THE RESIDENTIAL PROPERTY TRIBUNAL SERVICE
SOUTHERN RENT ASSESSMENT PANEL
LEASEHOLD VALUATION TRIBUNAL

Residential Property
TRIBUNAL SERVICE

Regulation 11 (1)(b) of the Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003

(Application to dismiss)

Case Number:	**CHI/21UF/LDC/2009/0026**
Property:	**127 South Coast Road Peacehaven East Sussex BN10 8QX**
Applicant/Landlords:	**Colin Arthur Mills Jane Anne Mills**
Respondent/Leaseholders:	**Clifford Arnold Ian Bennison**
Appearances for the Applicants:	**Jeremy Donegan Solicitor of Osler Donegan Taylor Solicitors (ODT)**
Appearances for the Respondent:	**Steven Kinch Solicitor of SDK Law**
Date of Hearing	**16th November 2009**
Tribunal:	**Mr R T A Wilson LLB (Lawyer Chairman) Mr B Simms FRICS (Valuer Member) Mr Richard Athow FRICS (Valuer Member)**
Date of the Tribunal's Decision:	**12th December 2009**

THE APPLICATION.

1. This is an interlocutory application made by the respondent leaseholders pursuant to Regulation 11(1)(b) of the Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003 ("Regulation 11") to dismiss an application dated 24th August 2009 made by the applicants pursuant to section 20ZA of the Landlord and Tenant 1985 Act.("the Challenged Application")

2. The respondents seek to have the Challenged Application dismissed on the basis that it is an abuse of process of the tribunal. A statement of SDK Law solicitors dated 13th October 2009 supports the respondents' application.

3. The applicant landlords oppose the application to dismiss and the grounds for opposition are set out in a statement of case of ODT solicitors dated 30th October 2009.

4. The hearing took place on 16 November 2009. Mr Arnold of the respondents attended the hearing and was represented by Mr Kinch of SDK Law and the applicant landlords attended the hearing and were represented by Mr Donegan of ODT

DECISION.

5. We decline to dismiss the Challenged Application pursuant to Regulation 11.

6. The tribunal makes an order under section 20C of the 1985 Act relating solely to the costs of this application to dismiss.

CHRONOLOGY.

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

   i) In the Summer of 2005 the applicants carried out consultation with the respondents in relation to roof works to be carried out to the premises.

   ii) In October 2006 the applicants carried out the roofing works.

   iii) In January 2008 the applicants commenced County Court proceedings against the respondents for the recovery of interim service charges.

   iv) In February 2008 the respondents filed defences with the County Court.

   v) On the 4th April 2008 the County Court proceedings were transferred to the Leasehold Valuation Tribunal. ("the Original Proceedings")

   vi) On the 30th April 2008 provisional directions were given by the tribunal.

   vii) On the 30th May 2008 the parties agreed further directions providing for a target date for the hearing of the 19th September 2008. These directions provided for the applicants to file their statement of case by the 25th July 2008; for the respondents to reply by 15th August 2008 and for bundles to be filed with the tribunal by the 24th August 2008.

viii) A hearing took place on the 19th September 2008 but the tribunal made no determination as the applicants had failed to file a statement of case and as a consequence the respondents had not been able to file their replies.

ix) At the same hearing both parties agreed to an adjournment and further directions were given by the tribunal in which it was envisaged that the applicants would make an application under Section 20ZA for dispensation of the consultation requirements in respect of the roofing works. This was to be done by the 3rd October 2008 with a revised target date of the hearing set for the 4th November 2008.

x) In September 2008 the applicants, via their solicitors, sought to withdraw the Original Proceedings in both the County Court and with the tribunal.

xi) On the 24th August 2009 the applicants made, for the first time, an application pursuant to section 20ZA of the 1985 Act, which is the Challenged Application.

REGULATION 11.

Regulation 11 sets out the circumstances where a tribunal may dismiss an application on the grounds that it is an abuse of process and it reads as follows:

8. ***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 RESPONDENT'S SUBMISSIONS.

9. Mr Kinch provided a written statement of his case and at the hearing expanded upon the written submissions made by him. He led no evidence that the Challenged Application was either vexatious or frivolous, rather he maintained that it was an abuse of process because it was manifestly unfair. Upon withdrawal of the Original Proceedings in September 2008 the respondents had a legitimate expectation that the matter was concluded and would not be the subject of further litigation.

10. The making of the Challenged Application some eleven months later therefore came as a considerable and unwelcome surprise since it revived proceedings, which had come to an end.

11. Mr Kinch further contended that if the Challenged Application was allowed to proceed then it would have the effect of permitting the applicants to disregard the earlier directions of the tribunal giving in September 2008 and in effect to achieve an unauthorized extension of time. This amounted to an abuse of process.

12. The Challenged Application was also premature as the applicants had still failed to produce certified accounts, which was a condition precedent to payment and to the applicant's entitlement to recovery. The fact that the new application was premature meant that it constituted an abuse of process.

13. The directions given in September 2008 had not been complied with and by bringing the Challenged Application the applicants sought to resurrect the Original Proceedings based on a fresh application, which related to the same subject matter. This resulted in duplication. The tribunal was in effect being asked to determine an action, which had been abandoned but now revived under the guise of a different section of the 1985 Act. This amounted to an abuse of process.

14. The making of the Challenged Application had involved his clients in additional expense at a time when they had a legitimate expectation that the matter was at an end. It was not reasonable to expect the respondents to incur additional legal fees at this late stage bearing in mind that the applicants had consistently failed to comply with the directions of the tribunal in respect of the Original Proceedings.

THE APPLICANT'S SUBMISSIONS.

15. Mr Donegan had also provided a written statement and expanded upon this at the hearing.

16. He reminded the tribunal that the applicants had made no section 20ZA application within the Original Proceedings, which he accepted had been withdrawn by his clients of their own accord. Mr Donegan accepted that his clients had not complied with the directions, which were made within the Original Proceedings, but he contended that

there was no need to comply as the proceedings themselves had been withdrawn without a determination being made by the tribunal.

17. Mr Donegan stated that the Original Proceedings involved a determination in respect of the alleged non-payment of interim service charges. The position had now moved on insofar as his clients expected to be able to produce signed certified accounts within the next 2 to 3 weeks. At this point the applicants would not be claiming interim service charges but service charge based on the actual cost of the roofing works. This in effect meant a different claim based on a different jurisdiction and one, which had not yet been heard by the tribunal.

18. Mr Donegan told the tribunal that his clients had withdrawn the Original Proceedings so that they could get their house in order. At the time of withdrawal it was implicit in the letter of withdrawal that the applicants reserved their right to pursue the question of service charge when formal accounts had been prepared. The letter of withdrawal envisaged that at a later stage, service charge demands would be made on the basis of actual expenditure and not budgeted expenditure. The respondents were therefore wrong to assume that the withdrawal of the Original Proceedings meant an end to the matter.

19. Mr Donegan contended that the tribunal had gone beyond its powers in the Original Proceedings when it had ordered the applicants to make an application under section 20ZA of the 1985 Act. The tribunal did not have the power to order a party to make an application. The applicants were well within the limitation periods in bringing the Challenged Application in August 2009 and it would be unfair if they were not allowed to pursue it at this stage. Furthermore there was no duplication because a section 20ZA application had not been made during the Original Proceedings.

20. As far as prejudice was concerned, Mr Donegan did not accept that the bringing of the Challenged Application involved the respondents in any extra expense. The same expense would have been incurred had his clients made the application eleven months previously. There was no change in the nature or scope of the work. In contrast, if the Challenged Application was dismissed now, the consequences for the applicants would be stark. They would lose the opportunity to be able to claim from the respondents the full cost of the roofing work, which was nearly £12,000. Instead his clients would be limited to recovery of just £250 from each respondent.

REASONS FOR OUR DECISION NOT TO DISMISS THE APPLICATION.

21. 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:

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

    (2) 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

(3) 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

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

22. At the hearing Mr Donegan confirmed that the tribunal had in effect given notice that it was minded to dismiss the application and he accepted that this notice complied with Regulation 11 and he took no issue on its validity.

23. We next had to consider whether the Challenged Application amounted to an abuse of the tribunal's process. We reminded ourselves that as far as the Original Proceedings were concerned, the applicants had on two occasions failed to comply with directions issued by the tribunal. Furthermore a somewhat unhappily worded letter had been sent by their former solicitors to the tribunal seeking to withdraw the Original Proceedings. Having regard to the content of this letter the tribunal could understand why the respondents had formed the view (albeit wrongly) that this was the end of the matter.

24. However we do not accept the respondents' submissions that the bringing of the Challenged Application involves either duplication or is an attempt to re-litigate matters, which have already been determined. It is common ground that the tribunal did not make a determination in the Original proceedings. Furthermore we do not follow their arguments that the bringing of the Challenged Application at this stage puts the respondents to greater expense than they would have incurred had the Challenged Application being made in October 2008. We consider that the same work would have been necessary whenever the application had been brought.

25. Furthermore we reject the respondents' contention that the bringing of the Challenged Application involves duplication because no application under section 20ZA of the 1985 Act was made within the Original Proceedings.

26. The Original Proceedings brought under section 27A of the 1985 Act were legitimately withdrawn before determination and therefore the tribunal takes the view that the bringing of this Challenged Application under section 20ZA of the 1985 Act does not amount to an attempt to re-litigate matters which have already been determined. The facts of the case have moved on since the Original Proceedings. At that time the issues to be determined by the tribunal related to the payment of interim service charge. One year on the tribunal has been told that certified accounts are likely to be produced shortly which will crystallize the respondents liability for service charge based on actual expenditure rather than budgeted interim service charge. The subject matter of a fresh section 27A application under the 1985 Act if made will therefore be different to that before the tribunal in the Original Proceedings .

27. The tribunal accepts the applicants contention that the wording of the withdrawal letter from the applicant's former solicitors did leave the door open for the applicants to pursue service charges for the roofing works at a later date, even though the wording is not particularly clear.

28. The tribunal also accepts the applicants case that when the Original Proceedings were transferred from the County Court to the LVT, the amount claimed represented an on account payment request for the roofing work and not the final amount. The tribunal takes the view that the production of certified accounts is not a condition precedent to payment of these on account sums. We therefore reject the arguments made by the

respondents that the failure of the applicants to produce certified accounts means that both the Original Proceedings and the Challenged Application proceedings are premature.

29. Looking at all the evidence before the tribunal it concludes that the applicants have retained the right to pursue service charge amounts in respect of the roofing works, which are supported by certified accounts and otherwise comply with the contractual provisions of the leases and the statutory framework relating to service charge demands. The tribunal rejects that the Challenged Application amounts to a rehearing or involves duplication or is an attempt to revive an abandoned case.

30. We then considered the issue of prejudice to the parties. For dismissal, is the alleged extra expense that the respondents will be put to in defending a claim that they thought had been abandoned. As stated above however we do not accept that the prosecution of the Challenged Application some 11 months later than contemplated by the parties will lead to any increased expense. The same work will be involved and there is no suggestion by the respondents that the applicants would have been precluded from making the application in September 2008.

31. Against dismissal, is the undoubted substantial prejudice to the applicants being denied the opportunity to seek to recover the cost of roofing works in the order of £12,000, which the parties accept have been carried out to the property.

32. We consider that the onus is on the respondent to prove abuse and that the threshold to make such a finding is a high one. Taking all the evidence into account the tribunal concludes that the respondents have not discharged this burden and as a consequence the bringing of this section 20ZA application for the first time at this stage does not amount to an abuse. The Challenged Application should be allowed to proceed.

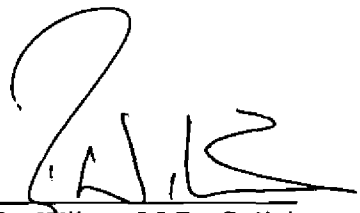
COSTS.

33. Late in the hearing Mr Kinch sought an order that the costs of these proceedings to strike out should not form part of a future service charge account. He maintained that if his application was successful then it was only just and equitable that the applicant be precluded from charging their legal costs of the application to a future service charge account. Even if his application was not successful he considered the conduct of the applicants had been such that it would not be right for them to in effect be awarded costs.

34. Mr Donegan accepted that if the application to dismiss was successful then it followed that the applicants should not be entitled to charge their legal costs to the service charge account. However if the tribunal did not dismiss then there was no reason why the legal costs should not be charged to the service charge account if the lease so provided.

35. The legislation gives the tribunal discretion to disallow in whole or in part the costs incurred by a landlord in proceedings before it being treated as relevant costs to be taken into account when determining the amount of future service charges payable. The tribunal has a wide discretion to make an order that is just and equitable in all the circumstances. Taking all the facts and circumstances into account and having regard to the conduct of the parties, the tribunal has concluded that it is just and equitable for a section 20C order to be made and it so orders. Although the application to dismiss has

not been successful, the case put by the respondent was not divorced of merit. Further more the applicants failed to comply with directions of the tribunal relating to the Original Proceedings and in the opinion of the tribunal have not prosecuted their case in a timely fashion. The making of a section 20C order means that both parties will be responsible for their own costs as far as this application is concerned and the tribunal considers that this is the just and equitable result.

Chairman 

RTA Wilson LLB Solicitor

Date: 12th December 2009