SOUTHERN RENT ASSESSMENT PANEL

LEASEHOLD VALUATION TRIBUNAL

In the matter of sections 35 and 37 of the Landlord and Tenant Act 1987 (as amended) ("the Act")

and

In the matter of Flats 1-8, Baden House, Great Bedford Street, Bath, Somerset

("the property")

Case Number CHI/00AH/LVT/2006/0005

BETWEEN

Bath Ground Rent Estate Limited — Applicant

and

The lessees of flats 1-8 at the property — Respondents

Appearances:

Messrs Paul Perry and Martin Perry of West of England Estate Management Co Ltd for the Applicant)
Mr David Cottrell for the Respondents

Hearing: 5th February 2007

Decision

Issued 9 February 2007

Tribunal: Mr R P Long LLB (chairman)
Mr J Reichel FRICS
Mr D Wills

Decision

1. (a) The Tribunal orders that each of the leases of Flats 1-8 Baden House shall be varied by adding the following words to the end of clause 4(ii) in each of them, namely:

"together with a sum not exceeding £120 exclusive of value added tax in each year for the costs and expenses of management of the property and one-eighth part of such reasonable surveyor's fees incurred in respect of any of the works mentioned in either clause 5(v) or 5(vi) the recovery of whose cost the provisions for the time being in force imposed by section 20 of the Landlord & Tenant Act 1985 (as amended) or any statutory modification or re-enactment thereof and of any statutory instrument made in accordance with it"

(b) The Tribunal determined that payment of compensation is not appropriate in the present case.

(c) The Tribunal has not been made aware of any documents upon which a memorandum of such variations should be endorsed. The parties may apply to it within three months after the issue of this decision for an order for such endorsement if it is required

(d) If the Tribunal's understanding that all of the leases in question are in the same form as the example shown to it proves false to the extent that this Order requires to be modified to apply to any individual lease, then the parties have leave to apply to it within three months after the issue of this decision for such modification of this Order as may be necessary to enable an alteration in the terms set out above to be made to all the leases.

Reasons

Application

2. This was an application by Bath Ground Rent Estates Limited made pursuant to section 35 (2) of the Act to vary the leases of Flats 1-8 at the property by the insertion of a provision allowing for the cost of management to be included in each of them in one of two alternative forms proposed in that application.

Inspection

3. The Tribunal inspected the property externally on 5th February 2007 in the presence of Mr M Perry. It saw a four-storey block consisting of eight two-storey maisonettes built of reconstituted stone under what appeared to be a flat roof. Access to all maisonettes is at the rear of the block by means of individual front doors. Ground/first floor maisonettes are accessed directly at ground level or via a short balcony (the block being on a hill). Second/third floor is accessed via an external stairway and second floor balcony. There appeared in consequence to be no internal common parts, a fact that Mr Perry

confirmed. The block appeared to be typical of property that was erected in the early 1960's, as the date of the leases seems to confirm was indeed the case.

4. A very small area of garden lies between the building and Great Bedford Street at the front, and there is a further small area of garden containing some bushes and a small yard at the rear. The Tribunal was informed by Mr Perry that the car parking area beyond the block and the garages leading from it are not part of the freehold and are managed by, or on behalf of, the owners of town houses on the north side of that parking area.

The Leases

5. The Tribunal was provided with a copy of a sample of the leases at the property with the application. The lease in question was of flat 1 (Mr Cottrell's flat) and was dated 17th October 1962. It demised the flat for a term of 999 years from 25th December 1961 at a rent of £8-40 per annum. The demise included the internal face of external walls, one half (severed vertically) of internal dividing walls, ceilings and floor and floor joists and conducting media in or about the maisonette and used only by it, together with appropriate rights that are not relevant to the matters in issue. Paragraph 4(iv) contains a covenant for the lessee to repair and maintain the windows and the glass in them. The Tribunal understands that all the leases are in the same form and its order is made on that basis.

6. The landlord covenants in paragraph 5 (i) of the lease to insure the building against fire and other usual risks. In paragraph 5 (v) the landlord covenants to maintain the main structure (including the roof and exterior walls, chimneys gutters and rainwater pipes) the lower balcony and staircase leading to it, the conducting media used in common and the yard and drying area. It is not clear from the copy lease in the Tribunal's possession who is responsible for the upper balconies. The landlord is expressed in paragraph 5(vii) to be responsible for discharging two freehold rent charges reserved on parts of the site of the property amounting to £12-00 in total.

7. Paragraph 4 (i) imposes on the lessee an obligation to pay one-eighth of the cost incurred by the landlord in insuring the property, and 4(ii) imposes an obligation to pay one-eighth part of the estimated costs and expenses of repair and redecoration.

The Law

8. The application was initially made under section 37 of the Act, which envisages variation of leases by consent of a specified majority of the parties to the lease. However, since it was opposed by the lessees, the matter (and in particular the hearing) proceeded instead upon the basis of section 35(2)(e) of the Act. That section empowers the Tribunal to order the variation of a lease or leases if it or they do not make satisfactory provision for the recovery by one party from another of expenditure incurred or to be incurred by him or on his behalf for the benefit of that other party or a number of persons who

include that other party. Section 35(3A), which expands upon that provision with regard to interest for late payment, does not arise in the instant case.

The Hearing

9. The Tribunal's initial directions in the matter envisaged that the matter might be dealt with by consideration of written representations without a hearing. However, further directions were issued dated 15th December 2006, when it had become apparent that a dispute existed, that provided that a hearing should take place.

10. The tribunal therefore had the benefit of reading the case presented with the initial application on behalf of the Applicant and the response from Mr Cottrell on behalf of himself, Mr & Mrs Davey of flat 5, Mrs Carter of flat 6, Mr Bradfer-Lawrence and Miss Denning of flat 7 and Ms Le Roy Lewis of flat 8. Ms Le Roy Lewis wrote to the Tribunal shortly before the hearing to say that she has now sold her flat. It further had the benefit of seeing witness statements from Mr Cottrell, and from Ms Le Roy Lewis and from Mr & Mrs Davey in support of Mr Cottrell's statement, and a statement in reply from West of England Estate Management Co Ltd ("WEM") on behalf of the Applicant.

11. The summary of the points raised by each party set out below contains both points from the documents referred to above and also points made at the hearing, including those made in response to questions on that occasion. It does not set out to repeat every point that was made, but the details of the submissions (other than those made at the hearing, which are set out here because they do not appear in the documents) are in the Tribunal's papers and, for the avoidance of any doubt, it took all of them into account in reaching its decision.

12. In support of the application, WEM drew attention to two previous cases that had been before differently constituted Tribunals in which they had varied leases of blocks managed by WEM and belonging the Applicant where there had been insufficient provision for management fees. Copies of these decisions were before the Tribunal as well as Mr Cottrell. The ground rent had a low and declining real value, and the landlord would not make available any funds for the management of the estate. They proposed alternative variations whereby the landlord would either be entitled to recover the reasonable costs of management or alternatively a fixed fee of £150 per flat. That was derived from the view they took that a proper fee for managing these flats would be £1330 plus VAT and surveyors' fees, but accepted a small reduction from the market rate to a total of £1200 plus those items.

13. It was common practice in leases to allow for the appointment and remuneration of managing agents. Of 105 blocks that WEM had under management the leases in only three (those previously before the Tribunal and those at the property) did not. The cost of management was such that, bearing in mind the small net income produced by the ground rents there was no

incentive, other than the contractual relationship created by the leases, for the landlord to continue to perform his management functions in future years. Good management was necessary to maintain the market value of the lessees' respective interests in their flats, and only by such an amendment as that now proposed could its continuance be ensured.

14. Mr Cottrell said that keystone of the Respondents' argument was that the test to be satisfied was that of 'reasonable necessity' rather than desirability. He offered no authority for this proposition but submitted that it was inherent in the wording of section 35(2) of the Act. Section 35 (2) (e) spoke of the recovery of expenditure incurred for the benefit of the other party, but there was no necessity to manage through a managing agent. These were very easy flats to manage. They required little by way of maintenance because of their nature and construction, and because the leases placed relatively fewer demands on the landlord than may be the case in other more complicated blocks.

15. These leases had operated very well through forty years, and there was no reason to suppose that they would not continue to do so. The lessees already paid the cost of supplying the services that the lease required. He accepted that the fact that the property has a flat roof added to the management requirement, but said that essentially this is a simple property to manage. The risk that a landlord would not carry out work because he was unpaid to do it was much less in the case of a property like this. The lessees had bought on the basis of a lease that required no management fee, and that would have affected their view of the price they were prepared to pay.

16. Mr Perry in reply said that the flat roof did add to the cost of management of this building. He accepted that there was no plant and there were few unusual features of construction but the maintenance obligation continued to exist. There should not be a point at which a management fee commenced to be payable as he thought Mr Cottrell was suggesting, and informal arrangements of the sort that Mr Cottrell intimated might be entered into were dangerous in that they worked only as long as all the lessees (whose make-up changed from time to time) continued to accept them. He suggested that a reasonable fee should be recoverable, and put that at present at £150 per flat. He did not agree that a reference to a "reasonable" fee amounted to an invitation to dispute.

17. Upon the question of any potential payment of compensation, Mr Cottrell said that anyone buying here would be aware that management requirements were at the low end of the scale that might apply to blocks of flats. Any change in the arrangements would have an effect on the capital value of their flats. He suggested that in a 5% environment such as that ruling at present a starting point for measuring any compensation might be twenty years purchase of the management fee.

18. Mr Perry replied that his clients say the lease is defective because it makes no provision for management fees. The proper management charge would not result in a high service charge cost overall, and it was that overall cost that might, if it rose too far, have an effect on value. There was no reason to

suppose that a landlord would continue to manage indefinitely for the sake of the gross income of £67-20 produced by the ground rents. Prudent purchasers should, and intending mortgages would in today's market, look for provisions that would ensure continuing management at reasonable cost.

Determination

19. The Tribunal accepted Mr Cottrell's contention that the decisions in the two previous cases referred to by the Applicant are not binding upon it. They were arrived at in respect of different properties and on different facts. It was for the Tribunal to determine the present case on the facts and the evidence before it.

20. It was plain that section 37 of the Act, on which the application was originally based has no application here because there is no majority of any sort amongst the parties for the changes proposed. The matter might therefore proceed (as had been envisaged at the hearing) under section 35 (2) (e) or not at all. That being so the Tribunal had two issues to decide. The first of those was whether or not the leases as they presently stood made satisfactory provision for the recovery by one party of expenditure incurred or to be incurred by him for the benefit of the other party. If they did not, then it had to decide whether or not there should be any amendment to them, whether in one of the ways proposed in the application or in some other manner, and whether or not in such a case any question of compensation might arise if such a variation may prejudice any party, or indeed whether the provisions of section 38(6) of the Act would prevent such a variation in the event of any prejudice.

21. It is common ground that the leases lack any provision for the remuneration of whoever from time to time manages the property. Mr Cottrell says that this is a very straightforward property to manage by comparison with other blocks where, for example, issues of maintenance of plant and machinery or issues of employment might arise, and the Tribunal agreed with him that in those terms that is so.

22. It bore in mind however that several (though by no means all) of the matters listed by the Applicant in a schedule of management tasks supplied with the application remained relevant. They included the need to budget, to account in accordance with increasingly demanding statutory requirements, compliance with FSA regulations, ensuring that the insurance was on foot and that premiums and cover were appropriate, site inspection, compliance with various statutory regulations relating to the building and to services to it, and correspondence. Each of those and indeed some other tasks such as that relating to section 20 notices are essential to the management of the property, and each bears its attendant cost. Mr Perry submitted that the fact that a number of the lessees underlet their flats tended to add to the burden of management. As the leases stand, the landlord bears all these costs.

23. There was some discussion whether or not the existence of a flat roof added to the management tasks. The Tribunal accepted that flat roofs do tend to require more maintenance than pitched ones, and more regular replacement over a period of twenty-five years at the very most.

24. Mr Cottrell said that the test that the Tribunal must apply in deciding whether or not the lease should be varied is that of reasonable necessity and derived that proposition from the wording of section 35(2)(e) of the Act. The Tribunal saw no reason to depart from the wording that Parliament has supplied, that is to say whether the leases make satisfactory provision for the recovery of expenditure, in this case incurred by the Applicant for the benefit of the Respondents. There is no provision in these leases for the recovery of any costs of management, so that there is little difficulty in holding that they do not make satisfactory provision for its recovery.

25. As Mr Cottrell rightly pointed out, there is no doubt that a provision for the recovery of those sums would benefit the Applicant, which presently bears the cost of them itself. The Respondent's reply through Mr Perry was that because the income from this block is so very low (the Tribunal calculated that it is a net sum of £55-20 after allowing for payment of the freehold rent charges) there is no practical incentive (other than the purely contractual one) for any landlord to manage, and that there is accordingly a risk that the building may at some future date be less well looked-after than is presently the case. Mr Cottrell countered that by saying that this is a building that largely looks after itself.

26. The Tribunal concluded that the cost of management is incurred for the benefit of the Respondents in this case. Although this is not a very difficult building to manage by comparison with some, nonetheless all the tasks associated with its insurance and maintenance must be carried out properly and all the infrastructure requirements of its maintenance, some of which are listed in paragraph 22 must be undertaken. It is in the interests of the Respondents that this should be done in order to maintain the value of their investment as well as the amenities of the property. The Tribunal accepted too that the level of income engendered by the property is such that it did present a risk of future neglect. Accordingly, in its judgement, the power to vary the lease contained in section 35(2(e) of the Act had been engaged in the terms set out in paragraph 20 above.

27. Mr Cottrell argued against a provision for 'reasonable' costs of management. He said that was a recipe for further litigation. Mr Perry suggested that a reasonable fee for managing the property at present may be £150 per flat plus VAT. He added that if asked to quote for that work in the open market he would in fact look for a total fee of £1330 plus VAT rather than the £1200 plus VAT that the figure he had put forward would produce.

28. The Tribunal bore in mind that the whole of the legislation and preceding case law surrounding the present law relating to service charges centres upon the concept of what is reasonable so that it did not find Mr Cottrell's submission on that aspect entirely convincing. On the other hand it felt that a sum of £150 plus VAT per flat for general management was too high here, and that £120 per flat, a figure used in the more recent of the two cases put before it, was more appropriate to a building of this simplicity. In order to place some control upon that aspect it concluded that it preferred presently to use the

second of the drafts before it, namely that which referred to a fixed sum despite the fact that that will probably mean another application to it in due course.

29. The Tribunal accepted that where major works are required, and it will be necessary to draw up a specification and perhaps undertake supervision, it is reasonable that the landlord should be able to recover the reasonable fees of a surveyor appointed for those purposes. In its judgement that is for the benefit of the Respondents in order to ensure that the work is properly specified, quoted for and supervised. It had in mind particularly that such steps will be necessary whenever the roof is replaced.

30. Mr Cottrell observed to the Tribunal that the Respondents may wish at a future time to undertake the management of the block themselves. It remarks in passing that whether that is done by means of exercise of right to manage or by enfranchisement or even by agreement, expenses of management will arise, and are likely to become more demanding as the remaining parts of the Commonhold & Leasehold Reform Act 2002 come into force. It slightly amended the draft submitted to it with a view to ensuring that any manager or company engaged in managing the block after such events may have occurred (and that may of course be a company controlled by some or all of the residents) will also be able to recover his or its expenses.

31. Finally, the Tribunal concluded that this is not a case where compensation is appropriate. The variations are for the benefit of the Respondents for at least two reasons. First they ensure the future proper management of the property, and second the fact that they do so is likely, as Mr Perry suggested, to make these leases more acceptable to potential mortgagees, and thus to make the Respondents' properties more marketable. The additional cost to the Respondents in the Tribunal's judgement is more or less balanced out by the advantages that the variation will give to them in the circumstances that now exist.

32. Whilst the Tribunal found Mr Cottrell's argument that a prospective buyer would add to his bid because there were no management costs attractive in theory, it was unable to accept it in practice. First, in its experience most potential purchasers (Mr Cottrell with his particular dual qualifications both as a surveyor and a barrister may well be an exception) do not make such detailed analyses when making an offer in the open market. Secondly, a sophisticated purchaser such as he describes may well agree with the Tribunal that a lease varied as the Tribunal has ordered better protects his investment for the reasons advanced above.

Robert Long
Chairman
9th February 2007