SOUTHERN RENT ASSESSMENT PANEL AND

LEASEHOLD VALUATION TRIBUNAL

Case No: CHI/24UP/LAM/2006/0007

IN THE MATTER OF THE LANDLORD AND TENANT ACTS 1985 AND 1987 AND IN THE MATTER OF MEON GARDENS, CHURCH ROAD, SWANMORE, HAMPSHIRE SO32 2TN ("the Premises")

BETWEEN:

Miss BRENDA COLWELL AND OTHER LESSEES OF THE PREMISES	APPLICANTS
AND	
LONGMINT LTD	RESPONDENT

TRIBUNAL: Mr D AGNEW LLB, LLM (Chairman)
Mr P D TURNER-POWELL FRICS
Mrs M PHILLIPS J.P.

DATE: 1st December 2006

REASONS

1. The Application

1.1 Miss Colwell of Flat 12 of the Premises applied to the Tribunal under Section 24 of the Landlord and Tenant Act 1987 (the 1987 Act) for the appointment of a manager in respect of the Premises. Her application was dated 6th September 2006 but she asked the Tribunal office to delay issuing the application until after the date specified in her "Section 22 notice" (i.e. the notice required by S.22 of the 1987 Act) as

the date by which the Landlord was to remedy the matters set out in the notice.

1.2 In her application Miss Colwell asked the Tribunal to make an order under Section 20C of the Landlord and Tenant Act 1985 ("the 1985 Act") that the Landlord's costs of these proceedings should not be added to future service charge demands.

2. The Background

2.1 The background to this case is important for the reasons which will become apparent later in these reasons.

2.2 In 2005 Miss Colwell and certain other lessees of the Premises applied to the Tribunal for a determination as to the reasonableness of service charges sought by the Respondent for the service charge years 2001 to 2005 inclusive. This resulted in a determination by the Tribunal dated 22nd December 2005 that a sum in excess of £27,000 had been charged to the tenants unreasonably over this period of time and should be repaid to the lessees.

2.3 The Landlord sought permission to appeal this order. Permission was refused by the Tribunal. The Landlord applied to the Lands Tribunal for permission to appeal. This application was refused by His Honour Judge Rich.

2.4 The parties were encouraged by the Tribunal to try to reach agreement as to who should be repaid and the amount that they should be paid. The parties could not agree and it was necessary for a further hearing before the Tribunal to be arranged in order for the matter to be

resolved. As a result of this hearing a schedule of payments was drawn up by the Tribunal and appended to its decision dated 12th July 2006.

3. The Grounds of the Application for Appointment of Manager

3.1 The Applicants' grounds for the appointment of a manager by the Tribunal were set out in the Section 22 notice dated 5th September 2006. They were as follows:-

i) that the Landlord has made unreasonable service and administration charges for the years 2001 – 2005 and that it is just and convenient for the order to be made.

ii) that the Landlord has proposed unreasonable service and administration charges for 2006 and that it is just and convenient to make the order.

iii) that other circumstances exist making it just and convenient for the appointment to be made.

3.2 The matters relied on by the lessees in support of these grounds were:-

(i) the fact that the Tribunal had made a determination that the service charge demands for 2001-2005 were unreasonable

(ii) that the budget for 2006 contained cost items that were unreasonably high

(iii) that in view of the history of the current managing agents' management of the Premises the lessees had lost all trust and faith in them and this constituted "other circumstances making it just and convenient" for an order to be made.

4. The Proposed Manager

4.1 The lessees put forward Mr Martyn Brown BSc MRICS as their preferred choice of manager should the Tribunal make the order sought.

5. Directions

5.1 On 27th September 2006 a procedural chairman of the Tribunal gave certain directions for the future conduct of the case so that it could be property prepared for hearing.

5.2 One such direction was for the Respondent to send to the Tribunal and the Applicants by 30th October 2006 a written statement stating which matters contained in the Application were agreed and which were disputed. Whilst the Respondent through its solicitors and managing agent appeared at the hearing to oppose the Application no such written statement had been lodged by it. It was not known therefore until the hearing whether or not the Respondent opposed the Application and if so on what grounds.

6. The Hearing

6.1 This took place at Wells Place Centre, Eastleigh on 1st December 2006. Prior to the hearing the Tribunal inspected the Premises. Present at the hearing were:-

for the Applicants:	Miss Colwell	(Flat 12)
	Mr Stacey	(Flat 8)
	Mr Ansty	(Flat 11)
and	Mr Nash	(Flat 20)

and for the Respondent: Ms Kate Rosser, solicitor for Longmint Ltd
Ms Sally Glover, Property Manager for Haywards Property Services, the current managing Agents

6.2 Miss Colwell's case was set out in her Application and a statement dated 24th October 2006. She brought certain aspects of her statement to the Tribunal's attention and was cross examined by Ms Rosser.

6.3 Ms Rosser then made an application to the Tribunal that the Application be dismissed. The points made by Ms Rosser in her application were as follows:-

(a) The applicants' Section 22 notice was dated 5th September 2006. It stated that if the Respondent remedied the matters set out in the Fourth Schedule to the notice within 14 days then no application would be made to the Tribunal. Her first submission was that 14 days was an unreasonable period of time in which to expect the Respondent to respond.

(b) Her next submission was that at the foot of the Fourth Schedule to the Section 22 notice the documents requested therein were required to be supplied by the Respondent by 18th September 2006. This was only 13 days after the date of the notice which was even more unreasonable than the 14 days specified in the notice itself and was inconsistent with the 14 days specified in the notice.

(c) Ms Rosser then submitted that the Respondent had complied with the requirement of the Section 22 notice and that this had been confirmed by a letter written by Miss Colwell to the Tribunal office dated 22nd September 2006. This letter stated:-

"Following our serving the Preliminary Notice - Section 22, to our Landlords Longmint, in which we requested 4 issues to be resolved, they have in fact now provided us with the relevant paperwork that was requested.

Unfortunately, as was the case when we applied to you last year re: their service charges, this paperwork has only now been provided following our informing them of our intention to apply to the Leasehold Valuation Tribunal for a change of Management Company."

Ms Rosser's submission was that this was an acceptance that the Section 22 notice had been complied with and that the matters complained of had been remedied and so as stated in the notice itself, the Application to the Tribunal should not have been made.

6.4.1 In response Miss Colwell accepted that she should not have submitted her application to the Tribunal until the 14 days for compliance with the notice had expired but she contended that this had been rectified by her asking the Tribunal not to issue the Application until after receipt of her letter to the Tribunal of 22nd September 2006.

6.4.2 Miss Colwell considered that 14 days was a reasonable period for the Respondent to produce the documentation sought.

6.4.3 Miss Colwell did say that she accepted that the required documentation had been provided within the time stipulated but had not meant her notice to say that if the matters capable of remedy were remedied within the period that the other grounds of her application which were not remediable would not be proceeded with. She had not appreciated as a layman that the notice might have that effect.

7. The Law

7.1 By Section 24(1) of the 1987 Act:-

"A Leasehold Valuation Tribunal may, on application for an order under this section ... appoint a manager to carry out in relation to the premises ...

a) such functions in connection with the management of the premises, or

b) such function of a receiver, or both as the tribunal thinks fit."

7.2 Section 24(2) of the 1987 Act states;-

"A Leasehold Valuation Tribunal may only make an order under this section in the following circumstances, namely –

a) ...

ab) where the tribunal is satisfied -

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

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

ac) where the tribunal is satisfied -

i) that any relevant person 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 the order in all the

circumstances of the case, or

b) Where the tribunal is satisfied that other circumstances exist which make it just and convenient for the order to be made."

7.3 Section 22(1) of the 1987 Act provides that

"Before an application for an order under Section 24 is made in respect of any premises ... by a tenant of a flat contained in those premises, a notice under this section must (...) be served by the tenant on –

i) the landlord and

ii) any person (other than the landlord) by whom obligations relating to the management of the premises or any part of them are owed to the tenant under his tenancy"

Section 22(2) sets out what the notice must contain.

8. The Tribunal's findings

8.1 The Tribunal made the following findings:-

i) the Section 22 notice served by the Applicant was a valid notice in that it complied with the requirements of Section 22(2) of the 1987 Act.

ii) whilst the Application to the Tribunal was dated only the day after the Section 22 notice (6th September 2006) the Application did not fall foul of the 1987 Act in that the Applicant had asked that the Application not be issued (and therefore was not "made") until after the service of the Section 22 notice for the matters specified in the Fourth Schedule thereto to be remedied had elapsed.

iii) the operative part of the notice requiring compliance by the landlord was the requirement for the requested documentation to be provided within 14 days. Bearing in mind the nature of the documentation

sought the Tribunal considered 14 days to be a reasonable period for compliance.

iv) notwithstanding the content of the Applicant's letter to the Tribunal of 22nd September 2006 and her apparent acceptance at the hearing that the Respondent had complied with the Schedule 4 requirements within the time specified, the Tribunal found that this was, in fact, not the case. By paragraph 11.2 of the Fourth Schedule to the Section 22 notice the Applicants had asked the Respondent "to provide an up-to-date estimate of the charges for the year 2006 with receipts for all expenditure from 1st January 2006." What the Respondent provided by way of a letter from its managing agents dated 15th September 2006, was a list of expenditure since 1st January 2006 together with a copy of the invoices in support of that list of expenditure. This could not be described as "an up-to-date estimate of the charges for the year 2006". This called for a revised and updated budget for the year 1st January 2006 to 31st December 2006. The Tribunal found that a draft budget for 2006 had been sent out, without prior consultation with the tenants, in February 2006. By September 2006, when the Section 22 notice was served, this draft budget had been superseded by events. The main change was that the resident caretaker, for whose salary a charge of £14,500 had been made in the draft budget, had retired at the end of June 2006 and had not been replaced. This alone would justify a re-working of the budget. The Tribunal accepted Miss Colwell's evidence that a second budget for 2006 was not received by the lessees until a date in October 2006, although no party was able to produce written

confirmation of the precise date. It must, however, have been after 24th September 2006 because on that date Miss Colwell submitted a statement to the Tribunal in which she stated: "We still await sight of the agreed budget for 2006 and only have the Draft Budget document (Appendix 3)". This was the document submitted to the lessees in February 2006 referred to above.

The Tribunal found, therefore, that the item capable of remedy contained in Schedule 4 to the Section 22 notice, namely the provision of an "up-to-date estimate of the charges for the year 2006" (in other words an up-to-date budget for that year) was not provided by the landlord before the date when the application was issued and that the Applicants were therefore entitled to make their Application.

8.2 Having decided that the Application could proceed to a determination the Tribunal then had to decide whether or not the Applicants had succeeded in showing that there were sufficient grounds for an order to be made appointing a manager. In that respect, the Tribunal made the following findings:-

a) It was a fact that in 2005 the Tribunal had found that certain service charges levied between 2001 and 2005 were unreasonable and a substantial refund had been ordered and paid.

b) There had been no consultation with the lessees before the draft budget for 2006 had been produced, contrary to the promise given to the Tribunal by the managing agent responsible at the time for Meon Gardens during the course of the hearing in December 2005.

c) There had been three different people responsible for the

management of Meon Gardens within the space of one year resulting in lack of continuity and the lessees having to explain matters to a succession of managers.

d) The draft budget for 2006 was not received by the lessees until two months into the year.

e) The Tribunal accepted Miss Colwell's evidence that when she discussed the draft budget with the current managing agent, Sally Glover, that she was not able to answer all her queries, that she would have to find out and report back to Miss Colwell but that had not happened.

f) The budget proper was not received until October 2006, ten months into the year. It was headed for the period 1st June 2006 to 31st December 2006. This was confusing to the lessees who took this to be an additional demand for money to the draft budget they had received in February.

g) The Tribunal found that this budget of October 2006 had not been compiled with any care in that some items were either unrealistic or did not bear relation to known facts. For example, Buildings insurance was shown at £3,720 whereas the landlord had already paid £4,133.09 for insurance by March 2006. £800 has been provided for gardening whereas the actual cost is probably less than one half of that sum. The rent for a garage was included in the service charge budget even though the Tribunal in 2005 had found that this was not a service charge item and should be separately charged. Figures for caretaker's electricity and water rates had not been adjusted even though there

had been no resident caretaker since the end of June 2006.

h) The Tribunal accepted that the lessees had never received a statement from the managing agents containing details of contributions for services charges received, listing the expenditure for the year and showing the surplus or deficit for the year and any accumulated surplus. The lessees found it difficult to believe that their payments on account apparently matched expenditure precisely in every year but they had no idea as to what may have happened to any surplus.

i) The draft budget of February 2006 contained an item for caretaker's salary of £14,500 whereas from the list of expenditure January to June 2006 supplied by the landlord's managing agent in September 2006 it is evident that the caretaker was being paid £516 or £517 per month, or £6192 or £6204 per annum. As this draft budget was used to calculate the monthly payment on account of service charges to be paid by the lessees, the resulting monthly payments were higher than they need have been.

j) The Tribunal found that as a result of the above catalogue of unsatisfactory aspects to the management of Meon Gardens by the landlord and/or its managing agents, some of which would have been in breach of the Service Charge Residential Management Code there had been a breakdown of trust on the part of the lessees in respect of that management and that this was understandable.

k) The Tribunal therefore found that the Applicants had made out their case for the appointment by the Tribunal of a manager and receiver for the Premises and found that it was just and convenient to so order.

9. The Appointment

9.1 The Tribunal had the opportunity of asking Mr Martyn Brown questions concerning his experience and understanding of the role of a Tribunal appointed manager and were satisfied that he was a suitable person to appoint for an initial period of two years and would so order.

10. The Section 20C Application

10.1 The Applicants having succeeded in their Application the Tribunal found that it would be wrong for the Landlord to be able to recoup its costs of the Tribunal proceedings from the lessees by way of future service charges and therefore decided that an order under Section 20C of the 1985 Act would be made.

Dated this 11th day of December 2006

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D. Agnew LLB LLM
Chairman

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Mrs M PHILLIPS J.P.

DATE: 1st December 2006

ORDER

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1. The Tribunal appoints Mr Martyn Brown BSc MRICS of The Old Manor House, Wickham Road, Fareham, Hampshire to be the receiver and manager of the Premises for an initial period of two years with effect from 1st April 2007.
2. He 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 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) in accordance with the duties of a manager set out in the Service Charge Residential Management Code published by the Secretary of State pursuant to Section 87 of the Leasehold Reform Housing and Urban Development Act 1993.

3. He shall receive all sums whether by way of ground rent insurance premiums payment of service charges or otherwise arising under the said leases.

4. He shall account forthwith to the freeholder for the time being of the property for the payments of ground rent received by him and shall apply the remaining amounts received by him (other than his fees as specified hereafter) in the performance of the covenants on the part of the landlord contained in the said leases.

5. He 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.

6. He shall be entitled to the following remuneration (which for the avoidance of doubt shall be recoverable as part of the service charge), namely:-

a) a basic annual fee of £140 plus VAT per flat for the first year and thereafter as negotiated between the manager and the lessees, for performing the duties set out in his firm's standard management services attached hereto

b) in the case of major works a fee of 5% plus VAT of the cost of the works, or 10% plus VAT where statutory consultation procedures are required.

7. The Respondent shall take all necessary steps to ensure that the existing managing agents pass to Mr Brown all details of accounts and all relevant papers which he requires in a timely manner to ensure a smooth and efficient handover of the manager's role at 1st April 2007 for the benefit of the freeholder and the lessees.

8. This order shall remain in force until 1st April 2009 or until varied or revoked by further order of the Tribunal whichever shall be the sooner.

9. The Applicant, Respondent and the Manager shall each have permission to apply to the Tribunal for further orders.

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D Agnew LLB LLM Chairman