RESIDENTIAL PROPERTY TRIBUNAL SERVICE
SOUTHERN RENT ASSESSMENT PANEL
LEASEHOLD VALUATION TRIBUNAL

Residential Property
TRIBUNAL SERVICE

PRELIMINARY DECISION OF THE LEASEHOLD VALUATION TRIBUNAL

ON AN APPLICATION UNDER SECTION 24 of the LEASEHOLD REFORM HOUSING AND URBAN DEVELOPMENT ACT 1993

Case Number:	CHI/00ML/OCE/2006/0041
Property:	Flats 1-8 Waldegrave Court Westfield Avenue Brighton BN2 8HW
Applicant:	Waldegrave Court Management Co Ltd
Respondent:	David George Rose
Application:	28 April 2006
Directions (Preliminary Hearing):	2 April 2007
Preliminary Hearing:	6 June 2007
Appearances:	For the Applicant: Mr C Davies, Barrister Instructed by James B Bennett & Co, Solicitors Mrs F Brown, Mrs S Cooley, Mr N Ingram, Mrs D Meston, Mrs J Tristram, lessees and members of the Applicant company, in attendance For the Respondent: Mr C Nelson, Solicitor, of ASB Law
Decision:	18 July 2007
Tribunal Members:	Ms J A Talbot MA Mr B H R Simms FRICS MCIArb

Summary of Decision

The Tribunal does not have jurisdiction to proceed with the Application made on 28 April 2006.

Case No. CHI/00ML/OCE/2006/0041

Flats 1- 8, Waldegrave Court, Westfield Avenue, Brighton BN2 8HW

Application

1. This was an Application dated 28 April 2006, made by Waldegrave Court Management Company Limited ("the Company"), pursuant to Section 24 of the Leasehold Reform and Urban Development Act 1993 ("the 1993 Act") for collective enfranchisement.

2. Directions were issued on 2 April 2007. Direction 1 stated: "these further directions supersede those dated 2 February 2007, as the Respondent has contended that the Tribunal does not have jurisdiction in the matter". The Directions further provided for the parties to produce written Statements of Case together with documents upon which they intended to rely. Both parties complied with the Directions.

3. Accordingly an oral Preliminary Hearing to decide the question of the Tribunal's jurisdiction was set down for 6 June 2007. The Tribunal had to decide whether or not the Tribunal was able to proceed with the Application dated 28 April 2006 for collective enfranchisement.

4. A hearing took place on 6 June 2007 in Hove. The Applicant was represented by Mr C Davies, a barrister. The Respondent was represented by Mr C Nelson, a solicitor. Various lessees and members of the Applicant company also attended.

Background Facts

5. By letter dated 15 March 2006, James B Bennett & Co ("JBB"), solicitors for the Applicant, served on the Respondent an Initial Notice pursuant to Section 13 of the 1993 Act dated 24 February 2006 ("the first Notice"). That Notice failed to specify a date for service by the reversioner of a Counter-Notice under Section 21.

6. On 28 April 2006 JBB applied by letter to the Leasehold Valuation Tribunal to "deal with the matter in accordance with the Initial Notice request by the tenants". The letter further stated that the landlord had "failed to file a Counter Notice as required". On 9 May 2006 the LVT office advised the Respondent that an Application had been received.

7. The Respondent passed the first Notice and Application to his solicitors, ASB Law ("ASB"). On 12 May 2006 ASB informed JBB that they considered the first Notice to be invalid. ASB also served a Counter Notice dated 16 May 2006 not admitting the Applicant's right to enfranchise on the grounds that the first Notice did not comply with Section 13 of the 1993 Act by virtue of the omission mentioned above and other alleged deficiencies (which are not directly relevant to this determination).

8. ASB also wrote to the LVT office on 17 May 2006 to the effect that the first Notice was invalid, that any application under Section 25 of the Act should be made to the County Court. The LVT office indicated that any dispute as to the validity of the first Notice should be made to the County Court and asked both solicitors to keep it informed of any such application. No application was in fact made. JBB made no further contact with the LVT at that time.

9. JBB did not expressly admit that the first Notice was defective but by letter of 9 June 2006 to ASB served a fresh Initial Notice ("the second Notice") dated 24 May 2006 (despite the fact that ASB stated they were not instructed to accept service). JBB did not inform the LVT office of this, or indeed make any further contact with the office until 23 November 2006.

10. ASB served a Counter-Notice dated 11 August 2006 without prejudice to its contention that the second Notice was defective for a variety of reasons. However, the second Notice did contain a date by which the reversioner was to serve a Counter-Notice. Further correspondence was exchanged between solicitors. JBB admitted that the first Notice was invalid and ASB accepted the validity of the second Notice.

11. On 16 November 2006 the LVT office, having heard nothing further from the parties since May 2006, wrote to JBB asking for an update. JBB replied briefly on 23 November 2006 stating: "the current situation regarding this matter is that we have served an Initial Notice on the Landlords and they have served their Counter-Notice and there are issues in dispute which we are trying to resolve".

12. ASB subsequently wrote to the LVT office stating that in their view the application lodged by JBB on 28 April 2006 had been "abandoned" in view of the invalidity of the first Notice and the fact that the application was premature. ASB assumed that this had been accepted by JBB in view of the service of the second Notice. ASB were not aware of any further application to the LVT following the second Notice. JBB did not respond further to requests from the LVT to clarify their position.

13. As a result, the situation remained unresolved, not to say confused, as to the status of the application dated 28 April 2006 and whether it referred to the first Notice or the second Notice. At this stage, from February 2007, there was further correspondence between solicitors. The LVT office issued Directions dated 2 February 2007 which were subsequently superseded by Directions dated 2 April 2007 in relation to the Preliminary Hearing. ASB continued to assert its view that the Application was invalid and requested a Preliminary Hearing on jurisdiction to decide the issue.

The Case for the Respondent (Reversioner)

14. The Tribunal heard first from Mr Nelson, solicitor for the Respondent, as it was he who had asked for the Preliminary Hearing on the basis that the Tribunal had no jurisdiction in relation to the Application made on 28 April 2006. He submitted that the Application of 28 April 2006 related to the first Notice only, had been made prematurely, and could not be subsequently amended to refer to the second Notice.

15. Essentially Mr Nelson relied on the statutory regime of the 1993 Act. Section 24(1) provided that where the reversioner had served a Counter-Notice admitting the claim but any of the terms of acquisition remained in dispute at the end of the period of two months after that Counter-Notice was given, either the nominee purchaser or the reversioner may apply to the LVT to determine the matters in dispute. Mr Nelson submitted that the 1993 Act provided for several scenarios depending on whether a Counter-Notice had been served or not.

16. Where no Counter-Notice has been served in response to an Initial Notice, an Application could be made to the County Court within six months under Section 25 for an order determining the terms of acquisition. Alternatively a Counter-Notice could be served admitting the right to enfranchise and all the acquisition terms, in which case Section 24(1) would not apply; or not admitting the right to enfranchise, in which case the nominee purchaser could apply to the County Court under Section 22 for a declaration that the Initial Notice was valid. Finally, a Counter-Notice could be served admitting the claim but not accepting all the terms. Only in this latter scenario could an Application be made after two months to the LVT.

17. In this case, the Applicant had "jumped the gun", as Mr Nelson put it, in that it applied to the Tribunal before it was known which of the above scenarios was applicable. No Counter-Notice had been served by 28 April 2006 and no Application under either Section 25 or 22 was subsequently made to the County Court. The first Notice was defective in any event in failing to specify a date for service of a Counter-Notice. It followed that the Application to the LVT was premature.

18. Mr Nelson did not accept that JBB's letter of 23 November 2006 was capable of being construed as either a clear reference to the second Notice or as founding a fresh Application in relation to the second Notice. He said that the two Notices were not identical save for the date for service of a Counter-Notice. He considered that the LVT office could well have been confused or even misled by the letter, as it had no knowledge of the second Notice. ASB was not aware of any second Application having been made to the LVT and assumed, following the events from 9 June 2006 onwards, that as the first Notice was invalid, it had been withdrawn, and the Application made on 28 April 2006 must also have been withdrawn or abandoned.

19. Mr Nelson also did not accept that there had been regular contact between JBB and ASB or that all the substantive issues were clear. He said there had been no response to the second Counter-Notice and no further correspondence between August 2006 and February 2007. Mr Nelson submitted that the Applicant had run out of time to make a further Application to the LVT to determine the matters in dispute arising out of the second Notice and Counter-Notice, and that as a result, the second Notice was deemed withdrawn under Section 29.

20. Mr Nelson did not consider that the Tribunal had any administrative powers under the Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003 to amend the original Application. It related only to the first Notice and could not be amended to refer to the second Notice. JBB had had ample time and opportunity to put in a fresh Application under Section 24(1) following the service of the second Counter-Notice in August 2006 but had not done so. They had confused everyone, including themselves, and failed to clarify matters when asked to do so.

21. Finally Mr Nelson contended that as a result the reversioner had been prejudiced in that extra costs had been incurred and unnecessary uncertainty arisen. Extended leases had already been granted another two lessees of flats in the block, and Mr Rose's preference, and intention, was to offer extended leases to the other lessees. However, the Applicant was not prejudiced in that it was always open to it to serve a fresh Notice if it still wished to exercise its right to collective enfranchisement.

The Case for the Applicant (Nominee Purchaser)

22. A Statement of Case was received from JBB (undated and unsigned) shortly before the hearing. Mr Davies, of Counsel, submitted on behalf of the Applicant that the Application lodged on 28 April 2006 was still capable of being adjudicated by the Tribunal in relation to the second Notice and Counter Notice and on the substantive issues in dispute on the enfranchisement as to the extent of property to be purchased and the price. His argument was set out in the Statement and what follows is a summary of the salient points.

23. Mr Davies contended that JBB had assumed the LVT Application was proceeding on the second Notice dated 24 May 2006, served on 9 June 2006, and the Counter Notice dated 11 August 2006. By serving the second Notice, JBB had *de facto* accepted that the first Notice was of no effect. The fact that the Application to the LVT was made on 28 April 2006, before the service of the second Notice, did not prevent the Application continuing to be valid; alternatively, a fresh Application had been made by JBB's letter of 23 November 2006.

24. That letter, according to Mr Davies, was a clear and specific reference to the service of the second Notice and Counter-Notice. The Tribunal put to Mr Davies that the letter contained no reference to the date of the second Notice and Counter Notice, and that no copies of those documents were provided. His reply was that JBB assumed, in context, and in the light of letters from the LVT putting the matter on hold, issuing Directions, and stating that it had no power to dismiss a valid Application, that their original Application was still considered to be valid and was proceeding in relation to the second Notice.

25. In support of his contention that the letter of 23 November 2006 constituted a valid application in itself, Mr Davies submitted that it complied with Regulation 3 of the Leasehold Valuation Tribunal (Procedure) (England) Regulations 2003 ("the Regulations"), headed "Particulars of applications". Regulation 3(1) required details of the parties and the property. Paragraph 1 of Schedule 2 to the Regulations required, in an enfranchisement case, "a copy of any notice served in relation to the enfranchisement" together with some additional information. Mr Davies further contended that it was open to the Tribunal to correct that defect by exercising its discretion conferred by Regulation 3(8) to dispense or relax the requirement so as to permit the Application to constitute a valid Application in relation to the second Notice and Counter Notice.

26. In answer to questioning from the Tribunal that it could only exercise its discretion if "(a) the particulars and documents included with an application are sufficient to enable the application to be determined and (b) no prejudice will, or is likely to, be caused to any party to the application", Mr Davies accepted that no copy of the second Notice had been supplied with the letter of 23 November 2006 but that the letter itself was sufficient; and that no prejudice would be caused to the Respondent as the parties had proceeded on the basis that there was an Application before the Tribunal with issues to be decided as to the extent of the property and the price.

27. Mr Davies alternatively requested that the Tribunal should exercise its power under Regulation 12(3) to give a direction that the Applicant be permitted to amend the Application of 28 April 2006 or 23 November 2006 to refer to the second Notice and Counter Notice as this would secure the "just, expeditious and economical disposal of proceedings". Costs had been incurred, the matter had been progressed and it made sense for the transaction to be completed as swiftly

as possible. However, it emerged in questioning that neither party had yet prepared valuation reports, and a draft Application to the County Court had been prepared by the Applicant to amend the plan, but not yet issued. Nonetheless, Mr Davies argued that despite the procedural misunderstandings that had arisen, the substantive issues were clear and it would be unjust and costly not to proceed.

28. On the question of the statutory framework of the 1993 Act, Mr Davies argued that the wording of Section 24(1) did not prevent an Application being made to the LVT before two months had passed from the date of service of a Counter-Notice, or even where a Counter-Notice had not yet been served. As there was nothing to prohibit an early Application, it would become valid after two months from the date of any subsequent Counter-Notice where the terms of acquisition remained in dispute.

Decision

29. The Tribunal carefully considered all the arguments put forward by Mr Nelson and Mr Davies.

30. The Tribunal took as it starting point Section 24(1) of the 1993 Act. In the Tribunal's view, the wording was clear. It starts:

> *(1) Where the reversioner in respect of specified premises has given the nominee purchaser -*
> *(a) a counter notice under section 21...*
>
> *but any of the terms of acquisition remain in dispute ... a leasehold valuation tribunal may on the application of either the nominee purchaser or reversioner determine the matters in dispute.*

31. It is therefore clear that an Application can only be made to the LVT once a Counter-Notice has been served, and where entitlement to enfranchise is not in issue but the terms of acquisition are not agreed. The time limits are also clear: either party must apply to the Tribunal at least two months after the date of service of the Counter-Notice but not later than six months after. Without a Counter-Notice, Section 24(1) simply does not operate. There is an obvious reason for this: it would not be known whether there was a dispute over any of the terms of acquisition capable of being determined by a tribunal. The Tribunal rejected Mr Davies's contention that it was possible to make an Application in the absence of a Counter-Notice.

32. The Tribunal agreed with Mr Nelson's analysis set out at paragraph 16 above of what he called the various "future scenarios" that could arise following the service of an Initial Notice. The 1993 Act provided a clear statutory scheme, with time limits attached to each potential step. In the absence of a Counter-Notice, the Applicant's remedy is to apply to the County Court under Section 25, or where the Counter-Notice does not admit the right to enfranchise, under Section 22. It appears JBB failed to appreciate this, even after the exchange of correspondence between the LVT office and both solicitors when the Application was first received.

33. The Tribunal was therefore bound to conclude that the Application lodged by JBB on 28 April 2006 was erroneous and premature. It was also based on an invalid Initial Notice, because of the omission of the date of service for any Counter-Notice, as was pointed out by both the LVT office and by ASB on several

occasions. This point was not explicitly conceded by JBB until August 2006, by which time they had already served the second Notice on 9 June 2006. The LVT office, not knowing of any events post 28 April 2006, did not deem the Application as withdrawn but kept the case open expecting to be kept informed the parties that either the first Notice was admitted to be invalid or that the matter had been referred to the County Court. In the event this did not happen. It is not for the LVT office to give advice to solicitors for any party to proceedings. Both ASB and JBB had the opportunity to comment when the original Application was made. Only ASB chose to do so.

34. The Tribunal then considered whether, as submitted by Mr Davies, it was possible either to amend the Application of 28 April 2006 to refer to the second Notice, or to construe JBB's letter of 23 November 2006 as a fresh Application. It concluded that neither was possible. As a matter of common sense and timing, the Application could not be treated as referring to the second Notice, which was not even in existence when the Application was made. The Application could only relate to the first Notice, and could not proceed in relation to that Notice for the reasons already given.

35. The Tribunal agreed with Mr Nelson that JBB's letter upon which Mr Davies relied was neither clear nor specific. It did not state which Initial Notice and Counter-Notice was meant. It did not explain that a second Notice and Counter-Notice had been served since the original Application. It did not enclose, or refer to, any documents. At no stage did JBB inform the LVT office that the second Notice and Counter-Notice existed. The Tribunal was therefore unable to conclude that the letter was capable of being construed as a fresh Application in relation to the second Notice. If JBB had assumed otherwise, this was unfortunate, but was not, in all the circumstances, a reasonable or informed assumption. It was always open to JBB explicitly to withdraw the original Application and make a fresh Application in relation to the second Notice within the statutory time limits following service of the second Counter-Notice, in order to protect their client's position, but this was not done.

36. Even if the letter were to be accepted in principle as capable of being treated as a new Application, the Tribunal was not prepared to exercise its discretion under Regulation 3(8) to dispense with or waive any formalities. The failure to refer to, or provide copies of, the second Notice was fatal to Mr Davies's argument, and in the Tribunal's view, incapable of remedy. These documents are key to any enfranchisement application. Regulation 3(8) must be read in the context of Regulation 3(1), 3(2) and Schedule 2. The requirements of Schedule 2 Paragraph 1 are clear: the particulars to be supplied must include "a copy of any notice served in relation to the enfranchisement". The Tribunal was therefore not satisfied that Regulation 3(8)(a) was made out because "the particulars and documents provided" were not "sufficient to enable the application to be determined". In addition the Tribunal considered that in the light of the confusion which had arisen, that the parties were proceeding on opposite assumptions, and that the two Notices were not identical, the Respondent would be likely to be prejudiced by having to proceed in relation to the second Notice.

37. The Tribunal did not consider that any other procedural Regulation assisted Mr Davies in attempting to cure any defects in the original Application. The Regulations have a logical sequential structure and all the Regulations following Regulation 3 assume that a valid Application has been made. Regulation 12(3) only applies where a Pre-Trial Review is held. The present hearing was not a Pre-Trial Review but a preliminary hearing specifically to address the question of

jurisdiction raised by the Respondent. Regulation 12(3) did not empower the Tribunal to deal with that issue by the making of any Direction.

Costs

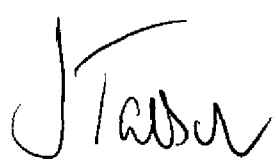
38. Mr Nelson asked the Tribunal to exercise its powers under Paragraph 10 of Schedule 12 to the Commonhold and Leasehold Reform Act 2002. He argued that by submitting the Application prematurely and then failing to withdraw it or issue a fresh Application a great deal of time and costs had been wasted and confusion caused which could have been avoided. He further argued that he had acted reasonably by making his position clear in correspondence but JBB had failed to do so. Mr Davies accepted that misunderstandings had arisen and that both parties had different perceptions of what was going on, but JBB thought they were proceeding with a valid Application. There had been no intention to mislead and neither the Applicant nor their solicitors had behaved unreasonably.

39. Having carefully weighed the arguments, the Tribunal decided that it would not be appropriate to make any order for costs against the Applicant. Its power under Paragraph 10 was essentially penal and could only be exercised in exceptional circumstances where a party had behaved "frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with the proceedings". Whilst it was certainly unfortunate that erroneous assumptions had been made and some confusion had arisen, the Tribunal did not accept that this amounted to unreasonable behaviour for the purposes of Paragraph 10.

Determination

40. For each and every reason stated above the Tribunal does not have jurisdiction to proceed with the Application made on 28 April 2006 and no further valid Application has been made.

Dated 18 July 2007



Ms J A Talbot
Chairman