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Residential Property
TRIBUNAL SERVICE

Case reference: LON/00BK/LSC/2009/0818

DECISION UNDER REGULATION 11 OF THE LEASEHOLD VALUATION TRIBUNALS (PROCEDURE) (ENGLAND) REGULATIONS 2003

Property:	**Morshead Mansions, Morshead Road, London W9**
Applicant:	Leon Di Marco
Respondent:	Morshead Mansions Limited
Heard:	29 March 2010
Appearances:	The applicant David Wismayer for the respondent
Tribunal:	Margaret Wilson Dallas Banfield FRICS Owen Miller BSc MBA
Date of decision:	16 April 2010

Introduction

1. This decision is made under regulation 11 of the Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003 ("the Procedure Regulations"). The questions to be decided are whether two applications made to the tribunal by Leon Di Marco on 14 December 2009 under section 27A of the Landlord and Tenant Act 1985 ("the 1985 Act") and under section 24 of the Landlord and Tenant Act 1987 ("the 1987 Act") should be dismissed at a preliminary stage without consideration of the merits. The application under the 1985 Act is to determine Mr Di Marco's liability to pay service charges to the respondent landlord, Morshead Mansions Limited ("MML"), in respect of the year 2007, and the application under the 1987 Act is to appoint Bruce Maunder Taylor FRICS as manager of Morshead Mansions.

2. Regulation 11 enables the tribunal to dismiss an application, either of its own motion or after a request from the respondent, on the ground that it is frivolous, vexatious, or otherwise an abuse of the process of the tribunal. This decision is made of the tribunal's own motion but, at a pre-trial review on 4 February 2010 when the tribunal informed Mr Di Marco that it was minded, if such a course appeared to be appropriate after full consideration of the circumstances, to dismiss the applications under regulation 11, David Wismayer, representing MML, said that if the tribunal had not decided to give notice under regulation 11 to Mr Di Marco of its own motion MML would have requested it to do so.

3. Regulation 11 provides:

> *(1) Subject to paragraph (2), where –*
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> > *(a) it appears to a tribunal that an application is frivolous or vexatious or otherwise an abuse of process of the tribunal; or*
> > *(b) the respondent to an application makes a request to the tribunal to dismiss an application as frivolous or vexatious or otherwise an abuse of the process of the tribunal,*

the tribunal may dismiss the application, in whole or in part.

(2) Before dismissing an application under paragraph (1) the tribunal shall give notice to the applicant in accordance with paragraph (3).

(3) Any notice under paragraph (2) shall state –

(a) that the tribunal is minded to dismiss the application;

(b) the grounds on which it is minded to dismiss the application;

(c) the date (being not less than 21 days after the date when the notice was sent) before which the applicant may request to appear before and be heard by the tribunal on the question whether the application should be dismissed.

(4) An application may not be dismissed unless –

(a) the applicant makes no request to the tribunal before the date mentioned in paragraph (3)(c); or

(b) where the applicant makes such a request, the tribunal has heard the applicant and the respondent, or such of them as attend the hearing, on the question of the dismissal of the application.

Background

4. Morshead Mansions is a block of 104 flats in Maida Vale. All the flats are held on long leases, and each leaseholder holds a share in MML. The sole director of MML is David Wismayer, who is a leaseholder, as is Mr Di Marco.

5. The affairs of Morshead Mansions have been before the courts and the tribunal on many occasions. The history is recorded in detail in previous decisions of the tribunal and the courts. For present purposes the following is, we hope, sufficient.

6. On 13 January 2000, after a hearing lasting 12 days, the tribunal, on the application of the leaseholders of 30 flats, appointed Mr Maunder Taylor as manager of Morshead Mansions under section 24 of the 1987 Act for the reasons given in the tribunal's decision of that date. Mr Maunder Taylor's period of management was not successful and was marked by extensive litigation. By orders dated 6 November 2002 and 3 February 2003, after hearings lasting a total of nine days and for the reasons given on 4 October 2002 and 24 March 2003, the tribunal suspended Mr Maunder Taylor's management, on terms, for a period of 18 months. MML unsuccessfully challenged, in the Administrative Court and the Court of Appeal, the tribunal's power to suspend the order rather than discharge it. On 18 November 2004 the tribunal suspended the management order indefinitely, again on terms. In July 2005, after much further litigation and while the order remained suspended, a number of leaseholders applied to the tribunal for the appointment of a different manager, who was rejected by the tribunal as unsuitable. By an order dated 13 March 2007, made after a four day hearing for the reasons given on that date, the management order was discharged, on terms as to Mr Wismayer's remuneration. Since the order was first suspended on 6 November 2002 the block has been managed by Mr Wismayer. By an application dated 19 July 2006 Mr Di Marco and other leaseholders sought to have Mr Maunder Taylor reinstated as manager of the block. That and other applications were the subject of a hearing after which the tribunal decided, by a decision dated 13 March 2007, that Mr Maunder Taylor should not be re-appointed as manager.

7. By a judgment dated 10 December 2008 the Court of Appeal held that a sum demanded from Mr Di Marco (and other shareholders) by MML by virtue of a special resolution of the company for the purpose, among others, of maintaining and repairing the block was demanded of him as a shareholder and not as a leaseholder and was not subject to the requirements of the 1985 Act (*Morshead Mansions Limited v Leon Do Marco* (Neutral Citation Number [2008] EWCA Civ 1371; Case Number B2/2008/0357)).

8. In these circumstances, after a pre-trial review held on 4 February 2010 at which Mr Di Marco appeared in person and Mr Wismayer represented MML, the tribunal said that it had in mind, if such a course appeared to be appropriate after full consideration of the relevant circumstances, to consider dismissing one or both of Mr Di Marco's applications at a preliminary stage on the ground that they might be frivolous, vexatious, or otherwise an abuse of the process of the tribunal. Mr Di Marco said that he would wish to be heard on the question whether the applications should be so dismissed and directions were made for such hearing.

9. The order made by the tribunal after the pre-trial review was, so far as is relevant, as follows:

> *(b) It appeared to the tribunal that one or both of the applications might be frivolous or vexatious or otherwise an abuse of process of the tribunal, the application in respect of service charges on the ground that some or all of the matters which it appears that Mr Di Marco wishes to raise have already been the subject of exhaustive investigation by the tribunal, the application to appoint a manager on the ground that Mr Maunder Taylor has in the past been appointed a manager and discharged from the post by the tribunal, and that the pursuit of both applications is likely to require disproportionate expense to the leaseholders of Morshead Mansions. It therefore appears to me to be appropriate to give notice to Mr Di Marco under regulation 11 of the Leasehold Valuation Tribunals (Procedure) (England) Regulations that the tribunal is minded, if on further investigation such a course appears to be appropriate, to dismiss the applications, in whole or in part, under the provisions of regulation 11 and accordingly to give notice under paragraph 2 of regulation 11.*
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> *(c) Mr Wismayer indicated at the pre-trial review that if the tribunal was not minded to give such notice the respondent would, in accordance with paragraph 1(b) of regulation 11, request the tribunal to dismiss the applications.*

d. Mr Di Marco told the tribunal that he wished to be heard by the tribunal on the question whether either or both of the applications should be dismissed under regulation 11.

In these circumstances the tribunal hereby gives notice under paragraph (2) of regulation 11 of the Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003, that it is minded, if such a course appears to be appropriate after consideration of the arguments addressed to it at the hearing hereafter directed, to dismiss the applications under section 27A of the Landlord and Tenant Act 1985 and section 24 of the Landlord and Tenant Act 1987

10. MML and Mr Di Marco were directed to serve statements of their case in relation to the question whether the applications should be dismissed under regulation 11 and the hearing requested by Mr Di Marco was listed for 29 March 2010.

11. MML did not serve or lodge a statement as it had been directed, and as Mr Wismayer had agreed, to do. Mr Wismayer said that the reason for MML's failure to serve a statement was that he was ill and had been admitted to hospital, which we accept to be true. Mr Di Marco provided a brief statement in which he submitted that the tribunal's notice did not comply with the requirements of regulation 11 and was invalid, and denied that any matters which he had raised in his applications had been previously investigated by the tribunal.

12. At the hearing on 29 March Mr Di Marco and Mr Wismayer appeared. We were satisfied that Mr Di Marco was not in any way prejudiced by the failure of MML to serve a statement of its case because nothing which was not already known to him was raised at the hearing.

13. Notice of the applications had been given by the tribunal to every leaseholder as required by regulation 5 of the Procedure Regulations. Before the hearing twelve leaseholders emailed or wrote to the tribunal to express

their views on the applications. Ten of them in different ways firmly expressed the view that the applications should not proceed to a full hearing because the writers were entirely satisfied with the present management of the block and/or the quality and cost of the services provided to them and were greatly concerned about the costs and disruption which further litigation would cause. In addition, the director of Mactra Properties Limited, a property company which holds 21 of the leases and one share in MML, sent a copy of a letter which its director had written to Mr Di Marco in which he said that while he was concerned about MML's failure to produce service charge accounts, he urged him to withdraw both applications because they would fail, and offered, if he did, to reimburse the application fee he had paid. He also sent copies of emails which Mr Wismayer had sent to every leaseholder recommending that each of them should write to the tribunal confirming whether he or she supported or opposed Mr Di Marco's applications. One leaseholder emailed the tribunal expressing some concerns about Mr Wismayer's management.

The arguments

14. Mr Di Marco submitted that the notice given by the tribunal under regulation 11(2) was not valid because it did not contain the grounds upon which the tribunal was minded to dismiss the applications. He said that the notice given by the tribunal was contained only in the final paragraph of the order set out in paragraph 4 above commencing "in these circumstances" and that it could not be read with the preceding paragraphs, and that in any event the statement of the grounds upon which the tribunal was minded to dismiss, set out in the preceding paragraphs, was inadequate because it contained insufficient detail. He said that he based his case on these submissions and did not wish to make any further submissions, although he agreed to answer questions from the tribunal.

15. Asked whether his application to appoint a manager had any support from other leaseholders, Mr Di Marco agreed that it did not have "broad support". He was able to cite no support from any current leaseholder other

than the single email referred to in the concluding sentence of paragraph 13 above. He said that he believed that Mr Wismayer had coached the leaseholders who had emailed the tribunal in support of the present management.

16. Asked why he had proposed Mr Maunder Taylor as the manager when Mr Maunder Taylor's previous management had been unsuccessful, he said that he knew of no-one else who would accept it, and when he was asked why Mr Maunder Taylor was willing to manage the block he admitted that he had not asked him.

17. Mr Wismayer made oral submissions. He said that Mr Di Marco's complaint that MML had not produced service charges was the subject of current proceedings in the county court and that a tribunal had taken the unusual step of refusing to entertain a transfer of those proceedings to it under paragraph 3 of Schedule 12 to the Commonhold and Leasehold Reform Act 2002 because it had no power to provide the appropriate remedy, specific performance. He said that he had himself communicated with Mr Maunder Taylor in order to establish whether, if Mr Di Marco asked him to do so, he would agree to be appointed as manager and he read to us Mr Maunder Taylor's email in reply from which it appeared, not surprisingly, that he would be unlikely to agree.

Decision

18. We are quite satisfied that these applications are vexatious and an abuse of the process of the tribunal and that they should not proceed further.

19. We reject Mr Di Marco's submissions as to the validity of the notice given under paragraph 2 of regulation 11. The preliminary paragraphs of the order dated 4 February 2010 give in general terms the grounds upon which the tribunal might be minded to dismiss the applications and it is obvious that the document is meant to be read as a whole. It is entirely appropriate that the

statement of the grounds upon which the tribunal might be minded to dismiss the applications should be expressed in general terms. It would in our view not be appropriate, where the notice is given at a very early stage in the proceedings and before evidence has been given, for the notice to give more than a general outline of the grounds upon which the tribunal might be minded to dismiss the applications. Sufficient grounds were given in the notice to enable Mr Di Marco to prepare his submissions, and no new matters emerged at the hearing. Had new matters emerged we would have offered him a proper opportunity, by adjournment or otherwise, to deal with them, but they did not. The purpose of the hearing was to hear detailed argument to enable the tribunal to decide whether the applications should be dismissed.

20. Turning first to the application under the 1987 Act, we are in no doubt that it is totally without merit, is doomed to failure and is vexatious and that its further conduct would be an abuse of the tribunal's process. We are quite satisfied that no tribunal would contemplate appointing a manager, particularly of a tenant-owned block such as Morshead Mansions, unless there were either wide support for the appointment from the leaseholders or exceptionally strong grounds for concluding that such an appointment was required. We are satisfied that there is virtually no support for this application and we do not for one moment accept Mr Di Marco's suggestion that Mr Wismayer has persuaded those leaseholders who contacted the tribunal to express their opposition to it against their will. We have no doubt that if they supported the application they would have said so.

21. It is most unlikely that any tribunal would consider appointing Mr Maunder Taylor to manage the block in circumstances where he was appointed as manager, was unsuccessful, and the order appointing him discharged. He has not even been asked if he would be prepared to accept the appointment and the indication is that he would be unlikely to do so if he was asked. Mr Di Marco agreed that as far as he is aware there is no other suitable person who would accept the appointment. In these circumstances, even if there were arguably good grounds for appointing a manager, the tribunal would be most

reluctant to contemplate undertaking the seemingly pointless exercise of deciding whether it would be just and convenient to make the order.

22. Moreover the indications are that the block is on the whole well managed, and, although the arrangements for collecting service charges are unusual and render largely nugatory the statutory protection offered to leaseholders under the 1985 Act, they have been sanctioned by the Court of Appeal.

23. The grounds for the proposed application set out in Mr Di Marco's preliminary notice dated 11 October 2009 under section 22 of the 1987 Act appear to have little merit.

24. The first ground relates to MML's admitted failure to produce service charge accounts for the years 2003, 2004 and 2005. As we have said, this allegation is the subject of an on-going claim by Mactra in the Central London County Court for disclosure of documents and specific performance of MML's covenant to produce accounts for those and other years. MML's defence is that it has not, to date, been practicable to produce the accounts for reasons, largely, of cost. Mr Wismayer said that MML regularly produces notices of the costs it has incurred which comply with section 20B of the 1985 Act which give the same information as certified service charge accounts would give. It is clear that the appointment of a manager would not address this complaint, which is the subject of more appropriate proceedings elsewhere.

25. The second ground in the section 22 notice relates to the reserve fund, the accounts of which form part of the service charge accounts the non-production of which are the subject of Mactra's county court claim. The same considerations apply.

26. The third ground is that MML's counsel attempted to mislead the Court of Appeal in his skeleton argument for the purpose of the hearing to which reference is made in paragraph 7 above. It is hard to see how the appointment of a manager would address this complaint, even if it was true,

which seems improbable given that the arguments of both sides were fully considered in the leading judgment.

27. The fourth ground is MML's failure to consult the leaseholders as required by section 20 of the 1985 Act in respect of works to the block carried out in 2007. Mr Wismayer said that, pursuant to the judgment of the Court of Appeal, no service charge has been demanded to cover the cost of the works and statutory consultation was not therefore required.

28. The fifth ground is that MML unlawfully and fraudulently demanded of Mr Di Marco service charges for the year 2003 which he had already paid. Mr Wismayer said that Mr Di Marco's failure to pay a demand for service charges by the due date had removed his entitlement to a shareholder's discount, and that Mactra had unsuccessfully taken an identical point in the Court of Appeal. Again, it is not easy to see how the appointment of a manager would address this complaint, even if it were justified, as it appears not to be.

29. The sixth ground contains complaints about the quality of Mr Wismayer's management. It is true that the tribunal has in the past held Mr Wismayer to be on occasions unpleasant and aggressive towards leaseholders who disagree with him, but he has also been held to have qualities which have enabled him to manage the block on the whole successfully and to the satisfaction of the majority of its leaseholders and residents.

30. The seventh ground is that the decoration of the exterior of the block carried out in 2003 was unsatisfactory in that rotten woodwork was painted over. However in paragraph 29 of its decision dated 13 March 2007 the tribunal, having inspected the block, determined that the standard of redecoration then carried out was "reasonable for its cost" and that its cost was reasonably incurred.

31. The final ground is that MML has failed to reply to letters from the tenant of one flat in the block. Mr Wismayer said that the allegation was untrue, but

even if it were true it is not in our view sufficiently substantial to amount to a ground for the appointment of a manager.

32. As for the application under section 27A of the 1985 Act, the only issue which Mr Di Marco seeks to raise is MML's failure to consult the leaseholders in accordance with section 20 of the 1985 Act in relation to the works carried out to the block in 2007. This is the same allegation as the seventh ground relied on by Mr Di Marco in his preliminary notice under section 22 of the 1987 Act and we consider it to be without substance for the reasons given in paragraph 27 above.

33. Accordingly we determine that both applications are without any merit and are certain to fail. We do not consider it right to subject the long-suffering leaseholders of Morshead Mansions to further expensive litigation in these circumstances and the applications are hereby dismissed as an abuse of the process of the tribunal.

CHAIRMAN:.....

DATE: 16 April 2010