that the present level of charges and the way the charge has been levied is not unreasonable on the evidence we have available to us. It may be necessary to see how the basis of charge for the management fee translates into an actual charge over a number of years.

Costs

34. The day before the hearing, the defendant, through EFRAG, submitted an application for the limitation of service charges under S 20C of the Landlord and Tenant Act 1985 namely that the costs of the proceedings incurred by Bromford before this Leasehold Valuation Tribunal should not be regarded as relevant costs. Bromford informed us that it was not their intention in any event to itemise the costs of the hearing before us and would not charge that to the leaseholders and freeholders at the Elm Farm Estate. In the light of that we make a confirmatory order under S 20C that the costs of the proceedings before this Tribunal are not to be taken into account in determining any service charge payable by the tenant Miss Berry.

Conclusion

35. For the reasons set out above we determine that the audit fee charged for the year ending March 2003 has been unreasonably charged and that the budgetary provision for a similar charge in the subsequent two years is also unreasonable. Apart from that, we find that the service charge is levied for the year ending March 2003 and budgeted for the two subsequent years are not unreasonable.

Dated 16 September 2004

Professor D N Clarke
Tribunal Chair