RESIDENTIAL PROPERTY TRIBUNAL
SOUTHERN RENT ASSESSMENT COMMITTEE
SOUTHERN LEASEHOLD VALUATION TRIBUNAL

Case No. CHI/24UL/LAM/2006/0002

re: Rotherwick Court, Alexandra Road, Farnborough, Hampshire GU14 6DD ("the Premises")

BETWEEN:

Dr. R.H.G. Whaley

Applicant

and

Minimum Finanzierungs Anstalt

First Respondent (Landlord)

and

Mr Bruce Bulgin (Flat 4)
Mr John Mason (Flat 8)
Miss S.E. Flanagan (Flat 9)

Second Respondents (Lessees)

Date of Application:	11th February 2006
Date of Hearing:	16th October 2006
Members of the Tribunal:	Mr J.B. Tarling, MCMI (Lawyer/Chairman)
	Mr M.R. Horton FRICS
	Mr D.L. Edge FRICS
Date of Decision:	20th October 2006

DECISION OF THE LEASEHOLD VALUATION TRIBUNAL

1. THE APPLICATIONS

A. Under Section 24 Landlord and Tenant Act 1987 for the Appointment of a Manager.
B. Under Section 20(C) Landlord & Tenant Act 1985 that the Landlord's costs arising from the proceedings are not to be charged through the Service Charge Account.

The Decision of the Leasehold Valuation Tribunal is:

(a) That it declines to make an Order appointing a Manager under Section 24 of the landlord and Tenant Act 1987, and

(b) That it makes an Order under Section 20C of the Landlord and Tenant Act 1985 that all or any of the costs incurred, or to be incurred, by the Landlord in connection with these proceedings are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.

2. THE STATUTORY PROVISIONS

A. Section 24(2) of the Landlord and Tenant Act 1987 ("the 1987 Act") as amended by Section 85 of the Housing Act 1996 provides that the Tribunal may only make an order in respect of an application for the appointment of a Manager in the following circumstances, namely:

(a) Where it is satisfied:

(i) that the Landlord either is in breach of any obligations owed by him to the Tenant under his tenancy and relating to the management of the premises in question or any part of them or (in the case of an obligation dependent upon notice) would be in breach of any such obligation but for the fact that it has not been reasonably practicable for the Tenant to give him the appropriate notice and

(ii) that it is just and convenient to make the order in all the circumstances of the case;

OR

(ab) Where the Tribunal is satisfied:

(i) that unreasonable service charges have been made or are proposed or are likely to be made, and

(ii) that it is just and convenient to make an order in all the circumstances of the case;

OR

(ac) Where the Tribunal is satisfied:

(i) that the Landlord has failed to comply with any relevant provision of a code of practice approved by the Secretary of State under Section 87 of the Leasehold Reform Housing and Urban Development Act 1993 (codes of management practice) and

(ii) that it is just and convenient to make an order in the circumstances of the case;

OR

(b) Where the Tribunal is satisfied that other circumstances exist which makes it just and convenient for the order to be made.

B. In respect of the Application under Section 20C of the Landlord and Tenant Act 1985 (as amended by section 83 of the Housing Act 1996) the ...Tribunal to which the application is made may make such Order on the Application as it considers just and equitable in the circumstances

C. Section 86 of the Housing Act 1996 transferred jurisdiction in respect of the appointment of Managers to the Leasehold Valuation Tribunal.

3. THE PREMISES

The Building is a 3 storey Block of 11 Flats built in the 1960s. It is situated on a secondary road near the centre of North Camp, Farnborough. In front of the Block is a car parking area. Access to the rear of the Premises is through an arch at ground floor level. At the rear are two rows of garages with a concrete forecourt between them. There is also a concrete drying area immediately behind the Block.

4. THE PARTIES

The Applicant, Dr. E.H.G. Whaley is the Lessee of Flat 2. The First Respondent is the Landlord and the owner of the Freehold. The second Respondents Mr Bulgin, Mr Mason and Miss Flanagan are the Lessees of Flats 4, 8 and 9 and they all oppose the application. Mr Bulgin is the current Chairman of the Rotherwick Court Residents Association ("the Residents Association") and Mr Mason was the previous Chairman of the Residents Association.

5. INSPECTION

The Tribunal inspected the exterior of the Premises on 16th October 2006. The front of the Building was brick with the top part clad with white UPVC weatherboarding. Part of the front elevation was tile-hung. The Block had a Flat roof. Most of the windowframes had been replaced with UPVC double glazed units. Two Flats (Numbers 2 and 4) had the original wooden windowframes which showed signs of disrepair. There were two identical entrances at the front of the Building each leading to 6 flats and 5 flats respectively. There were Entryphones attached to the wall adjacent to the two entrances. In the arch leading through to the rear garden was some old furniture which had presumably been thrown out by one or more of the occupiers. Attached to the rear of the Block were some unsightly telephone wires and some trunking for communication cables. There was a communal TV ariel attached to the rear wall extending above the roof level. The rear the concrete drying area was untidy and partly covered with weeds. The garages at the rear were in urgent need of repair and decoration. The Tribunal members inspected both common entrance halls and staircases and these seemed to be well maintained and decorated and recently new carpet had been laid.

6. HEARING

A Hearing was held at the Offices of Rushmoor Borough Council at Farnborough when the parties were represented as follows:

The Applicant: Dr. R.H.G. Whaley appeared in person

The First Respondent: The Freeholder Minimum Finanzierungs Anstalt was represented by its duly authorised Agent, Mr James Fielding

The Second Respondents: Mr Bulgin and Mr Mason appeared in person.

7. PRELIMINARY MATTERS

(a) A Pre-Trial Review Hearing had taken place on 22nd June 2006 when various Directions had been given regarding evidence to be produced to the Hearing. As a result the Tribunal had two Bundles totalling about 300 pages before it at the Hearing. In particular at the Pre-Trial Review all parties had agreed that Mr James Fielding was authorised to represent the Freeholder (which was resident in Liechtenstein) as it's duly authorised Agent. The Tribunal had further directed that if any party wished to nominate a person to be appointed as an LVT appointed Manager, that person was to provide the information set out in the Schedule to those Directions in advance of the Hearing and be invited to attend the Hearing. At the date of the Hearing none of the parties had nominated anyone to be so appointed, although they had all had the opportunity to do so.

(b)There appeared to be little dispute as to the history of the management of the Block and it could be summarised concisely as follows. The Block was built in about 1969 by a Mr R.E. Welch, who was a local Builder. 99 year Leases of all 11 Flats were all granted in a similar form. They were typical of Leases granted at that time and the provisions as to repair and maintenance were very limited. There was no provision for the payment of any advance maintenance, the

appointment of a Managing Agent, or any of the usual terms which are found in most modern Leases. On 27th October 1969 Mr Welch wrote to the new Lessees and recorded that he expected the Lessees themselves to manage the Block. He would pay the Insurance Premium in accordance with the Lessor's covenant in the Leases and obtain refunds form the Lessees. Reference was made in that letter to a Residents Committee being established. Subsequently, on a date which is unknown, but was probably about that time, the Rotherwick Court Residents Association was formed and a copy of a handwritten Constitution was included in the Hearing bundle. This referred to "Residents" rather than "Lessees" and the Constitution was in a very basic form. Clearly this intended to involve all Residents, whether Lessees or not, in the management of the Block.

(c) In 1995 the Freehold was sold to the current Freeholders who appointed the Firm of FMS to act as their Managing Agent. That Firm was under the control of Mr James Fielding who was the current Agent for the Freeholder. As a result of various Demands for payment, the Applicant decided to take action to protect himself from such Demands. He issued an Application in the Aldershot and Farnham County Court against FMS and eventually obtained a Judgement (a copy of which had been included in the Hearing Bundle) which absolved him from having to pay the amounts demanded. He also won an Order for Damages of 5p against one of the Defendants and £5 against the other, but there was no Order for costs in his favour.

(d) The Applicant was the Chairman of the Residents Association for a time but following various allegations and threats by him against other members of the Residents Association there was disharmony and the remaining members of the Residents Association decided to exclude the Applicant from membership. As a result the remaining members of the Residents Association decided that they would no longer require the Applicant to make payments to the Service Charge Fund, but that annually a Statement of such liability which was attached to the Lease of his Flat was prepared and sent to him. Copies of some of those Statements were included in the Hearing Bundle.

(e) In 1999 The Residents Association appointed the Firm of Edgefield, a firm of Managing Agents based in Farnham, to provide a "Standard Management Service", and entered into a written Management Agreement. For that service a fee of £785 plus VAT per annum was charged in 1999 and at the date of the Hearing the management fees had risen to well over £400 per annum per flat. One of the functions of the Managing Agents was to prepare annual Service Charge Accounts, copies of which were included in the Hearing Bundle.

(f) at the date of the Hearing the position was that the Freeholder had delegated the management of the Block to the Residents Association who in turn had appointed Edgefield to carry out the day to day management. The Insurance of the Block had been handled by FMS and more recently by Mr Fielding himself. It was the matter of the Insurance which had become the major matter of concern to the Applicant.

8. THE HEARING

The Hearing commenced by the Chairman reminding all parties of the provisions of Section 24 of the 1987 Act. The Applicant had to satisfy the Tribunal that there had been a breach of covenant, or one of the provisions of the RICS Service Charge Code, or unreasonable Service Charge Demands etc as well as persuading the Tribunal that it was just and convenient to make an Order appointing a Manager. Before making an Application under Section 24 of the 1987 Act, Section 22 of that Act requires the Applicant to serve a Notice on the Landlord specifying the breaches and if relevant giving him time to remedy such breaches. Such a Notice had been served and it set out a number of allegations. It did not contain any specific allegations of breach

of any of the provisions of the RICS Service Charge Code, although it is possible that some of the allegations may be found to be within the various provisions of such Code.

9. THE APPLICANTS CASE

Dr Whaley addressed the Tribunal and went through the allegations of breach of covenant. These may conveniently be set out as follows:

(i) FMS initial demands for payments of Service Charge in 1995 were not legally payable.

(ii) FMS overcharged on Insurance, extracting £825 from the Residents Association, when only £404 was due.

(iii) FMS misled the County court Judge as to the identify of the Insurer, and charged the Residents association with an amount for Insurance which the County Court had ruled to be not payable.

(iv) The sum of £825 was not recovered by the Residents Association

(v) FMS switched to billing the individual Lessees for insurance when little was due, and they never billed the Applicant for his share of the premium.

(vi) FMS continued to over-charge for the Insurance.

(vii) A reference to the identity of the foreign Freeholder and whether they were capable of enforcing the covenants in the Leases.

(viii) A complaint had been made to the Freeholder about FMS, but the Freeholder referred the complaint back to FMS and it was not dealt with.

(ix) A reference to allegations of FMS bribing Lessees by getting them on their side and then manipulating them to fight each other. This had the effect of disrupting and corrupting the Residents Association, including excluding residents from meetings.

10. The Applicant referred to the various documents in the Hearing Bundle which supported his allegations. In particular the FMS correspondence with the Applicant and other Lessees and Service Charge Demands were considered. A copy of the County Court Judgement was also considered. He also referred the Tribunal to the Minutes of various Meetings of the Residents Association and to the correspondence between himself and Mr Mason and Mr Bulgin. One of the matters of concern was that the Residents Association had spent Service Charge money on what the Applicant considered as an improvement, namely the installation of two Entryphones.

11. In summary the Applicant was asking the Tribunal to appoint a Manager solely to manage the Insurance of the Building. He said he was happy with the management by Edgefield and was happy for this to continue. He also wanted the LVT to supervise the Residents Association as it was operating outside the powers in the Flat Leases.

12. THE RESPONDENTS CASE

Mr Bulgin, the current Chairman of the Residents Association, gave evidence first as he was unable to stay for the afternoon of the Tribunal proceedings due to prior engagement. He reminded the Tribunal that much of the Applicant's case involved matters which had taken place many years ago. He had not seen any proper Service Charge Accounts in the early days of the Residents Association, when the Applicant was in charge. Edgefield were now producing Annual service Charge Accounts showing the financial details of what was collected and what was spent. He was very satisfied with

Edgefield's performance and wished the status quo to continue. He had owned his Flat for the last 5 years or so and had been unaware of what had occurred prior to then. His Flat was let to a tenant and he had never had any problems with Edgefield. He agreed the Leases were poorly drafted but the property had to be managed despite the Leases not having sufficient modern management provisions and a common sense approach has to be adopted in the circumstances. He was content for Mr Fielding to continue to manage the Insurance of the Block. Mr Bulgin had regularly received copies of the annual Fire Insurance Schedule from Mr Fielding showing the Insurance details, and so far as he was aware all the other Lessees received those papers. He said he represented the 10 members of the Residents Association and all of them wished the status quo to continue. He opposed the appointment of a Manager as he considered it unnecessary.

13. Mr Mason then gave evidence and referred to the various documents in the Hearing Bundle. He had succeeded Dr Whaley as Chairman of the Residents Association and had been instrumental in communicating the decision of the Residents Association to exclude Dr Whaley from their meetings. He explained that the reason for this was the aggressive and threatening manner of the letters from Dr. Whaley and the threats of litigation against individuals.
He then went on to deal with the matter of the Entryphones. He said the Residents Association had responded to requests from five single ladies who had concerns about security of the Block. There had been occasions when drunks and other undesirables had obtained access to the common parts after dark and they wished to improve their security. Mr Mason pointed out that all the other 10 Lessees had agreed to contribute to the cost of the two Entryphones, and Dr. Whaley had not been asked to pay a proportion of the cost although he had had the benefit of the facility, if he wished to take advantage of it. He thought the value of the flats had been enhanced by the provision of this additional security facility. He had extended his own Lease and was happy for the status quo to continue.

14. Mr Mason said that he thought the Block was now well managed by Edgefield and his Flat was let to a tenant who also had no complaints about them. He had no problem with Mr Fielding carrying on with the Insurance and he had received copies of the annual Fire Insurance Schedules of cover etc. He said the events complained about by Dr. Whaley had all taken place many years ago and the position had changed significantly since then. He opposed the Application for the appointment of a Manager.

15. Mr Fielding then gave evidence on behalf of the Freeholder. Mr Fielding gave the history of his involvement since the acquisition of the Freehold by the current Freeholder in 1996. He had always been involved in arranging the Insurance of the Building since that time. He produced the Insurance schedules for the current and previous years. He said the Block had a good Claims History with very few claims over the past 10 years. The Flats had changed hands from time to time and on each occasion details of the Insurance had been supplied to the Solicitors involved. There had never been any queries and the sales of the flats had proceeded. The Buildings were part of a Block Policy which included other properties which he managed. He thought that there were savings to be made by such an arrangement, which were passed on to the Lessees in terms of reduced premiums. A few years ago the sum insured had been checked by a Valuer but in more

recent years the amount of cover had been index-linked. He agreed with members of the Tribunal that there were some queries regarding the identity of the Insured, the extent of and whether cover on the garages was included, and he said he would look into them. However he thought the current cover with a reputable Company such as the Royal and Sun Alliance was sufficient cover, and if anything he thought the Building may be over-insured. He considered the current premium of £1,470.74 to be acceptable for a Block of 11 Flats. No Lessee apart from Dr Whaley had queried the Insurance and they had all paid their share of the premiums, with the exception of Dr. Whaley.

16. CONSIDERATION

The Tribunal then retired to consider the evidence.

(i) The Tribunal reminded themselves of the statutory requirements and the circumstances in which they were empowered to make an appointment of a Manager. These are set out in detail in section 24 of the Landlord and Tenant Act 1987 (as amended by Section 85 of the Housing Act 1996) and are contained in Paragraph 2 A of this Decision. They had regard to all of the documentary and oral evidence and also what they saw at the inspection.

ii. Dealing firstly with the matter of whether the Landlord has demanded unreasonable Service Charges, it is clear that the County Court Decision in 1996, which had not been appealed by anyone, established a Judgement of the Court that such an event had taken place. That Judgement had found that FMS as Agents for the Landlord had demanded Service Charges that were not legally payable under the Lease and that Dr. Whaley did not have to pay them.

iii. There had been further Service Charge Demands for payment of various Service Charge Items such as Management fees for the Managing Agent, a supplement to cover Dr Whaley's share of the Insurance Premium, and Accountancy fees. None of these were permitted under the terms of the Leases and to that extent they had been unlawfully demanded. The installation of the two Entryphones was also clearly an improvement, rather than a repair, and the Flat Leases did not allow the Landlord to carry out improvements at the expense of the Service Charge Fund.

iv. None of the Respondents had effectively challenged the Applicant's contention that these items were not covered by the Leases and for the reasons set out above the Tribunal found that the Landlord had demanded unreasonable Service Charges as set out in Paragraph (2)(a)(ab)(i) of Section 24 of the 1987 Act.

17. The next question to decide was whether it was just and convenient to make an Order. The Tribunal reminded themselves that Section 24 of the 1987 gave them no particular guidance, nor did it place any restrictions on how they reached a decision on whether or not it was just and convenient to make an Order. They took the view that they were entitled to consider any relevant matter in reaching a decision.

18. First of all they reviewed the evidence and what they were being asked to decide. Much of the Applicant's evidence had been based on events that had happened some years ago. Setting aside the question of the Insurance, the current situation seemed to be working.

The Tribunal contrasted the rather aggressive style of approach adopted by the Applicant with the quieter and less aggressive style of Mr Mason and Mr Bulgin. There is no doubt in the minds of the Tribunal members that the exclusion of Dr. Whaley from the Residents Association, whilst it is to be regretted, was a last resort. He seems to have been an author of his own misfortune and now finds himself isolated. The Tribunal were considerably influenced by the evidence from Mr Mason and Mr Bulgin, whose evidence they accepted, that the current position where Edgefield manage the property is the best that can be achieved in difficult circumstances. In particular the evidence given by Mr Bulgin that 10 out of the 11 Lessees wished the status quo to continue seemed to be critical to the decision as to whether or not it was just and convenient for the Tribunal to appoint a Manager. There already seemed to be a Managing Agent in place who was in the opinion of 10 out of 11 of the Lessees, to be doing a good job. Indeed Dr Whaley himself said at the Hearing that he had no problems with Edgefield continuing to manage the Block.

19. The Applicant had failed to nominate a person to be appointed as Manager. He had had plenty of time to find such a person who was acceptable to the tribunal and had failed to do so. At the Hearing the Applicant has requested the Tribunal to appoint a Nominee of its own choosing. The Tribunal had made Directions some months earlier that if the Applicant, or indeed any other party, wished to nominate a person to be appointed as Manager, they should make such arrangements as had been set out on those Directions. None of the parties had decided to make such a nomination.

20. So far as the Insurance is concerned, Mr Fielding had been handling the Insurance arrangements for this Block for over ten years and apart from the Applicant, all the other 10 Lessees seemed happy for these arrangements to continue. There was certainly no evidence of Mr Fielding being either dishonest or corrupt. He had arranged for the Insurance to be handled through a reputable Broker and the requirements of the Financial Services Authority seemed to being complied with. The Applicants had requested the Tribunal to oversee the Insurance arrangements. The only powers available to the Tribunal under Section 24 of the 1987 Act is to give any Manager who is appointed such specific powers as would deal with this position. If no such Manager was appointed then the Tribunal has no powers available to it under this Section of the 1987 Act. For these reasons the Tribunal declines to make any such Order supervising the Insurance.

21. DECISION

For the reasons given above the Tribunal declines to make an Order under Section 24 of the Landlord & Tenant Act 1987 appointing a Manager. In passing, the Tribunal notes that the powers of Lessees to self-manage their Block by a majority of them is now enshrined in the law through the introduction of the no-fault Right to Manage provisions of the Commonhold and Leasehold Reform Act 2002. The decision the Tribunal has made in this case follows the statutory support for the view that the majority of Lessees should have the powers to manage their own property as they wish, albeit within the covenants contained within the Leases.

22. Section 20C Application

In respect of the Applicants application for an Order under Section 20C of the Landlord

and Tenant Act 1985 that the Landlord's costs arising from the proceedings are not to be recharged through the Service Charge Account, the Tribunal decided that even though the Leases are unlikely to enable the Landlord to make any such charge through the Service Charge Account it is reasonable to make such an Order. The Applicant had succeeded in satisfying the Tribunal that the Landlord had demanded unreasonable Service Charges and to that extent he should be given the protection of such an Order.

Dated 20th October 2006

J.B.Tarling (Signed)

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J.B.Tarling MCMI
(Chairman)