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HM Courts & Tribunals Service

Residential Property TRIBUNAL SERVICE

LONDON RENT ASSESSMENT PANEL

DECISION OF THE LEASEHOLD VALUATION TRIBUNAL

ON AN APPLICATION UNDER SECTION 168(4) OF THE COMMONHOLD AND LEASEHOLD REFORM ACT 2002

Case Reference:	LON/00AG/LBC/2012/0074
Premises:	8 Eton Hall, Eton College Road, London NW3 2DW
Applicant(s):	Shellpoint Trustees Ltd
Representative:	Mr H Lederman of counsel instructed by Lennons, solicitors
Respondent(s):	Ms Leila Mohammadi
Representative:	Mr J Fryer of CLC Solicitors
Leasehold Valuation Tribunal:	Mr Adrian Jack, Mr Michael Cartwright FRICS
Date of directions:	9th August 2012
Date of reg 11 notification:	2nd October 2012
Date of decision:	12 October 2012

Procedural

1. By an application received by the Tribunal on 23rd May 2012 the landlord sought a determination that the tenant was in breach of the covenants of her lease, namely:

    a. Clause 2(13)(b) "not at any time without the licence in writing of the Lessor and the Superior Lessor first obtained nor except in accordance with plans and specifications previously submitted in triplicate to the Lessor and approved by the Lessor and the Superior Lessor and to their satisfaction to make any minor internal alteration or addition in or to the Flat";

    b. Clause 2(18), not to cause a nuisance or annoyance etc; and

    c. Clause 2(19) "to keep the Flat including the passages thereof substantially covered with carpets except that in the kitchen and bathroom all over cork or rubber covering or other suitable material for avoiding the transmission of noise may be used instead of carpets."

2. The Tribunal held a pre-hearing review on 9th August 2012 and gave directions that the landlord should serve a bundle of documents on the Tribunal and on the tenant by 20th August 2012. The tenant had then to serve a bundle on the Tribunal and on the landlord by 3rd September 2012. The hearing was fixed for 13th September 2012.

3. By letter of 29th August 2012 the tenant's solicitor requested a postponement. The hearing date was moved to 11th October 2012 and the dates for the landlord's bundle changed to 18th September 2012 and for the tenant's bundle to 28th September 2012.

4. By letter of 1st October 2012 the tenant's solicitor wrote to the Tribunal to complain that the landlord has not served its bundle in accordance with the revised directions.

5. On 2nd October 2012 the Tribunal gave notification in accordance with regulation 11 of the LVT (Procedure) (England) Regulations 2003 that:

    "In breach of the directions the Applicant has failed to lodge its document bundle and by letter of 1 October 2012 the Respondent requests that the application be dismissed. In the absence of a comprehensive document bundle from the Applicant the Respondent cannot know the case that she has to answer. The tribunal cannot fairly make a decision without a response from the Respondent and a further extension of the directions at this late stage would result in an unjustifiable waste of the tribunal's limited resources that deprives

others of their proper entitlement. Consequently and for each of these reasons it is appropriate to dismiss the application.

As the dismissal will an in any event be heard at an oral hearing regulations 11(3)(c) and (4) are not engaged. To the extent that regulations 11(3)(c) and (4) may be engaged we consider that here are exceptional circumstances justifying giving less than 21 days notice of the hearing of the dismissal pursuant to regulation 14(4). The exceptional circumstances are that

a. the parties were given notice of the hearing date by letter of 4 September 2012; and

b. the hearing date was agreed by the parties; and

c. the Applicant will not be prejudiced because it will have ample opportunity to oppose the dismissal at an oral hearing."

6. On 3rd October 2012, eight days before the hearing, the landlord served its bundle. It did not contain any witness evidence.

7. At the hearing on 11th October 2012 the applicant was represented by Mr Lederman of counsel. The tenant was represented by Mr Fryer, solicitor. He produced a small bundle of submissions, which he gave to Mr Lederman and the Tribunal some minutes before the hearing commenced.

8. Mr Lederman said that he was relying solely on the contents of the letters of 20th February 2012 and 31st May 2012 to prove the breaches of covenant alleged. He accepted that this put him in difficulties as regards showing any breach of clause 2(18), the covenant not to cause a nuisance etc, but he said the letters showed that the tenant was accepting that she was in breach. He accepted that there was a breach of the Tribunal's directions, but relied on the letter from his instructing solicitor of 2nd October 2012 and Mrs Piggott's witness statement of 3rd October 2012 to excuse the breach. He said that he might need some additional time to consider the tenant's submissions and that he might need to research some further authorities in answer to those submisssions.

Regulation 11

9. Regulation 11 provides:

(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.

10. The Lands Tribunal in *726 Clive Court, Maida Vale, London W9; Volosinovici v Corvan (Properties) Ltd* LRX/67/2006 at [25] concluded that:

> "Regulation 11 is not to be read as being a limited filter power to prevent applications which are in whole or in part frivolous or vexatious or otherwise an abuse of process of the tribunal becoming launched. If an LVT concludes that, in the light of the all the circumstances including failure to comply with case management directions, an applicant's application or part of it is frivolous or vexatious or otherwise an abuse of process of the tribunal, then it is open to an LVT to dismiss the application in whole or in part under Regulation 11 notwithstanding that the application may have been progressing before the LVT for some time.
>
> [26] However, in order to dismiss an application or part of it as frivolous or vexatious or otherwise an abuse of process of the tribunal the LVT must properly consider the matter under Regulation 11 and give a decision which is adequate in law. This in my judgment requires an LVT:
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> 1. To remind itself of the provisions of Regulation 11 and to ensure that proper notice has been given under

Regulation 11(2) and (3) to the applicant and to ensure that any hearing required under Regulation 11 is held.

2. To analyse the facts relating to the application under consideration and to reach a conclusion as to whether the application (or some identified part of it) can properly be described as one or more of frivolous or vexatious or an abuse of the process of the tribunal.

3. To consider whether, if the application can in whole or in part properly be described as frivolous or vexatious or otherwise an abuse of process of the tribunal, the facts are such that the LVT should exercise its discretion to dismiss the application in whole or in part under Regulation 11.

4. To give clear and sufficient reasons for its conclusions."

11. We follow this four step procedure. The first step we follow above. So far as the listing arrangements are concerned, Mr Lederman argued that because the landlord had not been given 21 days notice under regulation 11(3)(c) the Tribunal had no jurisdiction to deal with the matter on 11th October 2012. We disagree. The purpose of regulation 11(3)(c) is to ensure that a party has adequate opportunity to ask for an oral hearing. Here that was ensured by listing the matter for the hearing on 11th October 2012. There was no prejudice to the landlord by adopting that course.

12. Mr Lederman also challenged the Tribunal's decision that there were exceptional circumstances shortening the notice given for the hearing on 11th October 2011. Notice of the hearing on 11th October had been given well in advance. We are doubtful that regulation 14(4) is engaged at all, because notice of the hearing had already been given. Assuming, however, that it was necessary to consider whether there were exceptional reasons for shortening the time for giving notice of the hearing of the regulation 11 matter, we turn to the earlier Tribunal's three reasons for abridging time set out above. We agree entirely with those reasons. Indeed Mr Lederman was constrained to admit that no prejudice had been caused to the landlord by the abridgment of time. Accordingly, we hold that we have jurisdiction to entertain the regulation 11 matter on 11th October 2012.

13. So far as the second step is concerned, there was no good reason for the landlord's failure to comply with the Tribunal's directions. In their letter of 2nd October 2012 the landlord's solicitors say:

> "We would advise that we had every intention of providing bundles to the Tribunal overnight in the DX and these are produced as far as possible as seen from the enclosed index. However, we need Counsel to address submissions to the Tribunal and Mr Lederman, who has had conduct of litigation with Mrs Mohammadi both in this Court, the County Court, the High Court and the Court of Appeal, was himself engaged in

another case last week and we have became aware that Mr Lederman is away from Chambers for religious holidays and therefore submissions cannot be concluded until tomorrow."

14. The letter contained no apology for the landlord's breach of the Tribunal's directions. Moreover it will be recalled that the directions (as revised) provided for service of the bundle by 18th September 2012. Mr Lederman's unavailability in the week commencing 24th September 2012 is irrelevant to this. There had according to Mrs Piggott's witness statement of 3rd October 2012 been a telephone conference with Mr Lederman on 3rd September 2012, so the bundle could have been prepared in accordance with the Tribunal's directions.

15. The failure to follow the Tribunal's directions was in our judgment an abuse of the process of the Tribunal. This was a breach which prejudiced the tenant, because it substantially reduced the time she had to prepare her case. The landlord is a well-funded and professionally represented commercial organisation. It is simply unacceptable that a party behaves with such blithe indifference to the Tribunal's directions. If Mr Lederman had needed additional time to consider the tenant's submissions, that too would have prejudiced the tenant.

16. We turn now to the third stage in the Upper Tribunal's analysis. Here we are entitled to look at the broader picture. There are a number of oddities in the landlord's case.

17. Firstly the landlord has decided to adduce no witness evidence in this matter. Mr Lederman, as we noted above, was constrained to admit that this made the allegation that the tenant had caused a nuisance difficult to justify. That alone would justify striking that allegation out as an abuse of process.

18. The other two allegations, however, are based on the tenant allegedly laying wooden flooring. It is apparent from the papers that there is a large amount of history to this case. In particular, the lifting of the carpet in the first place was necessitated by a leaking water pipe under the floor. This appears to be an ongoing problem. Without adducing any witness evidence the landlord was clearly making a conscious decision not to address the underlying merits of the case and instead rely simply on legal arguments.

19. A landlord is of course entitled to rely solely on legal arguments, but in considering whether proceedings are being taken for proper reasons it is relevant to look at the reality of the matter. In the current case the tenant is in a basement flat. There is no flat underneath her flat which might be bothered by a failure to carpet. Mr Lederman made an attempt to suggest that sound might be carried traversely. Without any evidence to such effect, we do not accept that.

20. The reality of the matter is that the landlord has a negligible prospect of obtaining forfeiture of the lease for the matters in respect of which it complains. Mr Lederman was forced to concede that in practice the best he could hope for would be an order giving the tenant relief on terms.

21. Secondly, this case appears to be part of an ongoing war of attrition. The tenant attempted to obtain formal consent for new flooring, but the landlord has refused on the basis that the lease was already forfeit.

22. Thirdly, the evidential approach of the landlord leads to a peculiar result. Mr Lederman says that the letters of 20th February 2012 and 31st May 2012 are admissions of breach by the tenant. Evidentially he relies on nothing else to prove the breach. But, if the letters are admissions of breach, the Tribunal has no jurisdiction: see section 168(2)(b) of the 2002 Act. On the facts of this case, the letters either are or are not admissions of breach; there is no middle course as suggested by Mr Lederman.

23. Each of these considerations would justify striking out. Putting the considerations together makes in our judgment an overwhelming case for doing so.

24. Mr Lederman suggested that this was a "nuclear weapon" and that there were other case management powers. On the facts of this case, there was little case management the Tribunal could have done other than to adjourn this matter to give the tenant an adequate opportunity to present her case. The landlord's preferred option might have been (if Mr Lederman's wish to consider the tenant's submissions further was refused) to press on with the merits on 11th October 2012 and the tenant might have felt constrained to agree, because of the costs implications of an adjournment. Either way, there was prejudice to the tenant.

25. On a modest claim, such as this, an adjournment would be disproportionate. Moreover, it would not only prejudice the tenant, it would also prejudice other litigants, whose cases would be put back. For these reasons too, we considered it appropriate to exercise our discretion to strike out.

Further orders

26. Mr Lederman wished to have an opportunity to make submissions (a) in answer to Mr Fryer's application for costs and a section 20C order and (b) to ask for permission to appeal. Accordingly we give him fourteen days for that purpose, with the same period for Mr Fryer to reply. Both parties agreed that these outstanding issues could be dealt with on paper.

DECISION AND DIRECTIONS

a. **The application is struck out pursuant to regulation 11 of the LVT (Procedure) (England) Regulations 2003.**

b. **The landlord has until 25th October 2012 to serve its submissions on the Tribunal and on the tenant as to why it should not pay costs under paragraph 10 of Schedule 12 to the Commonhold and Leasehold Reform Act 2002, why no order under section 20C of the Landlord and Tenant Act 1985 should be made and why it should have permission to appeal.**

c. **The tenant has until 8th November 2012 to serve its submissions in answer on the Tribunal and on the landlord.**

d. **The landlord may by 15th November 2012, but is not obliged to, serve a brief reply on the Tribunal and on the tenant.**

e. **The issues of costs and section 20C are adjourned for determination on paper in the week commencing 19th November 2012.**

Adrian Jack

Adrian Jack, Chairman 12th October 2012

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LONDON RENT ASSESSMENT PANEL

SUPPLEMENTAL DECISION OF THE LEASEHOLD VALUATION TRIBUNAL

ON AN APPLICATION UNDER SECTION 168(4) OF THE COMMONHOLD AND LEASEHOLD REFORM ACT 2002

Case Reference:	LON/00AG/LBC/2012/0074
Premises:	8 Eton Hall, Eton College Road, London NW3 2DW
Applicant(s):	Shellpoint Trustees Ltd
Representative:	Mr H Lederman of counsel instructed by Lennons, solicitors
Respondent(s):	Ms Leila Mohammadi
Representative:	Mr J Fryer of CLC Solicitors

Leasehold Valuation Tribunal:	Mr Adrian Jack, Mr Michael Cartwright FRICS
Date of original decision:	12th October 2012
Date of supplemental decision:	4th December 2012

8. We do agree that there is an arguable point of law as to whether the Tribunal could list the matter in the way it did in its notification under regulation 11 of 2nd October 2012. However, the point seems completely academic. If the landlord appealed and succeeded on its appeal, the Upper Tribunal would have to remit the matter to this Tribunal to redetermine the question as to whether the landlord was abusing the process of the Tribunal (sufficient time now having elapsed). This Tribunal (unless the landlord succeeded on its substantive grounds of appeal) would inevitably reach the same conclusion. Tribunals will not determine academic points so permission to appeal on this point is refused.

9. The other points are make-weights which have no real prospect of success. There is no other compelling ground to give permission to appeal.

10. We should add that we are baffled by the landlord's approach. If the letters on which it relies on as admissions are admissions, then the landlord can proceed straight to service of a section 146 notice and the landlord's application to this Tribunal is doomed on jurisdictional grounds. If the letters do not amount to admissions, then the landlord's application to this Tribunal is doomed on evidential grounds. The Tribunal is constrained to say that the landlord appears to be continuing its war of attrition with the tenant by its pursuit of an appeal.

DECISION AND DIRECTIONS

a. **The landlord shall pay the tenant £500 in respect of costs.**

b. **Pursuant to section 20C of the Landlord and Tenant Act 1985 the landlord is forbidden from adding the costs of and in the current application to the service charge account in respect of the block.**

c. **Permission to appeal is refused.**

Adrian Jack

Adrian Jack, Chairman 4th December 2012

Procedural

1. On giving its decision dated 12th October 2012, the Tribunal reserved a number of matters to be dealt with on paper. The parties have complied with the Tribunal's order and we accordingly determine the outstanding issues. This supplemental decision should be read with the substantive decision.

Costs

2. Mr Lederman submits that the strike-out decision is unusual. We agree that it is fortunately unusual for a party to be as flagrantly in breach of the Tribunal's orders as the landlord was in this case, but decisions to strike out are not particularly unusual in the Tribunal.

3. Where a case has been struck out under regulation 11, the presumption in our judgment is that a costs order will be made. The Tribunal does of course retain a discretion. Mr Lederman urges that the landlord has apologised and that this ought to be taken into account. The Tribunal does take it into account, but it is really of little weight and is not sufficient to mean that no costs order should be made. We repeat that the landlord is a commercial organisation with professional advisors.

4. Mr Lederman suggests that there is no causation. Costs, he argues, would have been incurred in any event in attending on 11th October 2012. We disagree. Firstly, Mr Fryer says, and we accept, that the late service of the bundles caused him additional work. Secondly, the Tribunal might well have had to adjourn the matter in any event.

5. We accept Mr Fryer's evidence that the additional costs incurred by him exceeded £500. Although we have a discretion to award less, on the facts of this case we see no reason to do so. Accordingly we order that the landlord pay the tenant £500.

6. The landlord has indicated that it does not propose to put its costs on the service charge. Nonetheless in order that there is a proper paper record of this concession, we make an order under section 20C of the Landlord and Tenant Act 1985 preventing the landlord putting any of the costs of and in the current application on the service charge for the block.

Permission to appeal

7. Mr Lederman seeks permission to appeal on a number of grounds. Firstly he says that the Tribunal had no jurisdiction to strike the matter out because sufficient notice had not been given of the application. We disagree for the reasons set out in the substantive decision.