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HM Courts & Tribunals Service

LEASEHOLD VALUATION TRIBUNAL

In the matter of S27A of the Landlord and Tenant Act 1985
and
Regulation 11 (1)(b) of the Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003

(Application to dismiss)

Case Number:	**CHI/21UH/LSC/2012/0081**
Property:	**6, Newnham Way** **Heathfield** **East Sussex** **TN21 8DA**
Applicant/Landlords:	**Wealdon District Council**
Respondent/Leaseholders:	**Mrs V Maw** **Miss A Sutherland**
Appearances for the Applicant:	**Mr M Tempest, Barrister**
Appearances for the Respondents:	**Mr P Martin**
Date of Hearing	**11th April 2013**
Tribunal:	**Mr Robert Wilson LLB (Lawyer Chairman)** **Mr Donald Agnew BA LLB LLM (Lawyer Member)**
Date of the Tribunal's Decision:	**29th April 2013**

THE APPLICATIONS.

1. This is an interlocutory application made by the Applicant freeholder pursuant to Regulation 11(1)(b) of the Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003 ("the Regulations") to dismiss an application made by the Respondents pursuant to S.27A of the Landlord and Tenant Act 1985 ("the Challenged Application").

2. The Applicant seeks to have the Challenged Application dismissed on the basis that it is an abuse of process of the Tribunal. The Respondents oppose the application to dismiss.

3. The Tribunal also had before it an application by the Applicant for costs under Schedule 12 Paragraph 10 of the Commonhold and Leasehold Reform Act 2002.

4. A hearing of the application took place on the 11th April 2013 at the Tribunal's offices in Chichester. Mr Tempest of counsel appeared on behalf of the Applicant and Mr Martin a layperson represented the Respondents.

DECISION.

5. The Challenged Application is dismissed under Regulation 11.

6. An order for costs is made against each Respondent under Schedule 12 Paragraph 10 of the Commonhold and Leasehold Reform Act 2002, in the sum of £500. These sums are to be paid by the Respondents to the Applicant within 28 days of the date of this decision.

FACTUAL BACKGROUND.

7. The parties agreed that the chronology of events and background facts so far as relevant to this application are as follows: -

   i) On the 1st June 2012, the Respondents filed an application with the Tribunal pursuant to S.27 of the Landlord and Tenant Act 1985.

   ii) A pre-trial review of the application took place on the 9th July 2012 following which directions were given which recorded concessions made by the Applicant in respect of a window replacement programme and further directions were given for the filing of evidence.

   iii) The matter was set down for a hearing on the 6th October 2012 and the parties and their representatives attended the hearing venue on that day having filed their evidence.

   iv) However, the application was not capable of being determined on that day, having regard to the content and format of the evidence filed on behalf of the Respondents and by agreement between the parties the day was treated as a further pre-trial review. During the course of the day the parties requested and were granted a series of adjournments during which the application was discussed and the issues between the parties were narrowed.

v) At the end of the day the parties' representatives agreed that the scope of the application should be limited in two respects. Firstly, the challenged years would be restricted to 2011 and 2012, and secondly the application was limited to service charges levied but not paid. The Applicant further agreed that they would not oppose the S.20C application brought by the Respondents.

vi) Following this pre-trial review the Tribunal issued its further directions dated 24th October 2012 ("the Directions") which recorded the agreements made, defined the scope of its remaining jurisdiction, and set out further directions to enable the parties to file their evidence and submissions in respect of any issues left for the Tribunal to determine.

vii) Following the issue of the Directions exchanges of correspondence took place between the parties' representatives in which the Applicant made further concessions and an open undertaking/declaration was given to each of the Respondents. The undertaking comprised an open declaration that the Respondents had no further liability to pay any service charges for the years 2011 and 2012. In addition, to the extent that any further service charge was due for these years from any of the Respondents, the Applicant would regard such sums as discharged.

viii) On the 19th December 2012 the Applicant wrote to the Tribunal giving it notice of the above undertaking and submitting that there could be no benefit to the Respondents or indeed anyone else in continuing the application. They submitted that it would only waste the resources of the Tribunal and that of the Applicant.

ix) Sometime after the 19th December 2012 four of the Respondents discontinued their application which left Mrs V Maw and Miss A Sutherland who still wished to proceed and continue to be represented by Mr Martin.

x) On the 2nd January 2013 the Tribunal wrote to the Respondents' representative Mr Martin, bringing his attention to the unqualified admissions made by the Applicant and indicating that it appeared to the Tribunal that there were no longer any matters within its jurisdiction to determine and that on this basis the application could be discontinued.

xi) On the 3rd January Mr Martin wrote to the Tribunal contending that the Applicant had still not complied with the Directions and raised a number of other matters which he contended that the LVT should review. These matters were stated to cover the period 2009 to 2012 and Mr Martin contended that the Tribunal should also determine the recoverability and reasonableness of paid service charges for 2011 and 2012.

xii) On the 15th January 2013 the Applicant wrote to Mr Martin putting him on notice that they intended to invite the Tribunal to dismiss the application under Regulation 11 on or after 30th January 2013 unless the Respondents were able to identify matters, which were still within the Tribunals jurisdiction to determine. In that letter they put Mr Martin on notice that in the event of the Applicant successfully applying to the Tribunal for an order dismissing, then the Applicant might also seek costs from the Respondents under Schedule 12.

xiii) On the same day, the 15th January 2013, Mr Martin wrote to the Applicant pointing to service charges allegedly paid in 2010 to 2012 for which no satisfactory invoices or payment documentation had been provided. Mr Martin suggested that these matters were still within the jurisdiction of the Tribunal. In addition he alleged that the Applicant had failed in its statutory

obligations to make disclosure of the relevant documentation and that there had also been possible incorrect consultation procedures carried out between 2009 and 2012. He raised further issues relating to the terms of the model lease for the development and a possible breach of the unfair contract terms legislation and various other matters concerning the sinking fund and other unspecified service charge irregularities. In short Mr Martin was not prepared to discontinue the application rather he sought to extend it.

xiv) As a result of the above the Applicant made an application to the Tribunal seeking dismissal of the application. Pursuant to Regulations 11 (2) & 11(3) the Tribunal gave notice to the Respondents that the Tribunal was minded to dismiss the application on the grounds that it had become an abuse of process and also as required by the Regulations the notice gave the Respondents a right to a hearing on the question whether the application should be dismissed.

xv) The Respondents' representative requested a hearing and directions were given for that hearing to take place on 11th April 2013.

8. REGULATION 11.

Regulation 11 sets out the circumstances where a Tribunal may dismiss an application and it reads as follows:

Regulation 11 of the 2003 Regulations: Dismissal of frivolous etc. applications

(1) Subject to paragraph (2) where –

(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 that 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.

THE APPLICANT'S SUBMISSIONS.

9. The Applicant's case can be briefly summarised in the following way. On the 19th December 2012 they had written to each of the Respondents making an unqualified admission that none of them owed any service charge for the years 2011 and 2012. In the light of this admission, they submit that there cannot be any underpaid amounts for the Tribunal to consider.

10. They make this claim because they say that the effect of the directions order of the Tribunal dated 24th October 2012 was to limit the issues that the Tribunal would be concerned to the following question; whether any underpaid amounts demanded by the Council in respect of service charge for the years 2011 and 2012 are payable and reasonable in amount? As all these charges have been conceded or waived they contend that there are no matters left for the Tribunal to determine.

11. In January 2013 the Applicant wrote to Mr Martin informing him that they intended to apply for the Respondents' application to be dismissed under Regulation 11 unless the Respondents were able to identify matters that remained within the Tribunal's jurisdiction. They say that in response to that letter Mr Martin raised a whole raft of issues including paid service charges, which he intended to pursue in the context of the current LVT proceedings.

12. It is the Applicant's contention that Mr Martin's letter written on behalf of the Respondents raises only points that are plainly outside the Tribunal's jurisdiction as defined in the Directions. As a result they contend that any further hearing can serve no purpose other than to waste the resources of the parties and that of the Tribunal and accordingly the application is now frivolous and vexatious.

THE RESPONDENTS' SUBMISSIONS .

13. The Respondents' opposition is not so easy to summarise as it appears to rest upon a misunderstanding of the impact and legal consequences of the admissions made on behalf of the Respondents at the pre-trial review on the 6th October 2012 and as recorded in the Directions.

14. Mr Martin's initial submissions at this hearing were that the Respondents retained their right to expand the scope of their challenge to years other than the 2011 and 2012. In particular, the Respondents had concerns about the level of service charges for 2009 and 2010 and that these years were still open to challenge.

15. After the Tribunal had referred him to the admissions made by him at the pre-trial review and as recorded in the Directions, namely that the challenged years were restricted to 2011 and 2012, Mr Martin accepted that this had been a mistake on his part and he appeared to accept that the Respondents were thus restricted to challenging service charge in 2011 and 2012 only.

16. The second central submission made by Mr Martin was that notwithstanding the Directions, the Respondents still retained the ability to challenge service charges already paid in 2011 and 2012 on the basis that they had not been reasonably incurred. In this context he maintained that the Applicant had still not given full disclosure of the invoices and receipts supporting the service charge paid in 2011 and

2012 and on this basis there were still matters upon which the Tribunal could and should adjudicate.

17. On being questioned by the Tribunal that the Directions had recorded the Respondents admission that the Tribunal would only adjudicate on service charges levied but not paid, he denied that he had made any such admission, and to the extent that any admission had been made then it was his mistake and the Respondents should not be penalised.

18. He maintained that he had made no admissions as to what service charges should be open to challenge and that the Directions had been wrong, something that he had flagged up with the Tribunal office at the time. He accepted that he had not sought to appeal the Directions and told the Tribunal that he was not aware that the Respondents had a right of appeal in these circumstances.

CONCLUSIONS.

19. We use as our framework for this decision the guidance handed down by the Lands Tribunal in the case of Volosinovici v Corvan (Properties) Ltd 2007 where it was held that in order to dismiss an application as frivolous or vexatious or otherwise an abuse of process the LVT was required to:

(a) remind itself of the provisions of Regulation 11 and ensure that proper notice had been given to the Respondent and that any hearing required by Regulation 11 was held,

(b) analyse the facts relating to the Challenged Application in order to reach a conclusion as to whether it could properly be described as frivolous or vexatious or otherwise an abuse of process,

(c) if it could be so described, consider whether the facts were such that the LVT should exercise its discretion to dismiss the application in whole or in part and

(d) provide clear and sufficient reasons for its conclusions.

20. The Tribunal is satisfied that it has complied with the procedural elements of the Regulations by giving due notice that it was minded to dismiss the application and giving the opportunity for the Respondents to be heard.

21. We next had to consider whether continuing the S.27 application would amount to an abuse of the Tribunal's process. In the judgment of the Tribunal the answer to this question is to be found in the Directions. The Directions were issued by the Tribunal following the pre-trial review, which took place on the 6th October 2012 in lieu of the hearing which had been set down for that day. At that time, there were six Respondents all represented by Mr Martin, and Mr Tempest of counsel appeared on behalf of the Applicant landlord. The pre-trial review was heard by a three member Tribunal.

22. Following the pre-trial review, the Tribunal issued the Directions which set out the background to the pre-trial review, recorded the jurisdiction of the Tribunal going forward, recorded the concessions and agreements made by the parties and finally gave directions in respect of the remaining issues to be determined. The relevant paragraphs are to be found at paragraph 3,5,7 and 8.

23. Paragraph 3 of the Directions state it was agreed that the scope of the application was limited to the service charge years 2010/2011 and 2011/2012 and that the application was further limited to service charge levied and not yet paid.

24. Paragraph 5 of the Directions state the Tribunal determines that its jurisdiction in this case is limited to determine under S.19 and S.27A of the Landlord and Tenant Act 1985 whether the amounts demanded by the Applicant in respect of service charge for the years 2011 and 2012 inclusive are unreasonable and payable.

25. Paragraph 8 of the Directions reads, it was agreed by the parties that the application was further limited to service charges levied and not yet paid.

26. The Directions were drafted by the chairman of the Tribunal and approved by each member of the Tribunal prior to issue and the Tribunal is satisfied that they accurately record the admissions of the parties' representatives made on the 6th October 2012. Mr Tempest for the Applicant also confirmed that in his opinion the Directions properly reflected matters agreed. The Tribunal therefore rejects Mr Martin's submissions that the Directions were issued in error.

27. The Tribunal is further satisfied that the Directions limited the issues that the Tribunal could consider to whether any unpaid service charges demanded by the Applicant for the years 2011 and 2012 were reasonable and payable.

28. The Applicant by its letter dated the 19th December 2012 effectively wrote off any unpaid service charges for 2011 and 2012. Bearing in mind that there were no further years open to challenge the Tribunal considers that following the letter of the 19th December 2012 there were no other matters within its jurisdiction to determine. In these circumstances to continue the application would be an abuse of process.

29. The Tribunal considered very carefully the submissions made by Mr Martin which centre on the fact that it was not his intention to limit the Respondents right to pursue their claim either by reference to restricting the number of years or by restricting the scope of enquiry to service charges levied but not yet paid. Be that as it may that is exactly what he has done. Whilst the Tribunal accepts that Mr Martin may not have understood the nature and extent of admissions made by him the admissions were made and the Tribunal cannot accept that the Respondents are now in a position to disassociate themselves from the admissions simply because Mr Martin was mistaken. The Applicant has acted on the admissions made and changed their position and they should not be prejudiced as a result of matters not of their own making. It was the Respondents choice to appoint a layperson to represent them in these proceedings and they must accept the consequences of that decision.

30. The Regulations give the Tribunal authority to regulate its own procedure and the Tribunal is satisfied that its decision to limit its scope of enquiry to 2011 and 12 and to service charges levied but not paid was well within its powers.

31. In conclusion the Tribunal is satisfied that the effect of the Applicant's letter of the 19th December 2012 is that it has conceded in advance any challenge to any outstanding element of the service charge for 2011 and 2012 and therefore there are no matters left for the Tribunal to adjudicate on. In these circumstances to continue the application would now be frivolous, or vexatious or otherwise an abuse of the process of the Tribunal. The Tribunal is further satisfied that in the above circumstances the facts are such that it should exercise its discretion to dismiss the application in its entirety and it so determines.

COSTS.

32. In the event that the Tribunal dismisses the application the Applicant landlord argues for a cost order on the basis that in continuing with the application, after the concessions made by the Applicant in December 2012, the Respondents acted frivolously, vexatiously, and otherwise unreasonably in connection with the

proceedings. Their costs for preparing and attending the dismissal hearing amounted to £1,490 inclusive of VAT and on that basis they seek £500, the maximum amount, from each Respondent.

33. The Respondents argue that as the Regulations provide for a hearing before the Tribunal has the power to dismiss an application, then it necessarily follows that costs should not be awarded against them in exercising their right to have a hearing so that they have the opportunity to put their arguments against the dismissal to the Tribunal for consideration.

34. With a degree of reluctance, the Tribunal has come to the conclusion that in not agreeing to discontinue their application following the concessions made by the Applicant in December 2012, the Respondents have acted frivolously, vexatiously and unreasonably in connection with the proceedings and they must accept the financial consequences.

35. The Tribunal is satisfied that when the Respondents first made their application, it was a proper one and it had merit. Indeed at the first pre trial review, the Respondents were successful in achieving concessions. At the second pre-trial review on the 6th October 2012 the Applicant made a number of further significant concessions. Accordingly up until December 2012 the Respondents actions were entirely reasonable. However when the Applicant made the declaration to waive all further service charges due for 2011 and 2012 the Respondents should have accepted that their application had run its course and that it should be discontinued as there was nothing further to be gained by continuing. Indeed four of the Respondents decided just that and discontinued their application leaving just Mrs. Maw and Miss Sutherland. They elected to continue their action seeking to raise issues that were clearly no longer within the scope of this Tribunal to determine. For example they sought to raise matters in the years 2009 and 2010 and disclosure of documents covering 2011 and 2012. In the judgment of the Tribunal this conduct was unreasonable. In January 2013 the Tribunal wrote to the Respondents' representative suggesting that the application should be discontinued on the grounds that there were no matters left for the Tribunal to adjudicate on.

36. The Respondents' representative's response was merely to raise the same issues and indeed he sought to expand the scope of the application to raise further and additional issues which he had already been told were outside of the Tribunal's jurisdiction. The Applicant also wrote to the Respondents' representative putting him on notice that an application to dismiss would be made unless the Respondents were able to identify matters on which the Tribunal could adjudicate.

37. The Tribunal accepts the submissions of the Applicant that throughout the course of this application and particularly after December 2012, the Respondents' representative's style of litigation has been to seek to expand the issues rather than reduce them and the Tribunal is satisfied that the cost burden on the Applicant has been considerable as a result of the refusal of the Respondents to accept and stand by the admissions made by them at the pre-trial review held in October 2012. It is no argument for the Respondents to say that their representative was in error and had made a mistake and that they should not be penalised as a result.

39. The Tribunal considers that the Applicant's costs incurred in preparing for and attending this hearing have been reasonably incurred and are reasonable in amount and for all of the above reasons the Tribunal determines that each Respondent is to make a contribution of £500 towards the costs of the Applicant.

Signed Chairman: _____

RTA Wilson LLB Solicitor Date: 29th April 2013