IN THE LEASEHOLD VALUATION TRIBUNAL

CHI/29UM/LSC/2004/0075

IN THE MATTER OF REGULATION 11 OF THE LEASEHOLD VALUATION TRIBUNALS (PROCEDURE) (ENGLAND) REGULATIONS 2003

BETWEEN:

Rev. HUGH BRIDGE

Applicant

-and-

HOLDING AND MANAGEMENT (SOLITAIRE) LIMITED

Respondent

THE TRIBUNAL'S DECISION

Background

1. This is an interlocutory application made by the Respondent pursuant to Regulation 11(1)(b) of the Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003 ("Regulation 11") to dismiss the application dated 27 November 2004 made by the Applicant pursuant to s.27A of the Landlord and Tenant Act 1985. The Respondent seeks to have the Applicant's application dismissed on the basis that it amounts to being *"frivolous or vexatious or otherwise an abuse of process of the tribunal"*. The Respondent's application is supported by the statement of Janet Dzie dated 13 April 2005 on behalf of the present managing agents, Solitaire Property Management Company Limited ("Solitaire"). Essentially, her statement complained that there has been a failure on the part of the Applicant to particularise his case.

The specific grounds relied on by the Respondent in support of this application were helpfully set out in the Skeleton Argument prepared by Counsel for the Respondent and each of those grounds are considered in turn below. The application was considered solely on the basis of the submissions made by both parties. The hearing took place on 17 May 2005. The Applicant attended in person and was assisted by Mr Byrne, the surveyor instructed by him. The Respondent was represented by Mr Bates of Counsel.

2. It was accepted by Mr Bates that there was no definition of what amounted to *"frivolous or vexatious or otherwise an abuse of process"* within the meaning of Regulation 11. He invited the Tribunal to adopt the same approach taken by the Courts when considering applications made pursuant to Rule 3.4 of the Civil Procedure Rules ("CPR 3.4") to strike out a statement of case, although there is no requirement for it to do so. It was necessary first of all for the Tribunal to consider the respective jurisdictions.

CPR 3.4 and Regulation 11

3. CPR 4.3(2) allows a court to strike out a statement of case if it appears to the court:

   (a) that the statement of case discloses no reasonable grounds for bringing or defending the claim;

   (b) that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings; or

   (c) that there has been a failure to comply with a rule, practice direction or court order.

The jurisdiction conferred by Regulation 11 is both statutory and specific. There is nothing within Regulation 11 that allows a Tribunal to strike out an application on the basis of CPR 4.3(2)(a) or (c) above. It is to be inferred that Parliament did not grant this power because invariably one or more of the parties that appear before this Tribunal, as indeed the Applicant does, appear in person. As lay litigants, they often do not properly particularise the application being made, take any relevant points in relation to that application or have a full understanding of the procedure and nature of the proceedings involved. It would be wrong for a Tribunal to strike out an application as a result of any such failing or defect that, *prima facie*, discloses a cause of action against the Respondent, especially if the Respondent has the benefit of legal representation. The Tribunal's power to dismiss an application is, therefore, limited to conduct by an Applicant that amounts to being frivolous, vexatious or an abuse of process. This is the only common ground between CPR 3.4 and Regulation 11.

4. It was submitted generally by Mr Bates that the four main grounds relied on by the Respondent in support of this application disclosed that the Applicant's case, on the evidence, was entirely without merit and was bound to fail. The Tribunal was, therefore, entitled to dismiss the application under Regulation 11.

5. The first issue to be considered by the Tribunal is, what conduct on the part of an Applicant amounts to an abuse of process? Under CPR 3.4(2)(b) a Court can strike out or dismiss a claim as an abuse of process, although this term is

not defined in the CPR or Practice Directions. It has been described as *"using that process for a purpose or in a way significantly different from its ordinary and proper use"* (*Attorney General v Barker* [2000] 1 FLR 759, DC *per* Lord Bingham of Cornhill, Lord Chief Justice). However, some general principles have emerged from the decided cases. For example, it is an abuse to bring vexatious proceedings, that is, to bring two or more sets of proceedings in respect of the same subject matter against the same Defendant. A party should not be allowed to litigate issues, which have already been decided by a Court of competent jurisdiction as this may also amount to an abuse of process. It does appear that the decided cases largely deal with the conduct of a Claimant in relation to matters of ***process*** when making a finding of abuse. There is no direct consideration given to the merits of any claim. Any application to strike out a claim for lack of merit has to be brought under CPR 3.4(2)(a), which is not available to a Tribunal under Regulation 11. Mr Bates' novel proposition that the lack of merit in the Applicant's case can amount to an abuse of process finds little support within CPR 3.4(2)(b). A court does have power to strike out a *prima facie* valid claim only where there has been an abuse of process. But there has to be a finding of abuse in support of the overriding objective (CPR 1.1), namely, to deal with cases justly. It is submitted that the threshold to make such a finding is a high one. It does not follow that even if a finding of abuse is made, the correct response is to strike out the claim. As a general rule, the striking out or dismissal of a claim should be a matter of last resort by any Court or Tribunal.

6. Having considered the general principles in relation to making a finding of abuse, the Tribunal then considered the specific grounds relied on by the Respondent in support of its application to dismiss the Applicant's application.

Decision

Ground 1 – Apportionment

7. This was Mr Bates' primary submission and his strongest point. At paragraph 6 of her statement, Miss Dzie describes the property as a hotel consisting of a main building ("the hotel") and an extended mews area ("the mews") to the rear. Both the hotel and the mews were at some point in time converted to 19 flats in total. The hotel is comprised of 12 flats and the mews is comprised of 7 flats (Nos. 14-20). The Applicant is the lessee of Flat 14 by virtue of a lease dated 25 January 1991 ("the lease"), which is situated in the mews. It appears that the leases of the flats in the hotel were granted earlier that the leases of the flats in the mews. There are two additional flats, namely Flat A and the caretaker's flat which were converted after completion of the major works.

8. The Respondent contends that, in paragraph 5.4 of his statement of case, the Applicant seeks to draw a distinction between the leases granted in the hotel and the mews. The distinction is made in support of the Applicant's contention that the mews is a smaller area than the hotel. Therefore, the service charges should be apportioned 75% to the hotel and 25% to the mews and that the Applicant, the lessee of Flat 14, should pay a contribution of 7.3% of the 25%.

9. Mr Bates submitted that the Applicant's contention was unsustainable for two reasons. Firstly, that although paragraph 1 of the Recitals of the lease speaks of the "The Fountain Hotel", "the Mews" and "the building", which are intended to have separate meanings, it does so in a shared context. The property is The Royal Fountain Hotel consisting of 7 flats (Nos. 14-20) referred to as the mews. There is also a "building" of which Flat 14 forms part and this consists of those other parts of The Royal Fountain Hotel that are not expressly mentioned in the lease. Mr Bates was supported in this view by reference to Part 1 of the Fourth Schedule of the lease, which continues the references to the building and the mews when apportioning service charge costs in relation to the building.

10. Secondly, that the Fifth Schedule of the lease provides that the Applicant's liability for the service rent (see clause 2 of the lease) is 7.3% of the costs incurred by the lessor pursuant to the Fourth Schedule of the lease. Mr Bates further submits that the Applicant's understanding of the lease is wrong. He cannot complain that his service charge contribution is unfair as it is a contractual term and it is not open to the Tribunal to vary it. By pursuing this point, the Applicant was acting frivolously, vexatiously and was an abuse of process.

11. The Applicant, by way of reply, stated that he was not contending that the liability of 7.3% for the service rent was incorrect. His contention was that the service charge costs incurred by the lessor were not being apportioned properly as between the hotel and the mews. The lease had to be read

restrictively in relation to the liability for the service charge costs. The costs incurred in relation to the mews ought to be kept separately. The buildings were physically separate and on that basis the service charge costs should be treated separately. The Applicant referred to the Third Schedule of the lease where the hotel was treated separately. His argument concerned only the extent of the property to which the 7.3% service charge contribution applied. He submitted that the references in the lease to the mews and the building were one and the same.

12. The Tribunal had before it not only a copy of the Applicant lease (Flat 14) but also a copy of the lease relating to Flat 6 dated 25 January 1989, which is situated in the hotel. Save for the leases being granted on different dates, the terms are identical. The reason why the leases were granted on different dates was because the construction of the mews took place at a later date. Both versions of the lease refer to "the building". On the Applicant's case this referred to the mews only. On the Respondent's case this referred to the entire property comprising both the hotel and the mews.

13. The meaning of the term "the building" turns on a construction of the leases. It is not intended to undertake that task in this Decision, as that is a matter for the final hearing. This Tribunal only has to be satisfied on balance that the Applicant has not acted unreasonably in pursuing this point in relation to the apportionment of the service charges. There are a number of difficulties with the leases granted in respect of the hotel and the mews. For example, it was common ground by both parties that the total service charge liability of the

lessees exceeds 100% under the terms of the leases. Mr Bates told the Tribunal that the Respondent had as a matter of practice varied the Applicant's service charge contribution downwards to 6.77% to take account of this anomaly. Both Flat A and the caretaker's flat, which were built after the mews, appear to be included in the service charge account but on the face of it do not appear to be within the definition of "the building" in the two leases before the Tribunal. It is clear that the meaning of the term "the building" has changed each time there was an addition to the property. It is also clear that these difficulties have been caused by the fact that the leases were not varied, including the service charge contribution of the lessees, to take account of the changing circumstances. The leases will have to be construed by the Tribunal at the final hearing in this regard. In the Tribunal's view the Applicant has acted reasonably in seeking clarification in these proceedings as to the meaning of "the building" in the context of the lease. This is relevant to the issue of apportionment. The Tribunal finds that the Applicant has not acted frivolously or vexatiously nor has there been an abuse of process on his part. Accordingly, the Tribunal does not dismiss the Applicant's argument on apportionment but in doing so it should be made clear that it makes no final finding of fact on this issue.

Ground 2 – Management Charges

14. The Respondent argued that the Applicant had misread the lease by contending at, paragraph 6.4 in his statement of case, that the lease allowed the freeholder to charge up to a 15% management fee and that this should be

reduced to 5% for the years 2000-2004 for poor management during that period of time.

15. The correct reading of the lease was that, where there was no managing agent, the freeholder may add 15% to any service charge costs for administration expenses (Fourth Schedule, Part II). Where managing agents are appointed, the Applicant is required to pay the fees and disbursements of the managing agents in respect of the Mews and in connection with the collection of rents (Fourth Schedule, Part I, paragraph 10). Mr Bates submitted that the latter situation applied, as during the relevant service charge years Solitaire were in fact instructed by the Respondent. This appeared to be common ground between the parties. The Applicant does not dispute that Solitaire was the managing agent during the relevant service charge years or that he is not liable under the terms of the lease to pay any management charges. Essentially, the Applicant simply contends that, for the service charge years 2000-2004, the management charges should be reduced to 5% to reflect the poor management.

16. The first submission made by Mr Bates was having regard to the total management charges set out in the audited accounts for the years 2000-2003, the disputed sum between the parties was £144.14. This figure was the difference between the Applicant's maximum liability (at 7.3%) under the terms of the lease and his proposed liability of 5%. Mr Bates submitted that having regard to the costs so far incurred by the Respondent, it would not be proportionate for the Applicant to be allowed to continue to litigate this issue.

However, he accepted that a case could not be dismissed because the disputed sums were small (see *Yorkbrook Investments v Batten* [1985] 2 EGLR 100).

17. The second submission made by Mr Bates was that the Applicant, in paragraph 6.4 of his statement of case, purports to accept a liability of 5% for the management charges and, therefore under s.27A(4) of the Act, the Tribunal does not have jurisdiction.

18. Both of these submissions can be dealt with together. At the hearing the Applicant did not accept that the disputed amount for the management charges was £144.14. He stated that it was in fact approximately £9,000. It seemed to the Tribunal that there is clearly an issue of fact to be determined on this issue. Even if Mr Bates is right about his point on proportionality, he accepted that the Tribunal could not dismiss this part of the Applicant's claim on the basis that it was *de minimis*. Indeed, Regulation 11 and CPR 3.4 are silent on the matter of proportionality. Accordingly, the Tribunal cannot dismiss this part of the Applicant's claim on the basis of proportionality.

19. The Tribunal also did not accept the submission made that the Applicant had agreed his liability for the management charges was 5% and, therefore, the Tribunal no longer had jurisdiction to deal with the issue. A proper reading of paragraph 6.4 of the Applicant's statement of case reveals that he simply contends that his liability for the management charges should be reduced to 5% as being reasonable. This is not accepted by the Respondent. Again, even if Mr Bates' submission was correct, there would only have been agreement

on the rate to be applied to the total management charges which is an issue, already dealt with at paragraph 18 above, that will have to be decided in any event. Therefore, the Tribunal does not dismiss this part of the Applicant's claim under Regulation 11. The Respondent's appropriate remedy may lie in an award of costs when the applicant's s.20C application falls to be considered by the Tribunal that ultimately hears this matter.

Ground 3 & 4 – Cost of Major Works & Quality of Maintenance Works

20. These two grounds were considered together as the Respondent's submission in relation to both was essentially the same, that is, the Applicant had adduced no evidence to support either claim. It was submitted by Mr Bates that the Application's contentions (at paragraphs 7.1 and 7.2 of his statement of case) that "historic neglect" on the part of the Respondent over a period of two and a half years resulted in a 20% increase in the amount of work that was required (or £60,000 deduction) and that the cost of repairs met by the buildings insurance policy (£20,000 deduction) should not have be passed on to the leaseholders was bound to fail. No Tribunal had ever reduced a service charge on this basis. The Applicant had adduced no evidence, expert or otherwise, to substantiate either of the amounts claimed and was now out of time to do so. A mere assertion was insufficient (see *Re: Blocks 94-110, 123-139, 152-168 Clayponds Gardens* LVT/SC/032/029/02). In addition, the Applicant had failed to particularise what proportion of the £20,000 claimed he had been charged and the amount disputed by him. These matters when taken together amount to abuse within the meaning of Regulation 11 and this part of the Applicant's claim should be dismissed. Mr Bates did, however, concede that

the argument about historic neglect could be run but that it was evidentially difficult to do so.

21. In relation to the £20,000 deduction claimed for the insurance repairs, Mr Bates further submitted that any failure on the part of a landlord to pay out on an insurance policy was a matter of breach of covenant and not within the jurisdiction of the Tribunal. This part of the Applicant's claim should also be dismissed for this reason.

22. On the issue of "historic neglect", the Tribunal heard representations from Mr Byrne. He stated that he was a chartered surveyor and a construction costs consultant. He said that he was the expert retained by the Applicant to comment on the extent and costs of the major works and the maintenance carried out by the Respondent. He explained that he was in some difficulties in the preparation of his report regarding the major works as the documents provided by the Respondent were largely incomplete. Importantly, he said that he was not instructed to comment on the extent of the historic neglect or to quantify this in monetary terms. On the matter of insurance, Mr Byrne stated that he was also instructed to ensure that any claims were properly made by the Respondent. The Applicant's case was simply that any valid insurance claims not made by the Respondent that should have been made would have resulted in unreasonable maintenance costs to the leaseholders.

23. On the historic neglect point, it was not necessary for the Tribunal to dismiss that part of the Applicant's claim, as this was effectively conceded by Mr

Byrne. He said that any expert report produced by him will be limited to commenting on the extent and costs of the major works, maintenance and on the matter of insurance claims in so far as they related to any increased maintenance costs. He said that he had been unable to produce his report on these matters because the Respondent had not made proper disclosure of the relevant documents to enable him to comment on them. The Tribunal heard no evidence on this and cannot making a finding in this regard. However, if Mr Byrne's assertion about non-disclosure was correct, this would appear to meet the Respondent's broad submission that the Applicant had so far adduced no evidence in relation to either of these grounds. Clearly, only Mr Byrne, as the Applicant's expert is able to comment on the extent and costs of the major works, maintenance and any relevant insurance claims. If he has not been able to do so for the reason given, the Respondent perhaps unfairly takes the point about the lack of evidence adduced by the Applicant. It follows that the Applicant should not be deprived of the opportunity of adducing such evidence possibly as a result of any such conduct on the part of the Respondent. This is a matter that can be addressed by the issuing of appropriate Directions at a pre-trial review. Accordingly, the Tribunal does not find for the Respondent and does not dismiss these parts of the Applicant's claim under Regulation 11.

Further Matters

24. The Respondent made three further "complaints" about the Applicant, as it was put no higher than this by Mr Bates. He submitted that they also fell within the scope of Regulation 11. These were:

(a) that the Applicant had not properly set out those matters that he is prepared to agree.

(b) that the Applicant takes a misconceived point about a breach of covenant of quiet enjoyment by the Respondent.

(c) that the Applicant fails to state what his case is, continues to change his position and advance new arguments, for example, the application of *R (Khatun) v Newham LBC* [2004] HLR 29.

25. By way of response, the Applicant argued that he was not in a position to set out fully what matters were capable of agreement until he had the benefit of his expert's report. The issue about breach of covenant of quiet enjoyment goes to the matter of the adequacy of the management of the property generally. His recent reliance on the case of *Khatun* was as a result of him finding out different things all the time from the Respondent because he has not been given full and relevant disclosure from the outset.

26. The Tribunal was of the view that, whilst it is desirable, there is no requirement on the Applicant to agree any matters capable of agreement. That is entirely a matter for the Applicant. Indeed, the Tribunal accepted the Applicant's explanation that he was not in a position to make an informed decision about what matters should be agreed without the benefit of a report prepared by Mr Byrne. It is hoped that Mr Byrne's report will have the effect of crystallizing or refining the issues further. The Applicant can agree any matter up to the final hearing. However, if he has acted unreasonably in doing

so, his conduct will be taken into account when the issue of costs is considered.

27. The Tribunal did not consider the breach of covenant point to be as discreet as Mr Bates submitted. It is arguable that the Respondent's failure to evict the squatters and deal with the other admitted acts of nuisance by the other tenants within a reasonable period of time goes to the adequacy of the management of the building generally. The position is analogous to the situation where a landlord has failed to comply repairing obligations, which has been held to be a breach of this covenant (see *Gordon v Selico* [1986] HLR 219, CA, *Mira v Aylmer Square Investments* [1989] 21 HLR 284, QBD). This conduct could amount to a substantial interference with the Applicant's ability to use the property in any ordinary, lawful way. The Tribunal does not have to make a finding of breach of covenant by the Respondent but it is entitled to look at all the circumstances relating to the management of the property when making a finding of reasonableness in relation to the management fees.

28. The Applicant's explanation for his changing position was that the Respondent was only disclosing documents on a piecemeal basis and he had to deal with any new issues that arose on disclosure. It was in this way that his reliance on *Khatun* arose. The Applicant stated that he did not rely on this case in support of any point about unfair contract terms as submitted by Mr Bates. He argued that it was relevant to the matter of reasonableness raised in correspondence with the Respondent's solicitors. The Tribunal considered that the Appellant was entitled to rely on any relevant authorities in support of his case both at

the final hearing and in correspondence. If Mr Bates is correct in his submission that the case is not relevant to the issues, then he will succeed in that argument before the Tribunal. For the reasons set out above, the Tribunal does not find for the Respondent and does not dismiss those parts of the application complained of by the Respondent under this heading.

29. The Tribunal took the view that the Respondent suffered no prejudice by allowing the issues that formed the subject matter of this application to go to trial. If the Respondent was ultimately successful in its arguments then it will possibly be compensated in costs awarded against the Applicant.

29. At the conclusion of the hearing on 17 May 2005, the Tribunal stayed this matter until the Respondent's application was determined and reserved the costs of the hearing to the Tribunal that dealt with the final hearing. In view of the findings made in this Decision and for the reasons given, the Tribunal directs pursuant to Regulation 12 that this matter be set down for another pre-trial review in order that the appropriate Directions can be given for this matter to proceed to a final hearing.

CHAIRMAN..... J. Neonakis

DATE..... 11/7/05