

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



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

**(Application to dismiss)**

<b>Case Number:</b>	<b>CHI/00ML/LBC/2009/0031</b>
<b>Property:</b>	<b>Flat 1, 9 Selborne Road Hove East Sussex BN3 3AJ</b>
<b>Applicant :</b>	<b>Leonard Hoole</b>
<b>Respondent:</b>	<b>Diana Stewart</b>
<b>Appearance for the Applicant:</b>	<b>Applicant appeared in person</b>
<b>Appearance for the Respondent:</b>	<b>Jeremy Donegan Solicitor of Osler Donegan Taylor Solicitors (ODT)</b>
<b>Date of Hearing</b>	<b>19<sup>th</sup> November 2009</b>
<b>Tribunal:</b>	<b>Mr R T A Wilson LLB (Lawyer Chairman) Mr N. Cleverton FRICS (Valuer Member) Ms J. Herrington (Lay Member)</b>
<b>Date of the Tribunal's Decision:</b>	<b>11<sup>th</sup> December 2009</b>

## **THE APPLICATION.**

1. This is an application made by the respondent pursuant to Regulation 11 (1)(b) of the Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003 ("Regulation 11") to dismiss an application dated 4th August 2009 made by the applicant under section 168 of the Commonhold and Leasehold Reform Act 2002 ("the Substantive Application").
2. The respondent seeks to have the Substantive Application dismissed on the basis that it is an abuse of process of the tribunal. The respondent's application is supported by a statement of ODT solicitors dated 17<sup>th</sup> September 2009.
3. The applicant opposes the application to dismiss and the grounds for opposition are set out in a statement of case dated 14th October 2009.
4. The hearing took place on the 19th November 2009. Diana Stewart attended the hearing and was represented by Mr Donegan and the applicant attended in person and represented himself.

## **DECISION.**

5. We dismiss the Substantive Application pursuant to Regulation 11.
6. We make no order for costs under paragraph 10 of schedule 12 of the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act")

## **CHRONOLOGY.**

7. The parties agreed that the chronology of events and background facts so far as relevant to this application were as follows:-
  - i) On the 4<sup>th</sup> August 2009 an application was made under section 168 of the 2002 Act ("the Substantive Application").
  - ii) On the 21<sup>st</sup> August 2009 the tribunal made preliminary directions relating to the Substantive Application.
  - iii) On the 2<sup>nd</sup> September 2009 the respondent made an application under Regulation 11 to strike out the Substantive Application.
  - iv) On the 3<sup>rd</sup> September 2009 the tribunal made further directions relating to the application to strike out pursuant to Regulation 11.
  - v) The subject property, 9 Selborne Road, Hove, East Sussex is a property converted into 4 self-contained flats the freehold title of which is vested in 9 Selborne Road Residents Limited ("the Freehold Company").
  - vi) Each flat owner is a shareholder in the Freehold Company and also a director.

vii) Mr Hoole is the lessee of flat 2 at the property which is the ground floor flat and Ms Stewart is the lessee of flat 1, the lower ground floor flat.

## **THE LAW**

8. The law is to be found at:-

- i) Section 168 of the 2002 Act
- ii) Regulation 11 of the 2003 Regulations
- iii) Paragraph 10 of Schedule 12 of the 2002 Act

i) Section 168 of the 2002 Act:

***168 no forfeiture notice before determination of breach.***

*(1) A landlord under a long lease of a dwelling may not serve a notice under section 146(1) of the Law of Property Act 1925 in respect of a breach by a tenant of a covenant or condition in the lease unless subsection (2) is satisfied*

*(2) This subsection is satisfied if –*

- (a) it has been finally determined on an application under subsection (4) that the breach has occurred,*
- (b) the tenant has admitted the breach, or*
- (c) a court in any proceedings, or an arbitral tribunal in proceedings pursuant to a post-dispute arbitration agreement, has finally determined that that the breach has occurred.*

*(3) Not relevant*

*(4) A landlord under a long lease of a dwelling may make an application to a leasehold valuation tribunal for a determination that a breach of a covenant or condition in the lease has occurred.*

*(5) Not relevant*

ii) 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.*

iii) Paragraph 10 of the Schedule 12 of the 2002 Act

#### **Costs**

(1) *A leasehold valuation tribunal may determine that a party to proceedings shall pay the costs incurred by another party in connection with the proceedings in any circumstances falling within sub-paragraph (2)*

(2) *The circumstances are where-*

- (a) *he has made an application to the LVT which is dismissed in accordance with regulations made by virtue of paragraph 7, or*
- (b) *he has, in the opinion of the LVT, acted frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with the proceedings.*

(3) *The amount which a party to proceedings may be ordered to pay in the proceedings by a determination under this paragraph shall not exceed*

- (a) *£500, or*
- (b) *such other amount as may be specified in procedure regulations.*

(4) *A person shall not be required to pay costs incurred by another person in connection with proceedings before a LVT except by a determination under this paragraph or in accordance with provision made by any enactment other than this paragraph.*

#### **THE RESPONDENT'S SUBMISSIONS**

9. At the hearing, Mr Donegan expanded upon his written submissions. The central plank of his case was that the Substantive Application had been made not by the Freehold Company as it should have been but by Mr. Hoole in his personal capacity. However,

under section 168 of the 2002 Act, it was only the Freehold Company who could make the Substantive Application and not an individual lessee. Therefore Mr. Hoole had no standing and if the Substantive Application were allowed to proceed then it was bound to fail. In effect the tribunal had no statutory jurisdiction to determine the Substantive Application because Mr Hoole was not the landlord of the subject flat and did not have the benefit of the covenants which he said had been breached by Mrs Stewart.

10. Whilst there was no statutory definition of what amounted to an abuse of process it was his contention that an application, which was doomed to failure, did amount to a clear abuse of process.
11. Furthermore he contended that at no time had the Freehold Company legally assumed or taken over the proceedings commenced by Mr Hoole or applied to be joined into the proceedings. This would require a valid resolution of the company which had not taken place. Resolutions of the company either had to be passed at a general meeting of the shareholders or be evidenced by a written resolution. It was accepted by Mr Hoole that the Freehold Company had not held a general meeting in over 12 years. Accordingly the company could not have assumed the proceedings by a resolution of a general meeting. The only other way in which the company could perhaps assume the proceedings was for there to be a valid written resolution passed by the Freehold Company. It was his contention that no written resolution had been passed. Therefore the position was that the Substantive Application was made and continued to this day in the name of Mr Hoole alone. Even though three of the four shareholders might have supported his actions, this support could not and did not amount to a transfer of the proceedings to the Freehold Company.
12. If the tribunal dismissed the application then it was only right that the respondent should be awarded costs up to the statutory limit of £500. The applicant had acted unreasonably in bringing the proceedings. ODT had written to him in June 2009 putting him on notice that the application, if made, would be misconceived and that ODT would apply to have it struck out and also seek an order for costs. Mr Hoole had ignored this letter and proceeded in any event. Mrs Stewart had incurred a fixed fee of £600 plus vat for this hearing so even if the tribunal awarded the maximum figure of £500 she would still be out of pocket.

#### **THE APPLICANT'S SUBMISSIONS.**

13. At the hearing Mr Hoole also developed the arguments set out by him in his written submissions.
14. He accepted that he had made the original application in his own name but all along it was his intention and motivation that he was pursuing the application on behalf of the Freehold Company.
15. He had sought advice at the outset from an organisation which he referred to as the Leasehold Association and they had informed him that he could proceed provided he had the support of his fellow directors. He had the full support of two directors and he referred the tribunal to two letters contained within his evidence from the two other leaseholders at the property namely Nicola Parker and Lisa Youell supporting the action being taken by him. They were written in September 2009 and both clearly consented to the Freehold Company taking proceedings against Mrs Stewart. Having regard to these

letters it could be seen that none of his actions had been taken in a vacuum, rather all had been taken with the consent and approval of two other shareholders/lessees.

16. Mr Hoole contended that there had been confusion as to the correct party to the proceedings throughout. He pointed to the fact that the original directions from the LVT had referred to the applicant being the Freehold Company. Added to this confusion was a letter from ODT making reference to the correct party to the Substantive Application being the "freehold proprietors." The reference to "freehold proprietors" in the plural gave him to believe that as one of four flat owners at the property he was entitled to make the Substantive Application.
17. Bearing in mind the confusing advice he had received and the fact that he was not legally represented, in addition having regard to the fact that his intentions had been to involve the Freehold Company right from the start, he invited the tribunal to overlook what he regarded as a technicality and allow the Substantive Application to proceed.
18. If the tribunal allowed the Substantive Application to proceed then he asked for a costs order to be made against Mrs Stewart. He had had to travel from Spain to attend this hearing and had incurred considerable expense. Even if the Substantive Application was dismissed, he considered that no order for costs should be made against him bearing in mind his motivation and intention had been to involve the Freehold Company.

## **CONCLUSIONS**

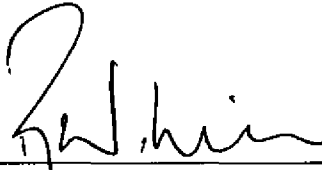
19. We use as our framework for this decision the guidance handed down by the Lands Tribunal in the case of *Volosinovici v Corvan (Properties) Limited* 2007 where it was held that in order to dismiss an application as frivolous or vexatious or otherwise an abuse of process the LVT was required to:
  - (1) remind itself of the provisions of Regulation 11 and ensure that proper notice had been given to the applicant and that any hearing required by Regulation 11 was held.
  - (2) analyse the facts relating to the application in order to reach a conclusion as to whether that application, or a part of 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.
20. We are satisfied that the tribunal office had given notice to Mr Hoole that it was minded to dismiss the application and that Mr Hoole took no issue with the validity of this notice.
21. We next had to consider whether the Substantive Application amounted to an abuse of process. We reminded ourselves of the provisions of section 168 of the 2002 Act. This section states that the correct applicant in these proceedings is the landlord of a long lease, in this case the Freehold Company and not a lessee such as Mr Hoole.

22. We looked at the Substantive Application letter, which clearly states Mr Hoole to be the applicant in his personal capacity. We therefore found on the facts that it was Mr Hoole who was the applicant at the outset of the Substantive Application and not the Freehold Company. This was a defect which needed to be cured.
23. We then went on to consider if the defect had been cured for example by establishing that the Freehold Company had taken over the proceedings from Mr Hoole.
24. We were reminded that Mr Hoole had told the tribunal that the Freehold Company had not held a general meeting in 12 years. This being the case it could not be said that the application, once made by Mr Hoole, had been assumed by the Freehold Company by resolution at a general meeting. Neither could he successfully argue that the Freehold Company had resolved to take over the proceedings by way of a written resolution. A valid written resolution must be circulated to all shareholders and passed by a majority of shareholders entitled to vote. No evidence was placed before the tribunal demonstrating that a written resolution had been circulated to all shareholders including Mrs Stewart. Letters and emails had been circulated between three shareholders in which they consented to the Freehold Company taking action against Mrs Stewart. However, in the opinion of the tribunal these letters did not amount to a written resolution because Mrs Stewart had not been party to this exchange of correspondence. Furthermore, there was no evidence before the tribunal that a directors meeting of the Freehold Company had been held, which had sanctioned either the issue or the assumption of the Substantive Application. We are therefore driven to the conclusion that the Substantive Application was started and continues in the name of Mr Hoole alone.
25. A similar issue arose in the Lands Tribunal decision, *Barton and others v Accent Property Solutions Ltd and others* LRX/22/2008. In that case the lessees had taken proceedings under section 27A of the 1985 Act challenging the reasonableness of service charges. Accent had been joined in as respondents in their capacity as managing agents of the property. The Lands Tribunal dismissed these proceedings against Accent as an abuse of process as they were not party to any of the leases and would therefore not be bound by a decision of the LVT. Although the facts in this case are somewhat different, the tribunal is satisfied that it is only the Freehold Company who can bring the Substantive Application. As Mr Hoole is not the Freehold Company, a determination made by the tribunal on the Substantive Application will not be binding on either the Freehold Company or Mrs Stewart. As in *Barton*, to allow the Substantive Application to proceed under these circumstances would amount to an abuse of process.
26. Finally having regard to our conclusion that the proceedings are doomed to failure we consider that the facts are such that the tribunal should exercise its discretion to dismiss the Substantive Application and we so determine.

### COSTS

27. Having regard to the facts and the conduct of the parties we are not persuaded to exercise our discretion to award costs against Mr Hoole. Even though Mrs Stewart has been successful, we accept that Mr Hoole's intentions and motivation throughout were to involve the Freehold Company. Unfortunately he appears to have misunderstood the advice given to him. The tribunal accepts that Mr Hoole made the application in good faith thinking that he was able to bind the Freehold Company, even though neither the

directors of the Freehold Company nor the shareholders had passed the necessary resolutions to enable the Freehold Company to proceed. We are mindful that Mr Hoole has not been legally represented and clearly he did not understand that the Freehold Company of which he is a shareholder and director is a separate legal identity from the individual lessees of the flats of which he is one. Bearing in mind all the circumstances we do not consider that this is a case where we should exercise our discretion to award costs either in favour or against any party. Accordingly no such order is made.

Chairman   
RTA Wilson LLB

Date 11<sup>th</sup> December 2009