

SOUTHERN RENT ASSESSMENT PANEL
LEASEHOLD VALUATION TRIBUNAL

CHI/24UJ/LVM/2007/0001

Decision of the Leasehold Valuation Tribunal on application made under Section 24 of the Landlord and Tenant Act 1987

Applicants:	R J Phillips & Others
First Respondent	C Beamish FRICS
Second Respondent	W F Stone
Re:	Admirals Court, Quay Road, Lymington
Date of Application	13 th February 2007
Date of Inspection	25th September 2007
Date of Hearing	25 th September 2007
Venue	Council Offices, Lyndhurst
Appearances for Applicant	In person
Appearances for	
First Respondent	In person
Second Respondent	N Andrews, Solicitor, Coles Miller

Members of the Leasehold Valuation Tribunal

	M J Greenleaves	Lawyer Chairman
	J Mills	Lay Member
Date of Decision	5 th October 2007	

Order Part 1

Order for Variation of Appointment of Manger

1. The Tribunal, being satisfied on the matters set out in Section 24 (9A) of the Act, with effect from the date of this decision varies the appointment of Christopher Beamish FRICS as Manager of the Property known as Admirals Court, Quay Road, Lymington so that it shall continue from 1st November 2007 on the following terms:
2. Any reference to the Second Respondent in this Order is a reference to the Second Respondent or other freeholder(s) of the Property from time to time.
3. The Manager shall manage the Property (PROVIDED THAT in respect of any parts of the Property other than Flats 1 to 9, this shall apply only to the repair maintenance and renewal of structural parts and to buildings insurance) in accordance with:
 - a. the respective obligations of the Second Respondent and the lessees under the various leases ("the leases") by which Flats 1 to 9 are demised and, in particular, but without prejudice to the generality of the foregoing, with regard to the maintenance, repair, decoration and services to and insurance of the Property
 - b. In accordance with the duties of a manager set out in the latest edition for the time being of the 'Service Charge' Residential Management Code (the Code) published by the Royal Institution of Chartered Surveyors 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 and any money receivable by him in respect of any other parts of the Property in accordance with the terms of this Order.
5. So that he shall have the requisite funds from time to time 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 the Second Respondent shall meet any shortfall in the combined recoverable service charges and insurance premiums, namely
 - a. Invoice the Second Respondent for 57.5% of the service charge expenditure payable in respect of the Property and the Manager shall be entitled to recover from the Second Respondent any balance of the amount of any such invoice unpaid for a period of 44 days after the date of the Manager's invoice
 - b. If any of the lessees of Flats 1 to 9 or the Second Respondent has not paid the Manager within 44 days of the date of the invoice, the Manager shall be entitled to charge any such lessee or Second Respondent, as the case may be,
 - i. interest on the outstanding amount at 4% over the Base Rate of the Bank with which the Manager holds service charge funds
 - ii. reasonable charges including court fees, costs on summons and any other costs awarded by the Court for action required to recover any outstanding amount
6. The Manager shall account forthwith to the Second Respondent for payments of ground rent received by him in respect of Flats 1 to 9 and shall apply the remaining amounts received by him (subject as mentioned in this paragraph and in paragraph 5) other than those representing his fees and expenses hereby specified) in the performance of the Second Respondent's covenants contained in the leases.
7. The Manager shall report to the Second 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 Second

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. The Manager shall make arrangements for:
 - a. The valuation or re-valuation of the Property for insurance purposes from time to time to ensure it is fully covered in accordance with the provisions of the leases, that valuation identifying
 - i. the insurance value of (a) the residential parts (which for clarification consist at present of flats 1-9) and (b) the commercial parts and Flat 10 of the Property separately
 - ii. how the total premiums payable for the Property should be apportioned between (a) the residential parts (which for clarification consist at present of flats 1-9) and (b) the commercial parts and Flat 10 of the Property. The cost of any insurance valuation shall be recoverable by the Manager under paragraph 5.
9. The Manager shall be entitled to the following remuneration:
 - a. A basic annual fee of £2,600 for performing the duties set out in paragraph 2,5 of the Code. This fee may be increased on 1st September 2008 and every anniversary thereafter by such percentage of the net fee as does not exceed 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.
 - b. 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
 - c. In the case of works of a net cost of greater than £250 for any one leaseholder, 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 PROVIDED THAT the Manager may incur and charge in addition to the lessees and the Second Respondent for the cost of obtaining professional advice on any matter which is not within the usual expertise of an experienced Chartered Surveyor
 - d. Value Added Tax shall be payable where appropriate in addition to the remuneration mentioned above.
10. This Order is not limited in time

Dated 5th October 2007.

Signed



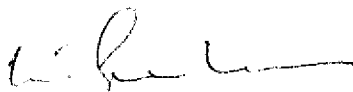
Chairman

Order Part 2

The Tribunal makes an Order under Section 20C of the Landlord and Tenant Act 1985 that the Second Respondent's costs incurred in connection with this application are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge.

Dated 5th October 2007.

Signed



Chairman

Reasons

Introduction

10. This was an application made by the Applicants on 13th February 2007 under Section 24 of the Landlord and Tenant Act 1987 ("the Act") in respect of Admirals Court, Lymington (the Property) for (a) the extension of the term of the appointment of Manager and (b) other variations of the terms of that appointment.
11. Mr Beamish, the First Respondent (the Manager), had been appointed Manager of Admirals Court by the Leasehold Valuation Tribunal by order dated 11th March 2005 expiring on 31st March 2007. At a hearing on 27th March 2007 the Tribunal extended the term of appointment of Mr Beamish as Manager until 30th September 2007 otherwise on the same terms
12. At a further hearing on 20th August 2007, the Tribunal ordered on an interim basis that the Orders dated 11th March 2005 and 27th March 2007 be varied so that Mr Beamish's term of appointment should be extended until 31st December 2007, but otherwise on the same terms as were ordered on 11th March 2005.

Inspection

13. The Tribunal inspected the Property in the presence of the Applicants and Mr Andrews. The Tribunal inspected the garaged spaces and the internal common parts and also Flats 1,5, 6, 7 and 9.
14. The Property is a substantial development basically comprised of commercial units on the ground floor and 9 original flats on the upper floors (with garaged car spaces on the ground floor). The development also originally included a restaurant on the first and second floor, but it has now been converted into one dwelling unit known as Flat 10 on the second floor and an office on the first floor. Other than for structural matters and buildings insurance, the commercial units and Flat 10 are managed by Mr Tubbs of Cowling & West, for the Second Respondent. Flats 1 to 9 and structural matters affecting them have hitherto been managed by the Manager under the previous Orders.
15. The development as a whole appears to be in reasonably good condition for its age and character.

Hearing

16. The same day a hearing was held which was attended by the parties as noted above. In addition to the documents contained in the Bundle, the Tribunal heard evidence from Mr Phillips, Mr Beamish and Mr Andrews.
17. Mr Phillips said that
 - a. the Applicants wanted Mr Beamish to continue as Manager for a further term; he had made good progress – a maintenance programme had been prepared and works identified but there was not yet agreement with the Second Respondent on the works to be done. There was also concern about the Second Respondent providing funds under the Order to enable the Manger to instruct works; on occasions delay in the Second Respondent paying had been funded by the Applicants.
 - b. The insurers would not apportion the insurance valuation or premium between the residential and commercial units as required in the original order dated 11 March 2005
 - c. The applicants agreed Mr Beamish's proposal as to his fees for the future
 - d. The Applicants requested the Manager's term be extended for 5 years.
 - e. They would like the commercial units removed from the Manager Order

- f. They would like Flat 10 to be included in the Manager Order but would not be willing for this to be done if that increased the proportion of service charge that they would have to pay.
- g. In reply to Mr Andrews he said:
 - i. He did not accept that much had been resolved since Mr Beamish's appointment as manager
 - ii. His letter to the Tribunal of 12th May 2006 had not been disclosed to the Tribunal before making this current application as no progress was being made
 - iii. The letter from the Second Respondent to Mr Beamish dated 8th February 2006 was the first time the Applicants had ever heard from the Second Respondent.
 - iv. All they wanted was for the Manager to be able to get on with his duties.

18. Mr Beamish said that:

- a. He had had to commence court proceedings against the Second Respondent for non-payment of charges in October 2005. He did not have any funds to cover those proceedings and the applicants had had to subsidise them.
- b. There was difficulty in complying with the existing Order concerning insurance; he does not know for how much to insure so did not know whether it was fully insured; he had used the historical apportionment between commercial and residential of the whole building value; he would like to arrange an insurance valuation of the residential and commercial units.
- c. He had made a written submission concerning the fees payable to him under the existing Order and his proposals for the future. In particular he emphasised that fees of the present level applied normally to cases relating only to residential units. That is not the case here because the Second Respondent retains commercial units and also has to contribute to the cost of service charge work and therefore has a large influence on how the building is managed. This means that unless he gets agreement to work from the Second Respondent before the work is done, it is likely to be challenged so he would end up funding it. The Second Respondent had therefore been able to cause delay in work being done. The role of Manager for this Property required considerable extra consultation and meetings with both the lessees and the Second Respondent.
- d. In reply to Mr Andrews, he said that
 - i. he did not provide the Second Respondent with a copy of the "Sealey" Report as the Second Respondent had not paid his share for it, but provided a copy as soon as he had paid. He accepted that actually the Second Respondent had paid in November 2005 but he had not provided the Second Respondent with a copy until January 2006.
 - ii. He accepted there had been a meeting between him and Mr Tubbs on 2nd February 2006 when some works were agreed. There had definitely been a dialogue with Mr Tubbs which had been helpful but then there had been long delays. These continued: he had sent Mr Tubbs a revised work schedule on 1st September 2007 and he was still awaiting replies.
 - iii. He accepted that he had agreed to his original appointment
 - iv. Regarding fees, he had agreed the present fees on his appointment, having previously sought higher fees
 - v. He had been shocked by the unbelievable amount of work with which he was actually faced as a result of his appointment to manage the Property

- vi. He did not accept that £150 per unit was the appropriate fee level for this Property for the reasons he had already mentioned
 - vii. He was not qualified to make an insurance valuation himself
 - viii. He did not accept there was any duplication between the role of Manager/Receiver and that of managing agent.
- e. In reply to the Tribunal, he said:
- i. He had taken over the Second Respondent's insurance but did not know when the cover had been reviewed; he had insurance certificates from the previous broker and he had calculated the apportionment between the residential and commercial parts from what had previously happened before his appointment
 - ii. He wanted to be paid for the work involved with the present Tribunal application
 - iii. Payment of service charges from the second Respondent are currently up-to-date
 - iv. He invoiced for work once the costs were known
 - v. Works carried out so far after agreement by the Second Respondent were a repair to a light-well roof and other minor work. He could not elaborate as he did not do the day-to-day management himself
 - vi. The work scheduled for 2007 had been agreed in principle and was now going out to tender (he produced a coloured schedule as to the situation on various items)
 - vii. He could not propose an overall cap of 10% for fees for other works to include fees of other professionals involved .
- f. Mr Andrews gave evidence on behalf of the Second Respondent:
- i. He referred to his written submissions
 - ii. He did not accept that an agents' fees are proportionately less per unit for larger blocks or that agents demanded a premium for fees for small blocks of flats
 - iii. His client wanted the fees payable to remain as provided for in the 2005 Order
 - iv. The Second Respondent had not acted unreasonably in relation to the Tribunal application so there were no grounds to award costs against him
 - v. He accepted that the Tribunal was not excluded from ordering payment of fees to a manager for work done by him in connection with a Tribunal application if the Order were to be varied in that respect.
 - vi. While he accepted the proposed variation to the Order would exclude from the Manager's jurisdiction the commercial units other than structure and insurance, he submitted, as he had in writing, that the Tribunal did not have jurisdiction to appoint a Manager affecting the commercial units at all under Section 24 of the Act. He relied on the definition of "tenant" as used in Section 24 and by reference to Section 21 of the Act which defines a "tenant", and submitted that as the commercial units fell within the jurisdiction of Part II of the Landlord and Tenant Act 1954 the 1987 Act did not enable a manager to be appointed in respect of them.
 - vii. He also relied on the case of Cawsand Fort Management Company Limited –v- Stafford which was due to be heard by the Court of Appeal in October 2007 as to the extent of the jurisdiction of the Tribunal to appoint a Manager/Receiver over neighbouring land. For that reason he submitted the

Tribunal should not continue to give a Manager under the act any jurisdiction over the commercial units.

- viii. In respect of the application for the Manager to be able to charge interest on late payment, he submitted there was no basis to do so unless the leases were varied; that there was no case to do so in respect of the Second Respondent's past conduct. He said that requiring the lessees to pay interest similarly would be even-handed but would not overcome his objections
- ix. That the Order should require the Manager simply to insure the whole building
- x. There should be a cap on fees relating to works and Tribunal cost
- xi. The manager's term of appointment should be extended for only 2 years
- xii. In reply to Mr Beamish he said that if another Manager were to be appointed, the new manager would not take another 2 years to "bed down"
- xiii. In reply to Mr Phillips, that although the Applicants did not want a hearing there were matters in dispute which had to be dealt with at a hearing
- xiv. In reply to the Tribunal,
 1. the Manager's fees should remain as provided for in the original Order but they should be reviewed for the commercial units.
 2. He did not know when the insurance arrangements had last been reviewed

Consideration

19. The Tribunal considered all of the case papers and all the evidence and submissions made at the hearing.
20. Although the Tribunal considered that some progress had been made by Mr Beamish in the management of the Property since his appointment in 2005, there are ongoing issues between the parties which necessitate the Manager's term to be extended and his powers to be reviewed.
21. The Tribunal did not find it necessary to decide whether any blame for delays or non-payment should be apportioned, but simply that the very existence of differences continuing since the 2005 Order, was significant evidence that relationships between the parties needed to improve backed with the Manager having appropriate powers and that he be paid reasonable remuneration. The Tribunal hopes that with the Order now made, the Manager will be better able to ensure the proper management of the Property for the benefit of all parties. While the original application and this present application were made by the residential lessees, the Tribunal felt that relationships between all parties could be improved if the Manager could fulfil his duties without undue perceived leaning towards either the Applicants or the Second Respondent. The Second Respondent does, unlike so many other cases, have a very significant interest in the Property and its upkeep to which he makes a significant contribution and the Manager needs to make every effort to be seen to be managing in the interests of all parties.
22. Extent of the Manager's functions over the Property.
 - a. Jurisdiction. The Tribunal considered the submissions made for the Second Respondent. the Tribunal did not accept Mr Andrews' contention that section 21 prevented the Tribunal from making an Order which affected the commercial units. Section 24 enables a tenant of a flat contained in any premises to apply to the Tribunal for the appointment of a manager. The Tribunal found that, in that context, the Section 21 definition of "tenant" only precludes a tenant of premises to which the 1954 Act applies making an application under Section 24. That does not of itself

prevent an appointed manager having responsibilities for the commercial units at the Property.

- b. In relation to the Cawsand case, it may be many months before the court of appeal hands down its decision. The Tribunal decided to apply the law as it is presently understood to be as it considers it essential that the Manager have power, albeit to a limited extent, over the commercial units. It may be that the Cawsand case may in due course decide that the Act does not extend that far in which case the Order now made may need to be reviewed. In the meantime an Order needs to be made and it proceeded accordingly.
- c. The Tribunal reviewed the 2005 Order and considered that in relation to the commercial units it went further than necessary to protect the Applicants. Having considered amendments at the hearing with the parties, the Tribunal made amendments resulting in Paragraphs 3 and 4 of the Order now made.

Interest and costs relating to late payment

23. The Tribunal decided that it was essential to the proper management of the Property that funds for works and service charges should be paid promptly and accordingly that proper provision should be made for sanctions in the event of payment being overdue, whether that be from a lessee or the Second Respondent. Apart from that being equitable, it should obviate the need for any of the Applicants to subsidise the Manager, a step which could prejudice the even-handedness of the Manager. For the same reason, the Tribunal did not provide for any recompense to the lessees for any funding as the Manager had proposed. The Tribunal provided paragraph 5 of the Order accordingly.

Insurance.

24. The Tribunal was concerned that there was no certainty that present insurance arrangements are up-to-date or adequate and that there is presently no independent means of apportioning the premium.
25. It is essential in the interests of all parties that an insurance valuation be obtained and reviewed regularly and also that the valuer should provide expert advice as to how the premium should be apportioned. The Tribunal made the Order in paragraph 8 accordingly.

Manager's Fees

26. The Tribunal accepts the Manager's submission that the circumstances of this case are not usual and that a higher rate of remuneration than normal might be appropriate. The Tribunal noted that Mr Beamish differentiated between the position of Manager/Receiver and managing agent. The Tribunal did consider that there is any significant difference in that a Manager appointed by the Tribunal is empowered to make decisions, while a managing agent might need to consult with his principal. That difference imposes greater responsibility on a Manager and that should be reflected in the fees payable. In addition the mixture of commercial and residential premises and the large role of the Landlord as the majority contributor to service charges made the role of the Manager more difficult. Likewise, if the Manager is also managing commercial units that should be taken into account as it was in the 2005 Order.
27. However, having substantially removed the Manager's jurisdiction over the commercial units as provided in paragraph 3 of the new Order, the Tribunal found that it would be reasonable to provide a fee enhanced over that provided for in 2005, but not to the extent requested by the Manager. The Tribunal considers a basic fee of £2,600 linked to the average earnings index to be reasonable.
28. It follows from the above that the Tribunal did not consider there should be an additional "managing agent's" fee.

Fees for complying with directions or applications to vary or discharge.

29. The Tribunal considers that while it has power to make such an Order, and accepting that Mr Beamish has incurred time on this present application, the time involved has not been

unusual and is part of the consequence of accepting appointment by the Tribunal. The Tribunal does not award any costs and also decided not to make any specific provision in this respect for the future.

Fees for works.

30. The Tribunal accepts that Mr Beamish, like other Chartered Surveyors, may not have expertise on all matters arising from his appointment and therefore in respect of works should, if appropriate, be able to instruct experts. The Tribunal decided to amend the 2005 in that respect but otherwise considered the 2005 Order provision to be appropriate.

Limitation in time of Order.

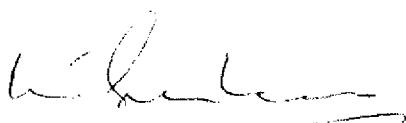
31. The Tribunal noted that all parties asked that the Order be limited in time. While the Tribunal earnestly hopes that relationships between the parties, with the assistance of this Order, will improve, there is as yet not a great deal of progress in that respect. Because the Second Respondent will plainly continue to have a significant interest in the Property, there is every possibility that difficulties may continue into the future. If the Order were to be limited in time, there is a risk that further applications may be needed and time and cost incurred as has happened in respect of this present application. The Tribunal is concerned that that be avoided if possible.

32. It is of course open to any party to apply for discharge of the Order. In considering any such application, that Tribunal would have to be satisfied, inter alia, that discharge would not result in a recurrence of the circumstances which led to this Order being made. It is certainly the hope that all parties will work for their mutual benefit towards achieving that situation so that a Tribunal could favourably consider such an application. However, until that becomes the position, the Tribunal considered it desirable that the Order should continue without time limit.

Limitation of Costs.

33. The Applicants sought an Order preventing the Second Respondent's costs of this application being recovered from them by way of service charge. The Tribunal found that there was no provision in the Applicants' leases which was sufficiently widely drawn to enable the Second Respondent to do so. In case it was wrong about that, the Tribunal made an Order under Section 20C of the Landlord and Tenant Act 1985.

34. The Tribunal made its decisions accordingly.



M J Greenleaves (Chairman)

A Member of the Southern
Leasehold Valuation Tribunal
appointed by the Lord Chancellor