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DECISION OF THE LEASEHOLD VALUATION TRIBUNAL ON APPLICATIONS UNDER SECTION 27A OF THE LANDLORD AND TENANT ACT 1985 SECTION 27

Applicant: Mrs Leila Mohammadi

Respondent: Shell Point Trustees Limited
Anston Investments Limited

Re: 8 Eton Hall College Road, London NW3 2DW

Application received: 22 November 2006

Hearing date: 20 December 2006

Appearances: Mrs Leila Mohammadi (Applicant)

Mr H Lederman (counsel) (Respondent)
Mrs J Piggott

Members of the Leasehold Valuation Tribunal:

Mr S Shaw LLB (Hons) MCIArb
Mr L B Packer

DECISION

BACKGROUND

1. This case involves an application made by Mrs Leila Mohammadi ("the Applicant") in respect of the premises at 8 Eton Hall, Eton College Road, London, NW3 2DW ("the property"). The Applicant purchased the long lease of the property approximately 20 years ago, and remains in occupation of the property. The precise status of the Respondents as identified on the title page of this Decision, is a little obscure, but it appears undisputed that one or other (or perhaps both) of these parties holds or has held either an intermediate and superior leasehold interest and/or the freehold interest in the property. Nothing turns on that precise status for the purpose of this application and this Decision.

2. The application is dated 20 November 2006 and made pursuant to the provisions of Section 27A of the Landlord and Tenant Act 1985. By virtue of the application, the Applicant seeks a determination from the Tribunal as to the reasonableness of service charges spanning the period from April 1982 up until (prospectively) April 2008. At the hearing, the Applicant informed the Tribunal that there was an error in the application, and that the commencement date for the period of review should be April 1990, and not April 1982. The Tribunal accordingly allowed her to amend the application to this effect.

3. The manner in which the application comes before the Tribunal is that having perused the application and the other documents available to the Tribunal, relating to this and other applications the Applicant has made to the Tribunal, the Tribunal wrote to the parties, of its own volition, by letter dated 28 November 2006, giving notice principally to the Applicant herself, to the effect that the matter was being listed for a Preliminary Hearing because *"the Tribunal is unable to deal with matters that have already been determined by the Court and it would appear to be the case (sic) for at least part of your application"*.

4. In that same letter, the parties were given the opportunity both to make both written representations, and to appear before the Tribunal, for an oral hearing if so desired. In addition, the Applicant was informed that if in the light of the Tribunal's letter, she wished to withdraw the application, she should so inform the Tribunal as soon as possible.

5. In the event, the Applicant did indeed seek an oral hearing and accordingly the matter was listed before the Tribunal on 20 December 2006, upon which date a Preliminary Hearing as to jurisdiction took place.

THE HEARING

6. At the hearing, the Applicant appeared in person and represented herself. The Respondents were represented by Mr H Lederman of Counsel and Mrs J Piggart of Messrs Bell Dening, the Respondents' Solicitors. Two other gentlemen, namely Mr N Singer and Mr G Brown also attended on behalf of the Respondents, but gave no evidence and made no representations to the Tribunal.

7. This case has a long and in many respects unfortunate background involving protracted proceedings in the County Court, an appeal to the Court of Appeal, and at least three separate applications for determinations of reasonableness of service charges to this Tribunal. The full background of the matter is set out in the judgment of His Honour Judge Hallgarten QC dated 29 May 2002, and running to over forty pages appearing at pages 24 to 66 of the hearing bundle. The background is also referred to in the judgment of the Court of Appeal, running to 26 pages and appearing at pages 68 to 93 of the hearing bundle. Yet further, the background can be gleaned from two earlier decisions of this Tribunal, the first dated 18 February 2002 (pages 13 to 19 of the bundle) and the second dated 7 December 2005, just over a year ago, appearing at pages 183 to 190 of the bundle.

8. No purpose would be served by repeating the whole of that background in the context of this Decision on the Preliminary Issue before the Tribunal, and indeed it is perhaps not pertinent to the issues which this Tribunal is required now to consider. Suffice it to say that over long periods, there have been

disputes between the parties concerning amounts alleged due by the Respondents pursuant to the terms of the lease, and cross-claims from the Applicant relating to alleged defaults on their part and allegations of disrepair in the property. All parties appear fatigued by the dispute, vast costs have been expended, and, as indicated, this Tribunal is the latest of a number of Tribunals asked to examine or re-examine various of these issues. In the course of the hearing, the Tribunal invited the parties to consider making use of the Tribunal's expert mediation services. The Applicant indicated her interest, but the Respondents felt that, given the protracted history of the case, mediation was unlikely to prove fruitful.

9. It is proposed to summarise the submissions made by or on behalf of the parties at the hearing of this Preliminary Issue as to jurisdiction, and thereafter to analyse these issues and to give the conclusions of the Tribunals.

RESPONDENTS' SUBMISSIONS

10. In a detailed and useful Case Summary running to some 17 pages, the arguments of Mr Lederman for the Respondents are set out, for contending that either this Tribunal has no jurisdiction, or alternatively (or additionally) the application should be dismissed as being frivolous, vexatious or otherwise an abuse of process pursuant to the provisions of the Leasehold Valuation Tribunals (Procedure) (Eng) Regulations 2003, Regulation 11. As a matter of procedure, by virtue of the requirements of the Regulations, a dismissal based upon these regulations would require the Tribunal to give further notice to the Applicant, and the possibility of a further hearing to cover essentially the same arguments as have been rehearsed before the Tribunal on the occasion of this hearing. Accordingly, Mr Lederman urged the Tribunal principally to dismiss the application at this stage for want of jurisdiction, and upon the basis of his contentions, briefly summarised as follows:

(a) Period April 1990 – November 2002

Mr Lederman drew the attention of the Tribunal to Section 27A(4)(c) of the Landlord and Tenant Act 1985 which provides that:

> *"No application under subsection (1) or (3) may be made in respect of a matter which – has been the subject of determination by a court ..."*

He took the Tribunal in some detail to the pleadings in the County Court proceedings referred to above, and to the Orders made in both the County Court and the Court of Appeal, and contended that it is clear from those proceedings and documents, that the issue of the reasonableness and recoverability of these service charges was either expressly or impliedly dealt with in those proceedings, so as to preclude jurisdiction by virtue of Section 27A(4) as referred to above.

(b) For the period from November 2002 to date (and indeed beyond, insofar as a prospective finding or guidance is sought in the application), the Respondents point to the Order of the County Court dated 24 October 2002, and that of the Court of Appeal varying that Order on 16 July 2003, by virtue of which Orders, possession of the premises was ordered against the Applicant, and her lease effectively forfeited, subject to relief from forfeiture, upon terms which have not been fully complied with by her. Accordingly, her lease is technically forfeit (although capable of being revived by compliance with the terms of the relief granted) and in the meantime, effectively from the date of the County Court order at the end of October 2002, there is no lease in respect of which service charges are being claimed. Such sums as are being claimed are in the nature of "mesne profits", or damages for use and occupation, and in relation to such charges, the Tribunal has no jurisdiction. The reason for this is, that such mesne profits are not *"service charges"* within the definition of Section 18 of the Landlord and Tenant Act 1985. The Tribunal is a creature of statute, and its jurisdiction is confined to that conveyed by the Act which, for the

reasons indicated, expressly precludes the Tribunal from making determinations in this context in relation to anything other than services charges as properly so defined.

(c) Very much as a last resort, and only on the basis that these first two contentions are held for some reason not to succeed, the Respondents contended that the application should be dismissed pursuant to Regulation 11 as referred to above (and after further notice had been given to the Applicant), essentially for abuse of process, and on the basis that there have already been two Tribunal decisions and a Court determination, corresponding with the matters she now seeks to raise in this further application.

APPLICANT'S SUBMISSIONS

11. The Applicant appeared before the Tribunal in person, and perhaps unsurprisingly, did not seek to engage with the legal issues raised in support of the dismissal of her application on behalf of the Respondents and as set out above. She had dismissed her legal advisors (of whom there had been several, both counsel and solicitors) because, so she informed the Tribunal, she had felt let down and betrayed by them, for a number of reasons which it is not necessary to examine in the context of this Decision.

12. Suffice it to say that she informed the Tribunal that she was not in good health, that she was distressed by these continuing proceedings (as indeed appeared to the Tribunal to be the case) and felt that her case had not been properly argued on her behalf in the County Court and the Court of Appeal. She put before the Tribunal a letter dated 18 December 2006 which referred to *"appalling condition"* in the property, and referred to various aspects of disrepair. She said that she wished the matter to be referred to mediation in order to bring to an end this long-standing dispute. As noted above however, the Respondents, having regard to the multiplicity of previous proceedings, the long history, and the accumulated costs and continuing delay, felt unable

to accede to the suggestion of mediation, and required the Tribunal now to make a finding in relation to jurisdiction.

ANALYSIS AND DETERMINATION OF THE TRIBUNAL

Period April1990- November 2002

13. The proceedings in the County Court referred to above were initially commenced by the Applicant herself as Claimant, and were essentially for damages for alleged breaches of repairing covenant as appears from the Re-Re-Amended Particulars of Claim appearing at pages 95 to 100 of the hearing bundle. However, the claim drew a Counterclaim from the Respondents, as appears from the Re-Re-Amended Defence and Counterclaim appearing at pages 103 to 121 of the bundle, coupled with certain print-outs and schedules appearing at pages 122 to 125 of the bundle. At paragraph 50 of the Counterclaim, the Respondents claimed arrears of various charges, including service charges from August 1992 until the end of September 1996. In the Re-Amended Defence to Counterclaim appearing at page 130 in the bundle, various defences are raised to the claim for service charges (several of them relating to particular provisions in the lease) but there appears no specific plea to the effect that the works were not carried out, or were carried out at excessive cost or unnecessarily.

14. In any event, the Court undoubtedly gave judgment for the arrears of service charge claimed (subject only to a small deduction) at paragraph 1 of its Order at page 3 in the bundle. The money judgment there referred to of £8,511.28, incorporates the service charge claim pleaded at paragraph 50 of the counter-claim which was amended some time in March 2002. The sums there claimed, as indicated, includes service charge items from 1992 to 1996. As

already observed in the previous Tribunal Decision dated 7 December 2005, this judgment was not overturned on appeal.

15. Moreover, when the matter proceeded to the Court of Appeal, the judgment was further varied or added to at paragraph 5 of the appellate court judgment (page 7 of the bundle) to the effect that service charges in the sum of £16,566.63 were ordered for the period from 14 November 1996 up until 28 November 2002.

16. It would therefore seem to this Tribunal, that there are clear judgments or determinations for the purposes of Section 27A(4) of the Act, dealing with the service charge claim for the period from, at least, September 1992 until the end of November 2002, and which preclude this Tribunal from assuming further jurisdiction in respect of these matters.

17. So far as the earlier period raised in this application and not directly covered by these court judgments is concerned, that is to say the period from April 1990 until September 1992, Mr Lederman on behalf of the Respondents contends that this period too was implicitly dealt with in the previous court orders, because the sums claimed in the proceedings are itemised in a computerised printout appearing at page 122-125 in the bundle, from which schedule or printout it will be observed that the account starts with opening arrears in November 1991 of a sum of £8,222.38.

18. Those arrears, contends Mr Lederman, must themselves have been for a period preceding November 1991, and would have incorporated the earlier period going back to April 1990 now sought to be challenged by the Applicant. Further he contends, amongst other matters, that even if there was no specific judgment dealing with this earlier period, (a) it was open to the defendant to have raised such complaints in the context of those proceedings, and applying various authorities and the principles of *"res judicata"*, it would be an abuse of process now to allow such an application to proceed and (b) these matters are now so stale that the documents relating to such a period, (approximately 16 years ago), are now unlikely to be available, and the

persons dealing with the matters equally are unlikely to be traceable, and in some cases may even no longer be alive.

19. So far as this earlier period of April 1990 up until August 1992 is concerned, the Tribunal finds that there is some force in Mr Lederman's contentions so far as they support an argument for strikeout for abuse of process. However, in the context of dismissing the claim pursuant to Section 27A(4) of the Act, it is necessary that there has been a previous determination by a Court. The dismissal of an application of this kind is in the nature of a Draconian order and although, as indicated in the grounds raised by Mr Lederman, there are strong arguments for a dismissal (subject to appropriate notice, and further consideration, as provided for by the Regulations)) for abuse of process, it does not seem to this Tribunal that this earlier period has specifically been the subject of a court order or orders. Accordingly, no dismissal of this part of the application is made pursuant to Section 27A(4).

The Period from November 2002 to Date, and for the Future

20. The contention on behalf of the Respondents in this regard is that the Order dated 24 October 2002 made in the County Court (and in this regard unchanged significantly by the variation in the Court of Appeal, - see paragraph 3 of the Court of Appeal Order at page 7 in the bundle), effectively gave possession to the Respondents of the property, forfeited the lease, and granted relief from forfeiture in terms which to date have not been complied with in their entirety by the Applicant.

21. As a matter of fact, this appears not to be contested by the Applicant in that although she has paid the £297.00 arrears of rent referred to at paragraph 3(i) of the Order of the Court of Appeal, she has not paid the costs referred to at paragraph 3(ii) of that Order, and indeed the detailed assessment of those costs has not yet taken place (although the Tribunal was informed that there were hearing listed in this regard in the Chancery Division in the High Court during January and February 2007). In the absence of an extant lease, there can be no charges properly defined as service charges for this period after the

date of forfeiture within the context of Section 18 of the Landlord and Tenant Act 1985.

22. A *"service charge"* is defined in Section 18 of the Act as:

> *"... an amount payable by a tenant of a dwelling as part of or in addition to the rent –*
>
> *(a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord's costs of management, and*
>
> *(b) the whole or part of which varies or may vary according to the relevant costs."*

23. Mr Lederman points out that the sums presently being claimed from the Applicant are by way of mesne profits, or damages for use and occupation, which are calculated in accordance with the appropriate rack rental for the property. These sums do not *"vary according to the relevant costs"* for the purposes of Section 18, and in any event are not calculated by reference to services provided by the Respondents in the ordinary way.

24. The Tribunal accepts this submission on behalf of the Respondent. It seems to the Tribunal that this conclusion is irresistible and that mesne profits as described above are not service charges for the purposes of the Act and it is not open to the Tribunal to review these further years included within the Applicant's application, unless and until the lease is revived by compliance with the conditions for relief from forfeiture stipulated by the Court. Of course, as already observed by the Tribunal in its Decision of 7 December 2005, if relief is indeed granted, an application could then be issued by the Applicant to raise challenges for the post-forfeiture period, once demands for service charges have been served upon her and the sums claimed are ascertained.

25. In the light of the findings of the Tribunal as referred to above, it is not necessary, save in one respect, for the Tribunal to go on to consider whether this application should in addition or alternatively be dismissed for abuse of

process pursuant to the provisions of Regulation 11 of the 2003 Regulations referred to above.

26. For the reasons indicated above, the finding of this Tribunal is that it has no jurisdiction therefore to deal with the application presently before it in respect of the period 1992-2008 by virtue of the provisions of Section 27A(4) of the 1985 Act. The only surviving period in the application is the period from 1990-1992, which the Tribunal finds has not been the subject matter of a specific court determination and is therefore not dismissed pursuant to Section 27A(4) of the Act.

27. However, the Tribunal is strongly minded to dismiss the remaining part of the application for abuse of process, pursuant to Regulation 11 of the Regulations already referred to. Before any such dismissal may take place, the Applicant is entitled to notice pursuant to Regulation 11, to notice from The Tribunal that it is so minded, and the grounds upon which it is minded to dismiss the application.

28. The Applicant should therefore take this part of the Decision to be notice for the purposes of the Regulations to the effect that the Tribunal is so minded. It is minded to dismiss that remaining part of the application on the grounds that it is an abuse of process principally for the reasons already alluded to above and set out in the case summary of Counsel for the Respondent. Specifically, the Tribunal is of the view that it would be an abuse of process to allow this part of the application to proceed because, either the matter was dealt with implicitly in the previous proceedings referred to above, or it was open to those then representing the Applicant to raise the matters raised in the remaining part of the application in those proceedings By application of the principles of Res Judicata, it is not open for her now to attempt to revive those matters in the context of this further application.

29. Further or alternatively, there is a real risk that it would be impossible now to have a fair trial of matters of such antiquity, given the inaccessibility of the documents and possible faded memories or lack of availability of the relevant witnesses. Yet further, the principle of a *laches* (unconscionable delay)

applies and, to put the matter more simply, there appears to have been no reason at all why service charges for this period, incurred now a very long time ago, could not have been raised at the appropriate time, closer to that period. There would be real prejudice to the Respondents in the incurring of costs wholly disproportionate to the amounts in issue in having to investigate the claim for a period now so long ago.

30. If the Applicant wishes to be heard further on this aspect of the case only (that is to say dismissal for abuse of process of the application in relation to this specific period, April 1990 – August 1992), she may request to appear before and be heard by the Tribunal on this question as to whether the application should be so dismissed, provided such request in made by no later than 28th February 2007, failing which the Tribunal will consider such dismissal without the need for a yet further hearing.

COSTS

31. The only other matter outstanding is that the Respondents invited the Tribunal to make an order for costs against the Applicant pursuant to its powers contained within Schedule 12 of the Commonhold and Leasehold Reform Act 2002. Those powers entitle the Tribunal to make an order for costs against a party in circumstances where it is satisfied that that party has behaved in a frivolous, vexatious or otherwise unreasonable manner in the context of the proceedings. The Respondents contend that they have already been put to substantial costs in dealing with the multiplicity of proceedings brought by the Applicant and that since this latest application was, in their contention, obviously doomed to failure, she should be so penalised in costs to the maximum degree.

32. Matters of costs are always subject to the discretion of the Tribunal. The Applicant is not now acting with the benefit of legal advice, and the matters raised in this Preliminary Issue are in many respects technical and legalistic. Although the poor prospects of this application may have been predictable for lawyers, there is no reason to assume such knowledge on the part of the Applicant acting in person. In all the circumstances, the Tribunal makes no

further costs order against the Applicant. She should however note that if she elects to seek to proceed with the remaining part of the application not dismissed by this Order, and is unsuccessful, the Tribunal would not necessarily take the same view, and might make a costs order against her personally.

CONCLUSION

33. For the reasons indicated above, this application is dismissed for want of jurisdiction, save in relation to the period April 1990 – August 1992. The Tribunal is minded to dismiss that part of the application too, for abuse of process, pursuant to Regulation 11 of the 2003 Regulations, but before considering making any further order in this regard, will await any response to the notice to the Applicant given in paragraphs 28-30 above, by no later than 28th February 200 . No order for costs is made upon the Repondents' application for costs under Schedule 12 to the Commonhold and Leasehold Reform Act 2002.

Legal Chairman: S.SHAW

Dated: 29th January 2007