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

Hearing: 25th July 2003

Appearances:

Mr Madge and Mr R Phillips for the applicants

Mr NP Jutton for the Respondent

Mr C L Beamish FRICS MBA (the proposed manager and receiver)

Interim Statement of Conclusions with Reasons

Date of Issue: 4th August 2003

Tribunal:

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

Application

1. This matter arises following the application made on 15th March 2003 by Mr P Madge and Mr R Phillips for the appointment of a manager of the building known as Admiral's Court at The Quay, Lymington, Hampshire ("the building"). The application is made under sections 21-24 of the Landlord & Tenant Act 1987 (as amended) ("the Act"). Preliminary notice of the proposed application was given pursuant to section 22 of the Act on 30 September 2002, and the Tribunal gave provisional directions on 2nd April 2003. The matter was originally listed for hearing in June 2003, but that date proved inconvenient for one of the parties, so that the matter eventually came before us on 25th July 2003.

2. Unless otherwise stated, references in this note to "paragraphs" are references to the paragraphs of the lease of 31st July 1972 mentioned in paragraph 6 below, and references to pages are to the number of the page in either the papers accompanying the application or in the respondent's reply, as the case may be. In the case of the papers accompanying the application we have referred to the numbers at the foot of each page rather than to those in the top right hand corner.

Inspection

3. We inspected the building in the presence of the applicants and of Mr Jutton of Messrs Scott Bailey, the landlords' solicitors, on 25th June 2003, immediately prior to the hearing. We saw that Admiral's Court is a four-storey building of brick with a reinforced concrete frame constructed at or about the end of the 1960's. It stands opposite the Quay in Lymington. There are no communal gardens of any sort.

4. The division between the commercial and the residential parts of the building is complex. There are three shops on the ground floor together with the communal garage, two separate entrances to flats, and the entrance to the Mandarin Chef restaurant. The restaurant is on the first and second floors and forms a division between the flats but is served by its own entrance and vestibule at ground floor level, and an internal staircase.

5. Five of the flats, all of which are to the left as one looks at the building from the front, are served by the flat entrance that is to the left of the restaurant. These five flats are served by a lift, whereas the remainder are not. The entrance to the right of the restaurant serves the remaining four flats. One of the flats served by the right hand entrance is made up of a penthouse on the roof above the restaurant and of an area on the second floor to the left of the restaurant. The remaining three flats are to the right of the restaurant. We were shown the communal staircases and the garage as well as an example of the light wells within the building that are communally maintained and an access way to part of the building at the rear.

The leases

6. We were provided with a sample of the leases of the flats. That provided was a copy of the lease of flat 1, now occupied by Mr & Mrs Madge. We understand, and have proceeded upon the basis that, the copy shown to us represents the terms of all of the residential leases for all purposes material to the matters before us. 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 for each subsequent period of ten years of the term.

7. 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 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.

8. 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 before us, 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 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".

   It then continues by providing that the cost of maintenance, repair renewal and insurance of the lift shall be borne equally between those five flats served by the lift, and that the cost of cleaning lighting and decorating the communal accesses to the flats shall be borne equally between the nine flats. The cost of insurance of the flats is also shared equally between the nine flats in accordance with the provisions at the end of paragraph 2.

9. Paragraph 3(2)(h) permits the collection of such amounts in advance on account of the service charge as the lessor or its accountants or managing agents specify at their discretion to be a fair and reasonable interim payment.

10. New rack rent leases of the three shops and of the restaurant were granted at various times between 1996 and 2001, and the respondent's solicitors provided copies of them. They are all in similar terms, although not quite identical. The services for which the landlord may recover payments are the maintenance repair rebuilding, renewal and reinstatement of the building and the decoration of those parts of it for which no other tenant is responsible, including the foundations, load bearing elements, roof, common parts, car parking area the pipes, and the exterior. There is provision for advance payment of service charges by means of a "provisional charge" procedure.

11. The significant aspect of the service charge arrangements in respect of the commercial parts of the building for the purpose of these proceedings is that they do not reflect the terms of paragraph 3(2)(f) of the residential leases set out above. It is sufficient for these purposes for us to adopt the description of the service charge arrangements given by the respondent in his reply. The leases do not define the service charge contribution by reference to rateable value or to any other formula, but as being such sum as the lessors' surveyor shall determine having regard, inter alia, to the nature of the individual demise and the services it uses. We noted too that these arrangements appear to make no provision for the recovery of any of the costs of management of the building.

Hearing

12. We held a hearing at Lymington on 25th July 2003. An earlier appointed hearing on 18th June had been adjourned because not all of the parties were able to attend on that day. Mr Madge and Mr Phillips attended the hearing on behalf of the residents. Mrs Madge and Mrs Phillips accompanied them but did not take part in the hearing. Mr Jutton of Messrs Scott Bailey appeared on behalf of Mr Stone, the landlord, and Mr C L Beamish, the proposed manager, also attended. We introduced ourselves and indicated the purpose and likely course of the hearing.

The Issues

13. We established that the parties agreed that a manager might be appointed. They differed however about some of the terms on which this might be done. Further, there were two other issues that the residents wished us to determine. One was whether or not the service charges levied over the last twelve years had been reasonable, and the other was that we should determine the meaning of paragraph 3(2)(f).

14. We pointed out that there was no formal application before us as to the service charges. Even if there were such an application, we understood that all of the service charges had been paid and so (in the absence of an agreement of the sort envisaged in that case) it would not be within our jurisdiction to determine them following the decision of the Court of Appeal in R v London Rent Assessment Panel ex parte Daejan Properties Limited. Since the parties agreed that a manager could be appointed, the tribunal had power to do that within the ground contained in clause 24(2) (b) of the Act namely that other

circumstances existed that made it just and convenient to appoint a manager, those circumstances being the agreement that such a course might be adopted. An enquiry into whether or not the service charges might have been unreasonable to establish the ground in clause 24 (1) (a) of the Act was therefore unnecessary.

15. We explained, and the parties accepted, that jurisdiction to declare the meaning of paragraph 3(2)(f) lay with the County Court and not with us. The parties indicated that they accepted that this was indeed so, and that they understood that nothing we might say would in any way inhibit the County Court's ability to deal with the matter as it may see fit. They said that it would however be helpful to them if we would informally indicate our view of the matter and we agreed that we would, on that basis, try to do so.

16. We have dealt with the issues before us and given our findings concerning them under the headings that appear below. Our further interim conclusions in the light of those considerations are set out at paragraph 38 – 48 below.

The Paragraph 3(2)(f) Point

Representations

17. The residents' position, advanced by Mr Madge, was that paragraph 3(2)(f) required each resident to pay only a service charge (other than in respect of the lift, the common accesses and the insurance of the flats) calculated by reference to the formula using rateable values set out in paragraph 3(2)(f). However, since 1990 the landlord had apportioned service charges as he thought equitable between the flats and the commercial properties. He had characterised the scheme in the leases as being unworkable and inequitable. Mr Phillips said that for example a cost of £1695 for roof repairs in the 1990 accounts (page 35) represented the whole of the cost of roof repairs. Upon further enquiry however, it was not clear that this had necessarily been the case. Mr Phillips said he based his point upon evidence that some later charges had been dealt with in this way. He had not seen the invoice for the cost in question as he became a resident after that time, and it was possible that the landlord had apportioned a part of the total cost of the roof work to the commercial properties. A lack of composite accounts dealing with the building as a whole made it difficult for the residents to know just what had been done.

18. Mr Jutton said that the landlord's reply was primarily set out in the statement sent to us in response to directions, and he referred us to page 5 of that statement. There the landlord says that it is his position that it is not possible to calculate the service charge contributions by the residential lessees by reference to the formula set out in paragraph 3(2)(f). There were no rateable values "in force". Rating with reference to domestic property was abolished with effect from 1st April 1990 by reason of the Local Government Finance Act 1988, which had the effect of repealing (with some savings) the General Rate Act 1967. Rating was followed by Community Charge and then, in 1993, by Council Tax.

19. Paragraph 3(2)(f) thus became incapable of performance. It failed, but the lease was not frustrated because it was not a fundamental term. The effect of all this was that from then on the service charge had to be calculated by reference to a fair and reasonable proportion of the expenses and outgoings incurred by the lessor as envisaged in the introduction to paragraph 3(2). There was in effect a variation of the lease removing paragraph 3(2)(f) or, in the alternative, a waiver by the lessees to the effect that service charges should not be calculated by reference to clause 3(2)(f) because they accepted and paid service charges calculated other than in accordance with that paragraph.

20. The statement goes on to say, on page 6, that the question of how the service charge should be calculated was not a part of the application before the tribunal. That is so, and we have set the matter out here only because the parties (including Mr Jutton on his client's behalf) indicated at the hearing that it would be helpful to them to have our view upon the point, whilst accepting that it is not authoritative.

Our conclusions

21. Our informal view of this point is that it is not impossible for the residential service charges now to be calculated in accordance with paragraph 3(2)(f). Furthermore we doubt whether there has been a variation of the lease whether by operation of law, or by waiver. We say that of course without the benefit of having had the matter argued fully before us, and upon the basis that our view is not binding for the reasons we have given.

22. However, in the hope of affording some assistance to the parties as they requested it seems to us that the rateable values as they stood in 1990 are still "in force" in the sense that they are still perfectly well capable of being established for these purposes, and indeed are still widely used for the calculation of water charges and where such formulae as this are applied for apportionment purposes. On the other hand we accept that where required for statutory purposes they have been specifically preserved by measures made pursuant to section 117(8) of the Local Government Finance Act 1988. The purposes here, however, are simply those of a means of apportionment.

23. Even if we are wrong about that, we doubt whether on a proper construction of the lease the words "in force" are used in quite the sense as that for which the landlord contends. The words used are "in force at the end of such year" and "in force at the same date". They appear in brackets. In our view their natural meaning is to identify the rateable value to be used as that for the relevant year in case there has been a change in rateable values rather than to specify that the apportionment can only be made if the rateable value in question is "in force".

24. If we are right on either of those grounds then there could not have been the sort of automatic variation of the lease for which the landlord seems to contend at the point in his statement before he refers to waiver. Indeed we entertain some doubt whether a variation of the sort he describes, apparently arising by reason of some change in statute that does not of itself require it,

and without more, is something that is likely to arise very often. The lease could have been varied by agreement, by waiver or by order of the Court under section 35 of the Act. In factual terms the information before us is that first and last of these has not happened.

25. The residents have indeed been paying charges based on the landlord's exercise of a discretion since (from what we have been told) 1991. If they had been aware of all the facts, and acquiesced in them, then it may be that such a waiver could be established. The information before us is that the residents did not know what was happening, at least from 1991 to1998, because no accounts were provided for the building as a whole. From 1998, when the circumstances appear from what we were told to have emerged, they have been in correspondence with the landlord to voice their disquiet over these matters, and although they have paid their charges they have made it plain that they have not accepted the manner of their computation. The history of the matter has not been put fully before us, but on the basis of the position that we have described we find it difficult to see that a waiver could properly be said to have occurred in the sense that it has brought about a permanent variation of the lease. The failure, for whatever reason, to provide accounts showing the service charge position for the whole of the building has been instrumental in ensuring that the residential lessees, and perhaps their commercial counterparts as well, have not been fully aware of all of the expenditure incurred in respect of the building and of the way in which it has been apportioned.

26. Even so, it is important that any apportionment based on rateable value should compare like with like. Mr Jutton suggested to us that the circumstances that have occurred with regard to the commercial properties since 1990 may have had the result that that the 1973 rateable values (which were those still in use in 1990) for the flats are no longer appropriate in such calculations now. If so that may indicate that a variation is needed in such a way that it would put the parties permanently back on the footing that they originally contracted to have. The situation has not been helped by the fact that the commercial leases appear to have been granted with little or no regard for the interaction of the service charges reserved by them with those for the residential parts of the building and the obligations that the landlord continued to owe to its residents under their leases.

The appointment of a Manager

Representations

27. The parties had indicated their agreement that a manager should be appointed. The applicants provided a schedule (Appendix 4) with their application setting out the functions that they desired that a manager should carry out. It appears at pages 4 to 9. The respondent in his reply indicated his consent to a number of those functions, but took issue with some others. It was agreed that the best way of dealing with those issues would be to go through each of the matters in issue so that both parties may comment on each as it arose. We report them below in the same way but have not, in the light of the interim conclusions we

have reached, commented upon all of them in this part of these reasons. The numbering referred to in paragraphs 28 to 35 of this note refers to the numbering in the applicants' fourth schedule, which was adopted by the respondent in his response.

28. The first of the points at issue was in item 10, which required the respondent to give reasonable assistance and co-operation to the manager. The respondent replies that this was not properly a function of the manager, although he would of course expect to render reasonable assistance and co-operation. We observed at the hearing that the respondent was a party to the proceedings, and that without expressing a view on the specific point it appeared to us that any order we made might, in general, require a party to take steps to facilitate its performance. The parties accepted that this was not in any case a major matter in the light of the respondent's comments.

29. Item 11 required the lessor to provide funding under the terms of the residential leases as required by the manager. The respondent's reply was that the tribunal could not order him to provide funding, but he gave no authority for the assertion. Mr Beamish had been invited to comment upon the matters concerning the content of the order since he had been involved in the preparation of the appendix setting out these requirements. He referred us to a decision of the London LVT in a case concerning 14-16 Hyde Park Gardens (LVT/VOD/014/001/01) dated 30th October 2001 in which the tribunal indicated at paragraph 17 that it considered that a tribunal could order a landlord to contribute to fill a funding gap in a receiver's funds where the lease might otherwise have required him to do so in the absence of the appointment of a receiver. Mr Beamish also referred to the recent Court of Appeal case of Maunder Taylor v Blaquiere (a case that happens to arise out of the same appointment as that in the London LVT case mentioned above) in support of his point, but did not take us to any particular point within it.

30. We asked Mr Beamish to comment on the position arising from Evans v Clayhope Properties Limited referred to in the London LVT case where the Court had expressly concluded that it had no power to order such a contribution. He said that he had not read it, but that the London tribunal had apparently been satisfied that it did not apply. We drew attention to the fact that we were not necessarily bound by the decision of another tribunal.

31. The respondent had indicated that he opposed item 12, which required the delivery up of all books and papers connected with the management of the property. We indicated that in any order that we made we would not expect to go further than to require the delivery up of such books and papers, or copies of them, that were reasonably necessary for the manager to have in order to continue the effective management of the property in question. The parties agreed that this would both meet the need and the objection.

32. Similarly the respondent opposed item 13, which required the manager to report to him on a three monthly basis. It was however agreed that it would be part of the receiver's normal duties to report to the landlord whenever necessary, so that no further issue was taken with that point.

33. The respondent opposed the proposed arrangements for insurance in item 20, which were that the receiver should insure the entire building and recover the appropriate portion of the cost relating to the commercial part of the building from the landlord. He said it would be part of the receiver's function to collect the premiums direct from the commercial tenants, and should not cherry pick those parts of the building that he wished to manage and those that he did not.

34. Item 21 required the manager to collect payments on account of service charge for the commercial premises from the lessor, but to do so on the basis of the terms of the residential leases. The respondent opposed this proposal. He said that it presumably sought to address a perceived inconsistency between the terms of the commercial and the residential leases. However the proposal itself was inconsistent with the terms of the leases. If the applicants took the view that the residential service charge should be collected in accordance with the provisions of paragraph 3(2)(f) then it was conceivable that there might be a shortfall. On the basis that that clause fails good management practice dictated that the manager should collect what he considered was a fair proportion of the costs from both sorts of lessee. The tribunal did not have power to order him (the respondent) to make such payments in any case.

35. Finally, item 22 required the respondent to pay the manager/receiver's costs (being as we understood it the costs of management and not his costs incurred in this application). This too was opposed by the respondent who said that under paragraph 3(2) the fees of a managing agent form part of the service charge. It would be contrary to the terms of the leases to require the lessor to be responsible solely for such charges. He had not opposed the appointment of a manager, but the fees of that manager should be paid in accordance with the leases. He put the applicants to proof that the proposed fees were reasonable.

36. We enquired of the applicants and of Mr Beamish just what fees and expenses were envisaged. They told us that Mr Beamish's fee for acting as manager and receiver would be £2500 plus VAT per annum, and that he would charge fees in addition at the rate of £95 per hour for work carried out by him in connection with his duties under nine of the twenty-two paragraphs setting out the work that the applicants wished him to perform set out in their Appendix 4. On further enquiry we established that Mr Beamish would in turn sub contract the work of managing agent at the building either to the firm of which he was a member or elsewhere. He would expect an additional cost of £2400 plus VAT per annum to be incurred by whoever took on that work, that being the sum that had until recently been paid by to the managing agents who had recently ceased to act. We pointed out to Mr Madge and Mr Phillips that this would appear to constitute a cost of over £5000 a year to manage a building with nine flats and four commercial units - that is to say of some £400 per unit – and asked if the residents would regard that as reasonable if they had to pay their share of it. They said that they would have to enquire, but that they thought they may not. However, they were asking that those costs be borne by the landlord.

37. Mr Beamish handed us a sheet setting out his qualifications as a Fellow of the Royal Institution of Chartered Surveyors, and a member of the Institute of Property management. He was awarded an MBA degree in 1990. He had experience of managing property from 1995 onwards, since which time he has been almost exclusively involved in residential leasehold property management with a small amount of commercial property included. His firm specialised in the field and presently manages over 1000 units, mostly in the area between Bournemouth and Portsmouth. He had professional indemnity insurance for £500,000, which he suggested may be enough. He did not know where the requirement that the manager should carry insurance for £2 million in the applicants' proposals arose. He would enquire about the RICS "bolt-on" for insurance to cover this sort of appointment, but his broker had told him that he would have to pay another £2600 or so in premiums to increase his cover to £2 million. If he had to pay such a sum then he would need to recover it as a further part of fees. Mr Beamish told us that he had not previously undertaken an appointment of this sort, but had made it clear during the discussion of the proposed duties of the described above that he clearly understood the difference between the duties of a manager and a managing agent and that a manager / receiver appointed by the tribunal owed his duty to it rather than to the parties.

Interim Conclusions

38. The purpose of the appointment of a manager and receiver under section 24 of the Act has been to enable the solution of particular problems at a property, and it has been especially used where the landlord has in some way been in breach of the duty that he owes to the tenants. The Court of Appeal emphasised the problem solving aspect of the matter most recently in the case of Maunder Taylor v Blaquiere to which Mr Beamish referred. We experienced some considerable concern over the way in which the appointment of a manager in this case, on whatever terms, might be capable of solving the problems that have arisen at Admiral's Court in a way that could be said to be just and convenient.

39. The fundamental problem appeared to us to have two roots, one perhaps arising from the other. The first root lies in the fact that the landlord took the view (apparently in 1990, but that was not clear from the evidence before us on this occasion) that the service charges could no longer be apportioned in the way that the lease provided because of the cessation of the general rating system. He decided that he was instead allowed to apportion as he thought fit, following the wording at the beginning of paragraph 3(2).

40. The residents aver that that decision has increased the amounts of service charge that they have been called on to pay. They admit that they have paid the charges so demanded until March of this year, but say that they have now ceased to do so until these matters have been resolved. It is not clear to us that the residents were aware of the fact that the service charges were now being apportioned in this way until 1998 or thereabouts, and it appears that despite the payments they have made they have been protesting about the method of apportionment ever since. If accounts had been presented showing the position

as it affected the whole property from 1990 onwards then the problem could no doubt have been tackled much more quickly, but the fact that they were not presented in this way meant that neither the commercial tenants nor the residential tenants knew how the landlord was apportioning their service charges.

41. The second root, which may be associated with the first, lies in the terms in which the landlord chose to grant new leases of the four commercial units between 1997 and 2001. He did so on the assumption that he was entitled to deal with the service charges in the way that he had since 1990. He made no provision for the costs of management in those new commercial leases but appears to have placed the whole cost of management of the whole of the building onto the residential lessees by reference to their obligation in paragraph 3(2) to pay costs of management and the fact that nothing in paragraph 3(2)(f) appears to provide for the apportionment of those costs in any way.

42. The result of these two matters has been that the residents have concluded that the apportionment of the service charges has no longer been carried out in accordance with the terms of their leases. They have been in correspondence with the landlord or his representatives since 1998 (and perhaps before that – the information presently before us goes no further back) and it is plain to us from what we heard that the matter has become acrimonious. That fact is evidenced in the suggestion by the residents that the landlord should pay all the costs of a manager whom we may appoint. On the other hand, we accept that the landlord appears to have been less than open in his dealings with the residents at least in the sense that accounts for the management of the whole of the property were not provided. It is understandable that they may have felt that this was a cloak to enable the landlord to apportion charges as he thought fit.

43. We entertain very grave concerns that if we were to appoint a manager as at present proposed these problems would not be solved, but would simply become part of an ongoing conflict between the manager and the landlord instead of being between the residents and the landlord as at present. There may be some funding problems if such an appointment was made.

44. We are not convinced by the decision in the London LVT case mentioned to us that the effect of section 24 of the Act was entirely to overcome the problems presented by Evans v Clayhope Properties Limited, which decided that a receiver could not look to the landlord to make up funding shortfalls. Reliance was placed in that case on the generality of the power to make orders contained in section 24(3). We have not had the benefit of course of hearing argument on the point, but if that was all that was required then it seems to us that it would not have been necessary for Parliament then expressly to address the narrow point in Evans v Clayhope Properties Limited by making provision in section 24(4)(c) for the payment of the manager's fees by any of the parties.

45. In any event, we are not presently convinced that it would be just and convenient in this case, despite the fact that the landlord appears to have been

less open in his dealings than he might have been, to direct him to pay the whole of the fees that might, on Mr Beamish's own calculation, amount to more than £5000 and VAT even before one takes into account any increase in the amount of his indemnity insurance cover. The residents too might be unwilling to accept so large a management cost, and it appears to us from our general knowledge and experience of the cost of management of buildings like this in this locality that such a cost is very much in excess of the sort of cost that we might usually see. On the information we have to date it is likely that these costs would have to be apportioned between the parties in some suitable fashion.

46. It appears to us that the remedy that will overcome the problems that exist at Admiral's Court in the long term would be for the leases to be varied in some suitable fashion. If that could not be achieved by agreement (as we think would be preferable) then it could be done by application under section 35 of the Act on the ground that the (residential) leases do not make satisfactory provision for the computation of the service charge. At the moment such an application would have to be made to the County Court but the jurisdiction will be transferred to this tribunal later in the year following the bringing into force of the relevant provisions of the Commonhold & Leasehold Reform Act 2002.

47. It is, as we understand it, accepted that until 1990 the arrangements under the leases gave rise to a more or less equitable division of the service charges between the flats and the commercial premises. If that is so then there is on the face of it no reason why a variation entered into now that restored that state of affairs as nearly as may be should not cover the problems that have arisen for the future. They may perhaps be a need for some small compromise on one side or another but it does not appear to us that, with one possible exception, this would amount to anything very major. If that could be achieved then all that should be necessary for the future proper management of the building as a whole is the appointment of a managing agent (which could well be Mr Beamish's firm) at an appropriate cost.

48. The one possible exception of which we are aware (though there may be others) lies in the question of the recovery of the cost of management. The residential leases make provision for the payment of this amount. As far as we can see the commercial leases do not. We do not know what situation obtained in 1990 under the previous commercial leases. In the case of rack rent leases, within our collective experience, the cost of management is usually treated as part of the rent and this may be the explanation of the absence of a reference to the cost of management in the new leases. Any other explanation is likely to be less favourable to the landlord. In our view it would be perfectly appropriate for the landlord to bear the appropriate proportion of the costs of management of the commercial element of the property out of the rack rents if he is unable to recover it from the commercial tenants in any such arrangement as we have indicated, and inequitable to load it onto the residents.

49. These observations represent our interim conclusions. If the parties are unable to resolve the matter then they have leave to come back to us to re-open the

question of the possible appointment of a manager. However, we reiterate first that it seems to us that the possible cost to them of such an appointment is much greater than would seem to us to be appropriate in this locality for most blocks like this one, and secondly that there may be some funding problems for the reasons that we have mentioned. We very much hope that by providing our initial views in the matter in this way we will enable the parties to take steps to resolve the matter in what we think would be a far more satisfactory and economical fashion.

Robert Long
Chairman

1st August 2003

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and	
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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

SOUTHERN LEASEHOLD VALUATION TRIBUNAL

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

Re: Admirals Court Lymington ("the property")

Between

The lessees at Admirals Court Applicants

and

Mr W F Stone Respondent

Order for the Appointment a Manager and Receiver of the Property

1. That Christopher Beamish FRICS of 46 Leigh Road Eastleigh Hampshire ("the manager") be appointed manager and receiver of the property with effect from 1st April 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 the property 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 residential 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 and any monies receivable by him in respect of the commercial premises at the property in accordance with the terms of this Order

5. So that he shall have the requisite funds from time to time in 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 the

property for such fee as he may agree with the respondent (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 not more than fourteen days thereafter

(c) 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. For the purposes of this provision the expression "due shares" shall mean such proportion in respect of each commercial lessee of the 57.5% of the service charge expenditure mentioned above as the respondent shall within fourteen days of the invoice referred to in sub paragraph (b) notify to the manager, or in the case of no such notification within that period such proportions thereof as the manager shall reasonably determine.

(d) 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 sub-paragraph (c) against the amounts due to him by the respondent under the invoices raised in accordance with sub paragraph (b) against the respondent, and shall be entitled to recover from him any balance of the amount of the invoices 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 thirty days after the date of the manager's invoices to the commercial lessees.

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. The manager shall report to the respondent annually in writing upon the state and condition of the property and upon any major anticipated items of expenditure and details of any problems that the manager has encountered in collecting the service charge contributions from any lessee, such report to include a copy of the service charge accounts for the whole of the property. The manager shall also report in writing to the respondent from time to time upon any significant matter relating to the property that the manager reasonably considers should be brought to his attention.

8. a. That the manager and the respondent shall make arrangements with the present insurers of the property to make any payments under the insurance policy presently effected by the respondent to the manager; and

b. that if the manager insures the property under one policy he shall ensure that insurer states what is the apportionment of the cost of the

premium in relation to the leases of the residential flats and the commercial premises at the property.

9. That the manager shall be entitled to the following remuneration (which for the avoidance of doubt as to the leases of the residential flats 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 the property; 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, in addition to any fees that the manager may be entitled to recover under the commercial leases

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 average earnings index, but there shall be no further fee increase of any kind without the express permission of the tribunal.

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

11. This Order shall remain in force until 31st March 2007

Dated 11th March 2005

.....
Chairman

premium in relation to the leases of the residential flats and the commercial premises at the property.

9. That the manager shall be entitled to the following remuneration (which for the avoidance of doubt as to the leases of the residential flats 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 the property; 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, in addition to any fees that the manager may be entitled to recover under the commercial leases

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 average earnings index, but there shall be no further fee increase of any kind without the express permission of the tribunal.

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

11. This Order shall remain in force until 31st March 2007

Dated 11th March 2005

(signed)

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Chairman

SOUTHERN LEASEHOLD VALUATION TRIBUNAL

In the matter of section 24 of the Landlord & Tenant Act 1987 and in the matter of Admirals 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

Upon consideration in private on 11th March 2005 of written representations that had been invited from the parties concerning the form of appointment of manager

Reasons for amendments to the draft Order for the appointment of manager

Date of Issue: 22nd March 2005

Tribunal:

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

1. When the tribunal issued its decision in this matter in January 2005 it appended a form of draft Order for the appointment of Mr Beamish to be the manager and receiver of Admirals Court for a period of two years. It invited written representations upon the detail of the Order, and such representations were duly received from both parties. The tribunal regrets that the various commitments of its individual members have meant that 11th March proved to be the first possible day that they were able to meet to consider the representations and to issue the Order in its final form.

2. The representations were primarily contained in letters from Mr Beamish on behalf of the residential lessees dated 21st January and 27th January 2005, and in letters from Messrs Scott Bailey on behalf of the landlord dated 24th January and 9th February 2005. There was a little correspondence subsequent to these main letters that the tribunal also saw, and all of the correspondence appeared, from appropriate confirmations contained in the letters, to have been circulated to all parties.

3. The tribunal observed two errors in the decision as issued (one of which had been picked up by both parties) and now corrects them pursuant to regulation 18(7) of the Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003 (No 2099 of 2003) as follows:

   a. in paragraph 42, the accounting year in which the figure of £2001-38 appears was not stated. The words "the 1998 accounts" should appear in place of the words "the 20 accounts" in the second line of that paragraph. The 1998 accounts were at page 220 of the Respondent's bundle before the tribunal; and

   b. the reference to the figure of £1000 in the second line of paragraph 54 is a clerical error. The figure that should appear in its place is £600.

4. The remainder of this note deals first with consideration (under the headings of the first letter from each side) of points made in Mr Beamish's letter of 21st January (including any counter observations in Messrs Scott Bailey's letters of 24th January and 9th February) and secondly with original points in Messrs Scott Bailey's letter of 24th January and any counter observations in Mr Beamish's letter of 9th February. Finally it deals with one or two points of clarification that the tribunal thought it helpful to add, and with the question of the commencement date referred to in a letter from Mr Madge dated 2nd March 2005.

Mr Beamish's letter of 21st January

5. Points 1-3 in Mr Beamish's letter related to correction of matters of record – the spelling of "Admirals Court", Mr Stone's initials and Mr Beamish's address. These matters have been corrected in the final Order.

6. Mr Beamish sought a commercial fee if he were to be requested to collect the commercial rack rents. Messrs Scott Bailey say that their client does not intend to instruct him to do so. Wording has been added in paragraph 5(a) of the Order to allow Mr Beamish and Mr Stone to agree a fee for that work if

Mr Stone ever changes his mind about instructing Mr Beamish to collect those rents during the currency of the Order. Plainly neither of them is under any obligation in that respect.

7. Paragraphs 5(b) and (c) have been amended and a new paragraph 5(d) has been added to deal with the points the parties have made about the mechanism for collection of the commercial service charges. Their effect is first to give Mr Stone the opportunity that he seeks to instruct Mr Beamish about the proportions in which he is to seek to collect those charges (but Mr Beamish may do as he reasonably determines in this respect if he is not so instructed within fourteen days of invoicing Mr Stone) and the second is to reduce the period after which Mr Beamish may look to Mr Stone for the shortfall to thirty days. This recognises the management problems that Mr Beamish may face if he does not receive the service charges in reasonable time. It does not affect Mr Stone's ability to seek to recover any recoverable shortfall from the relevant commercial lessee. The tribunal considered that the effect of these changes when taken together was to produce a more effective means of management of the property for the benefit of the parties as a whole.

8. Mr Beamish sought an additional fee for the "provisional charge notice" to the commercial lessees for which provision is made in their leases. The tribunal considered that this was properly provided for within the leases themselves to such extent as may be appropriate, and did not consider it proper to make any additional express provision.

9. The Order now expressly deals with the fees for managing the residential and the commercial parts of the property so that they may be separated in any accounts, and the correction at paragraph 3(b) above avoids the ambiguity as to fees that paragraph 54 of the reasons inadvertently created.

10. The tribunal considered it appropriate that the indexation of fees should be by reference to the "average earnings index as Mr Beamish requested. However, it had already borne in mind the new regulations about demands for ground rents when it considered the rates of remuneration originally put forward, and it would not therefore be appropriate to revise them in the light of such additional work as the new provisions may impose.

Messrs Scott Bailey's letter of 24th January

11. The tribunal considered that it would be reasonable that Mr Stone should have a report, as he requests, from Mr Beamish from time to time, but a report at least five times a year was not in its judgement a reasonable requirement. It has made provision in a new paragraph 7 in the Order for an annual written report, coupled with a report from time to time on any significant matter relating to the property that the manager reasonably considers should be brought to Mr Stone's attention. It observes that as a matter of practice it may be helpful for all notifications to the residential lessees relating to the building also to be copied to the commercial lessees and, of course, to Mr Stone.

12. The question of any agent whom Mr Beamish may employ is one for him as manager, and not in the tribunal's judgement a matter upon which it should presently seek to interfere.

13. The point made in paragraph 4 of Messrs Scott Bailey's letter is dealt with by the amendments to paragraph 5 of the Order described in paragraph 7 above.

14. Provision is now made in paragraph 8(b) of the Order for the identification of the premiums for the commercial and the residential insurance cover if the buildings insurance for the property is effected by means of one policy only. As a matter of practice the manager will also need to identify the cost of the lift cover.

Tribunal's amendment

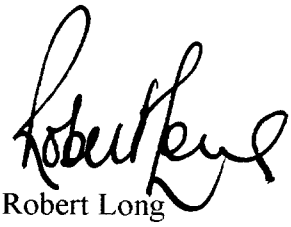
15. The tribunal has slightly amended the wording of paragraph 4 of the Order to make plain the extent of the monies that Mr Beamish may receive in his capacity as receiver of the property.

Commencement Date

16. In his letter of 2nd March Mr Madge asked that the commencement date of the Order be brought forward to a date before the expiration of twenty–eight days from 11th March that would have resulted from the terms of the original decision in view of the time that has elapsed since that decision was given. That letter was copied to the other parties and no objection had been received to the proposal. The tribunal therefore concluded that it would in the light of those circumstances be convenient to provide that the Order shall be effective on 1st April 2005, some nine days quicker than may otherwise have been the case.

Appeal

17. Since these reasons will not be capable of issue at the same time as the tribunal's Order is issued, the tribunal considers it appropriate that the time for seeking leave to appeal the original decision, the terms of the Order or anything in these reasons for amendments to the draft Order shall be, and it hereby is, extended to expire twenty one days after the date when these reasons are issued to the parties.



Robert Long
Chairman

20th March 2005