RESIDENTIAL PROPERTY TRIBUNAL SERVICE
DECISION BY THE LEASEHOLD VALUATION TRIBUNAL for the LONDON RENT ASSESSMENT PANEL

COMMONHOLD AND LEASEHOLD REFORM ACT 2002 – SCHEDULE 12, PARAGRAPH 10

LON/00/AG/LVT/2004/0001/01

Property:	**Frognal Court, Finchley Road, London NW3**
Applicant:	**(1) Lessees of Frognal Court (see attached schedule)**
	(2) Dr A J Wapshere
Represented by:	**(1) Messrs Woolsey Morris & Kennedy**
Respondents:	**Longacre Securities Limited**
Represented by:	**Mssrs Mackrell, Turner, Garrett**

DECISION AND REASONS

1. In this matter the Tribunal was considering whether an award of costs should be made against Longacre Securities Limited pursuant to paragraph 10 of Schedule 12 to the Commonhold and Leasehold Reform Act 2002. Having heard the submissions of counsel and having considered the circumstances of the case, the Tribunal decided not to award costs. The reasons for the decision are set out below.

Background and Findings of Fact

2. On January 9, 2004, Long Acre Securities Ltd. (the landlord), applied to the Tribunal for the variation of 54 leases under section 35 of the Landlord and Tenant Act 1987. Following a pre-trial review, directions for the hearing of the case were made on February 19, 2004.

3. The application was made at a time when the landlord was seeking to grant a sub-underlease of the residential part of the Frognal Estate. At least some of the lessees were aware that the landlord intended to grant a sub-underlease, because proceedings for a declaration that notices served by the landlord in respect of the tenants' pre-emption rights under the Landlord and Tenant Act 1987, were on-going in the Chancery Division of the High Court. On March 3, 2004, Mr G Vos QC, sitting as a deputy Judge of the Division, held that in fact the notices were valid.

4. Following that determination, the landlord put the property in an auction due to take place on April 1, 2004. At the auction, a potential purchaser for the sub-underlease was found, however the contract was conditional upon consent being granted by the landlord's superior landlord. Such consent was not immediately forthcoming.

5. On April 8, 2004, Messrs Woolsey Morris & Kennedy wrote to the Tribunal in the following terms:

   "It would appear that on April 1, 2004 .... There was an auction when the Applicant sold or at least granted an underlease of the entire premises to which this application relates.... We have yet to hear from the new owners and are unaware whether it is their intention to proceed with the application that has been made and we doubt that the Applicant will have the appetite for these proceedings now that their interest has been passed on to others.

   We would therefore be grateful if the Tribunal could consider this latest development and revert to us and to the other Tenants who are not represented by us with their view on the current status of the proceedings. What our clients do not wish to do is to incur significant time and cost in complying with paragraph 2 or the Order made on February 19, 2004 only to find that the Applicant withdraws the application.

   We would ask therefore that, subject to the Tribunal's decision in this matter, the time period for the responses called for in paragraph 2 should run from the Tribunal's decision. We believe that it is the intention of a large number of the Tenants who instructed us to represent them at the initial hearing to henceforth represent themselves and it is important therefore that they are clear as to their obligations...."

6. The Tribunal sought the comments of the landlord and on April 22, 2004 received a letter from Messrs Mackrell Turner Garrett who, in summary, stated as follows:

(a) They confirmed that an auction sale took place but that the contract between the landlord and the prospective purchaser was conditional, that no date for completion had been set and there was no guarantee that it would proceed;

(b) That the applicant remained the correct party. It was possible that the case would be heard before completion (if it occurred) and the prospective purchaser could then apply to be joined or substituted in the proceedings;

(c) That since it appeared that a large number of lessees would "henceforth" represent themselves, legal costs would be kept low;

(d) The landlord intended to proceed with the case to a final resolution;

(e) That the timetable for directions should be maintained or the hearing date moved on by two weeks.

7. A letter in response was received from Mess Woolsey Morris & Kennedy, in effect expressing a concern that if the sub-lease become unconditional before the hearing date, that the applicant would not proceed with the matter and requesting sufficient time for the lessees' to respond to the landlord's evidence. Following this correspondence the Tribunal wrote to the parties, altering the date for hearing and giving the tenants further time for compliance with directions.

8. Apart from lodging evidence, nothing further was heard by the Tribunal from either party until shortly before the hearing date fixed for July 6 and 7, 2004. On June 11, 2004, the landlord received consent to its grant of a sub-underlease. On June 16, 2004, a telephone conversation took place between the landlord's solicitors and Messrs Woolsey Morris & Kennedy, where the landlord suggested that the proceedings ought to be stayed pending completion of the sale to the sub-underlessee. The landlord's solicitors was asked to put the suggestion in writing which they did in a letter dated June 22, 2004. On June 30, 2004, Messrs Woolsey, Morris & Kennedy responded to the effect that the matter should proceed to hearing. On July 2, 2004, the landlord withdrew the variation application in its entirity.

9. On July 7, 2004, Messrs Woolsey, Morris & Kennedy , sought costs under paragraph 10 on behalf of their clients. On July 12, 2004, Dr Wapshere of 26 Frognal Court, also sought costs under paragraph 10, on his own behalf. A hearing of the issue was held on December 13, 2004.

The statutory provision

10. Paragraph 10 of Schedule 12 to the 2002 Act provides:

"10(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 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

....."

The Submissions

11. On behalf of the lessees Ms Forman Hardy explained that costs were sought on the basis of paragraph 10(2)(b). However, it was not contended that the landlord had acted "frivolously, vexatiously, abusively or disruptively", but that it had behaved "otherwise unreasonably" in connection with the proceedings.

12. Furthermore it was not said that the landlord had made the application for a variation unreasonably nor that the application had been withdrawn unreasonably. Accordingly, the only matter in issue was whether the landlord had behaved unreasonably in April 2004, in the course of the correspondence described above. In effect Ms Forman Hardy argued that following the auction sale, the landlord ought to have sought to have the application stayed. In that way, the lessees would not have incurred unnecessary costs in preparation for a hearing that did not go ahead and in connection with an application that was withdrawn within days of that hearing. She pointed out that the fear that this might occur was expressed in

the letters of April 8 and April 22, 2004 from Messrs Woolsey, Morris & Kennedy.

13. On behalf of the landlord, Mr Jones contended that there had been no unreasonable behaviour. In particular he averred that in April 2004, the landlord could not be certain that the sale of the sub-underlease would proceed to completion (in fact the sale has not yet completed). The consent of his client's own landlord was not forthcoming and the application for a variation was based on sensible commercial considerations. It was not speculative but was a genuine attempt to obtain lease variations which would make the Frognal Estate mangaeable. In those circumstances, he submitted, it was not unreasonable for the landlord to push the application ahead.

14. Mr Jones also referred the Tribunal to provisions governing the award of costs in the Employment Tribunal together with associated case-law. Ms Forman Hardy submitted that the Tribunal should not have regard to this.

The reasons

15. The Tribunal took account of the helpful submissions from counsel and of the evidence put before it. It recognises that the tenants are genuinely and understandably aggrieved by the landlord's conduct of the application. The grievance is fuelled by the fact that withdrawal of the proceedings was anticipated as early as April 2004. However the Tribunal has a very confined jurisdiction to award costs. As was accepted by all concerned, the Civil Procedure Rules do not apply to the LVT and the mere fact of withdrawing an application is not a sufficient ground for awarding costs under paragraph 10 of Schedule 12.

16. Although the authorities cited by the landlord and in particular *McPherson v. BNP Paribas* [2004] IRLR 558, were of interest, the Tribunal did not consider that they assisted in this case. Even if the principles were applicable to the LVT, the narrow issue here, turns very much on its own facts.

17. The Tribunal considers that the words "otherwise unreasonably" must be read in context with the rest of paragraph 10(2). Therefore the unreasonably conduct must

be akin to frivolous, vexatious, abusive or disruptive behaviour. In particular, it must go beyond the normal range of conduct in ordinary litigation.

18. In this case there is nothing to indicate, and it was not argued, that in seeking to continue the proceedings in April 2004, the landlords had acted in anything but good faith. It is said that the responsible course of action would have been to seek to adjourn or stay the proceedings, but an application for such a stay was received from *neither* party either in April or at any time until the application was withdrawn.

19. It is the Tribunal's view that the power to award costs in paragraph 10, should only be exercised in a clear case of unreasonable conduct. Here, although it has been argued that it would have been more reasonable to have sought to have the proceedings adjourned than to have continued them, this does not of itself render the action of proceeding with the case unreasonable within the meaning of paragraph 10.

20. Accordingly, the tribunal determined that no order should be made.

Chairman .....

Date 20.12.04

Tribunal members:
Siobhan McGrath (Chairman)
Mr J Sharma FRICS

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Respondents:	**Longacre Securities Limited**
Represented by:	**Mssrs Mackrell, Turner, Garrett**

DECISION AND REASONS

1. In this matter the Tribunal was considering whether an award of costs should be made against Longacre Securities Limited pursuant to paragraph 10 of Schedule 12 to the Commonhold and Leasehold Reform Act 2002. Having heard the submissions of counsel and having considered the circumstances of the case, the Tribunal decided not to award costs. The reasons for the decision are set out below.

Background and Findings of Fact

2. On January 9, 2004, Long Acre Securities Ltd. (the landlord), applied to the Tribunal for the variation of 54 leases under section 35 of the Landlord and Tenant Act 1987. Following a pre-trial review, directions for the hearing of the case were made on February 19, 2004.

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We would ask therefore that, subject to the Tribunal's decision in this matter, the time period for the responses called for in paragraph 2 should run from the Tribunal's decision. We believe that it is the intention of a large number of the Tenants who instructed us to represent them at the initial hearing to henceforth represent themselves and it is important therefore that they are clear as to their obligations...."

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(c) That since it appeared that a large number of lessees would "henceforth" represent themselves, legal costs would be kept low;

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