RESIDENTIAL PROPERTY TRIBUNAL SERVICE

LEASEHOLD VALUATION TRIBUNAL FOR THE LONDON RENT ASSESSMENT PANEL

Case Number LON/00AG/LIS/2005/0067

Landlord and Tenant Act 1985 (as amended) sections 27A and 20C ("the Act")

In the matter of8, Eton Hall, Eton College Road, London NW3 2DW

Parties:	**Mrs L Mohammadi**	**Applicant**
	Shellpoint Trustees Limited	**Respondent**

Representatives:

Mrs L Mohammadi represented herself

Mr H Lederman	**Counsel**
Mrs J Piggott	**Bell Denning Solicitors for the Respondent**
Mr G Brown	**Parkgate Aspen Managing Agents**

Application date: 27th June 2005.

Pre Trial review: 7th September 2005.

Preliminary Hearing on jurisdiction : 28th November 2005.

Tribunal members:

Mr A A Dutton	**Lawyer Chair**
Mrs H Bowers	**MRICS**

Decision date: 7th December 2005

REASONS

A. BACKGROUND

1. An application was made by Mrs Leila Mohammadi ("the Applicant") for a determination of the liability to pay service charges for the years commencing 6th April 1996 to 6th April 2006. The service charges in dispute related to management fees, legal fees, charges associated with the porter's flat, pest control, water damage and common parts repairs.
2. This case has a long and detailed history which is adequately set out in the Respondent's case summary prepared for a pre trial hearing held on 7th September 2005. At that hearing the Tribunal ordered that there should be a preliminary hearing to determine the Tribunal's jurisdiction to entertain the application made by the Applicant.
3. The issues to be determined at the preliminary hearing were twofold.

   (a) The Respondent avers that the judgment of the Central London County Court in proceedings between the Applicant and Respondent in case number 93/53183 dated 24th October 2002 and subsequently varied by the Court of Appeal on 16th July 2003 prevents the Applicant from bringing proceedings before the Leasehold Valuation Tribunal because of section 27A (4)(c) of the Landlord and Tenant Act 1985 and

   (b) The judgment of the Court as referred to above has resulted in the Applicant's lease being forfeited and that, as the Applicant has not as yet obtained relief from forfeiture, the payments due to the Respondent are mesne profits and not service charges, and thus the Tribunal cannot consider them.

B. SUBMISSIONS

For the Respondent

4. The Respondent was represented by Mr Lederman who has a close knowledge of the case having represented the Respondent at the County Court proceedings and the Court of Appeal. He was able to give helpful background to the case which for the purposes of this decision we do not need to recount in detail. There are however, some details that it would be helpful to record and which we have taken into account in reaching our decision.
5. In the defence to Counterclaim dated 6th June 1997 the Applicant at paragraph 7 asserted, amongst other matters, allegations that the service charges claimed in advance were not reasonable in respect of payments to a reserve fund and

in respect of major works. In an amended reply and re-amended defence to counterclaim which wholly replaced the earlier pleading the Applicant appears to resile from allegations as to reasonableness, instead confining her arguments to the ability of the Respondent to recover the payments under the lease.

6. We should also refer to the decision of the Leasehold Valuation Tribunal dated 18th February 2002. The decision was with the papers and well known to both parties. On this occasions the Tribunal dismissed an application by the Applicant for the determination of service charge payments on the grounds that the matter was to be heard before the County Court and that the Court had already refused the Applicant's request for transfer. It noted that "If the County Court makes no determination (which must be considered unlikely) the Applicant would have an unfettered right to make a fresh application to this Tribunal".

7. The County Court, in the judgment dated 24th October 2002 as varied by the Court of Appeal, ordered that the Applicant should pay the sum of £8511.26 calculated by reference to the re-re-amended defence and counterclaim (paragraph 50 thereof) which set out the items in dispute which included the service charges from 1992 to 1996 and took into account a payment that had been made on the Applicant's behalf by her building society of over £8750. The judgment went on to order a further payment of £16,566.63 in respect of service charges and rent arrears for the period 14th November 1996 to 28th November 2002. Neither of these items were the subject of appeal to the Court of Appeal.

8 In the varied order of 24th October 2002 the Court further ordered that the Applicant would be entitled to relief from forfeiture if she paid £297 arrears of ground rent, which she has done, and the costs of the Respondent's counterclaim, except those referable to service charges and mesne profits, and her application for relief. Those costs have yet to be determined and are at present the subject of detailed assessment, although no hearing date has, we were told, been fixed.

9. The mesne profits were assessed at the rate of £350 per week and it was further ordered that if relief from forfeiture was not obtained then the Applicant would be required to pay mesne profits at that rate until possession.

10. It is the Respondent's case that mesne profits are not service charges within the meaning of the Landlord and Tenant Act 1985 section 18(1)(a) and are not variable as provided for at subsection (b) of 18(1). If relief from forfeiture is obtained then Mr Lederman conceded that the mesne profits will fall away and the Respondent would look to recover the service charges attributable to the flat from the end of 2002 to whatever date relief was granted. Accordingly, at that time the Applicant could, if she wished, issue an application under section 27A of the Landlord and Tenant Act.

    For the Applicant

11. Mrs Mohammadi had prepared and submitted on the day of the hearing a submission with a number of documents to which she referred. Unfortunately, her submissions did not deal with the issues before us as to jurisdiction. She complained that the legal representation she had received had not properly advanced the case she wished to put before the Court, but conceded that she had signed the statement of truth to the final pleading. Further, she had exercised her right to appeal the order made in October 2002, with some success, but not on the question of the quantum of the service charge payments. She complained that she had not known the identity of the Landlord or the managing agents and that this had prevented her from paying the service charges, which she acknowledged she should pay. She expressed a wish to resolve the issues between herself and the Respondent and that she would undertake mediation if it were offered.

12. At the conclusion of the submissions Mr Lederman applied under paragraph 10 of the 12th Schedule to the Commonhold and Leasehold Reform Act 2002 for the costs, limited to £500 to be paid by the Applicant on the grounds that if we found in the Respondent's favour the Applicant had acted in a frivolous and vexatious manner in attempting to re-litigate the issues, in effect a third attempt. Further, the Applicant's lease did not contain provision for the Respondent to recover the costs through the service charge regime against the Applicant, although it did allow the recovery against other leaseholders. Mrs Mohommadi sought to resist the application on the basis that she had not been provided with details for the service charges despite numerous requests. She told us that she was in receipt of state benefits.

C. LAW

13. Section 18 of the Landlord and Tenant Act 1985 states as follows:

(1)In the following provisions of this Act "service charge" means 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

14. Section 27A (4) of the act states as follows:

(4) No application under subsection (1) or (3) may be made in respect of a matter which

(a).....

(b).....

(c) has been the subject of determination by a court

15 Section 20C of the act allows the Tribunal to prevent the Landlord from recovering costs through the service charge regime of Tribunal proceedings. We were told by Mr Lederman that the lease does not allow the Landlord to recover the costs of these proceedings from the Applicant.

16. Paragraph 10 to schedule 12 of the Commonhold and Leasehold Reform Act 2002 states as follows:

(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 leasehold valuation tribunal which Is dismissed in accordance with the regulations made by virtue of Paragraph 7, or

(b) he has, in the opinion of the leasehold valuation tribunal, 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.....

(b).....

(4).....

D. DECISION

17. Despite the voluminous bundles of documents that were provided this matter comes down to two issues as set out at the start of these reasons. Firstly, is the Applicant prevented from pursuing her claim in respect of the reasonableness of the service charges for the years 1996 to 2002 because of the Court judgment? Secondly, does the fact that her lease is presently forfeited prevent her from challenging the mesne profits of £350 per week from the 29th November 2002 until possession?

18. We will deal with the question of jurisdiction in respect of the service charges to 2002 first. There is no doubt that section 27A(4)(c) prevents us from determining the liability to pay service charges where there has been a determination by the Court. We find that the varied judgment given in the County Court proceedings on 24th October 2002 clearly gives a money judgment in respect of service charges from 1992 to 2002. Paragraph 1 of the judgment refers to the sum of £8511.26 being the sum pleaded in the re-re amended defence and counterclaim amended some time in March 2002. This includes service charge items from 1992 to 1996. It was not appealed. The further sum ordered at paragraph 5 to be paid by way of service charges and ground rent is for the period 14th November 1996 to 28th November 2002 and again was not appealed. Although the Applicant complains about her legal representation there is nothing to suggest that the judgment was irregular, or indeed wrong, as the Court of Appeal was not asked to adjudicate on these items, but on other matters which impact in part on the second limb of the jurisdictional issue.

19. We find therefore that we do not have jurisdiction to determine the liability to pay service charges for the years 1996 to 2002 because of section 27A(4)(c). Had the Applicant's application gone back to 1992 we would have found that there was no jurisdiction to deal with those earlier years for the same reason.

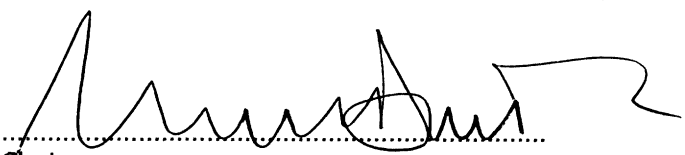
20. We turn now to the question of the service charge years for the very end of 2002 onwards. We set out above the wording of section 18. We find that the mesne profits of £350 per week which are fixed and not variable, are not service charge payments. Indeed we were told that the sum represented the estimated open market rental value for the flat. There is no doubt that the monies due after the order for forfeiture had been made, as it was in the October 2002 order (see paragraph 2), are recoverable as mesne profits. If the Applicant pays the outstanding costs as defined in paragraph 3ii of the varied judgment after assessment, or by agreement, then she will be entitled to relief from forfeiture. If such relief is granted she can then issue an application for the determination of liability to pay those service charges from the end of 2002 onwards, once of course, the Respondent has served a demand upon her and she knows the sums involved and indeed whether she wishes to continue with the challenge.

21. If the Applicant wishes to pursue the matter she must ensure that she settles the costs promptly. If she has not determined what costs might be due to her following the Court of Appeal hearing she would be wise to leave the question of set off to one side and pay the costs as set out in paragraph 3ii of the judgment within the 14 days allowed and deal with the Court of Appeal costs separately.

22. On the question of costs pursuant to paragraph 10 of the 12th schedule to the Commonhold and Leasehold Reform Act we find that there is some merit in the Respondent's application. It seems to us that such an order should not be made as a matter of course. They do not follow the event as might be the case in civil proceedings. The proceedings before the Tribunal are intended to be, in the main, free from cost consequences and reflect the fact that one or both parties may be unrepresented. The provisions of paragraph 10 of the 12th schedule are in effect a penalty for acting frivolously, vexatiously, abusively, disruptively or otherwise unreasonably. We have dismissed the application. Although technically as an abuse of the process, we do not find that the Applicant's actions are frivolous or vexatious or disruptive nor do we find that she has acted unreasonably in respect of the forfeiture issue which is not straight forward. The same cannot be said of the issue relating to the earlier years where a perusal of the Act should have shown to the Applicant that her ability to proceed on matters that already been determined by the Court was

unsustainable. This is a long running dispute which we hope could be settled. If it cannot, then the Applicant can, subject to obtaining relief from forfeiture renew her application for the years 2002 to date, and beyond. Whilst she is "guilty" of making a premature application in respect of the years 2002 onwards she was wrong to make an application for the previous years for the reasons we set out above and accordingly we have concluded that the Applicant should pay the sum of £250 towards the Respondents costs. Such payment is to be made within 28 days.

23. May we take this opportunity of expressing our wish that the parties reach a compromise on this matter. A vast amount of costs have already been incurred by both parties. The Court made a ruling in 2002 which, as we have recorded above precludes our involvement on a number of matters. We hope that the Applicant will consider any offer to settle that the Respondent might make, we were told that a number of without prejudice overtures had been made, and bring what is a long running and very expensive piece of litigation to a close.



Chairman

7th December 2005

Date