

**IN THE FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)**

Case Ref: LON/00BJ/LSC/0286

In the Matter of: The Landlord and Tenant Act 1985
 section 27A

B E T W E E N:

**THE MAYOR AND BURGESSES OF THE
LONDON BOROUGH OF WANDSWORTH**

Applicant/ Landlord

and

**VARIOUS LEASEHOLDERS OF
100 HIGH-RISE RESIDENTIAL BLOCKS
IN THE LONDON BOROUGH OF WANDSWORTH**

Respondents/ Leaseholders

**THE COUNCIL'S 'INITIAL RESPONSE' TO AN APPLICATION
TO STRIKE OUT/STAY THE PROCEEDINGS PURSUANT TO
AN EMAIL DIRECTION OF THE TRIBUNAL DATED 7.5.2019**

Introduction

The Parties to this Application

1. The London Borough of Wandsworth ("**the Council**") started these proceedings by an application ("**the Council's Application**") to the First-tier Tribunal ("**the Tribunal**").
2. The Council's Application concerns the Council's decision to install sprinkler systems in all blocks of flats of ten or more storeys which are owned by the Council. These blocks of flats are referred to herein collectively as "**the Blocks**".
3. The Respondents to the Council's Application are the leaseholders of flats in the Blocks, collectively referred to herein as "**the Leaseholders**".

The Issue on the Council's Application

4. By the Council's Application the Council seeks the Tribunal's decision on whether the Council has a contractual right to recover service charges from the Leaseholders in respect of the Council's costs of installing sprinkler systems in the Blocks? This question is referred to herein as "**the Principal Issue**"
5. The Principal Issue depends on the rights and obligations of the Council and of the Leaseholders under the terms of the leases under which the Leaseholders own their flats ("**the Leases**").
6. The relevant terms of the Leases, which relate to the rights of the Council to recover service charges from the Leaseholders for certain of the Council's costs are similar but are not identical. The Council has identified three different types of lease. The Council has referred to these three types of lease as Type 1, Type 2A and Type 2B Leases.
7. In Type 1 leases the leaseholder has an obligation to contribute, by way of service charge, to the Council's costs of:

'... do[ing] such things as the Council may decide are necessary to ensure the efficient maintenance and administration of the Block...'
8. In Type 2A and Type 2B leases the leaseholder has an obligation to contribute, by way of service charges, to the Council's costs of:

'... do[ing] such things as the Council may decide are necessary to ensure the efficient maintenance and administration and security of the Block ...'
9. The Council's position is that the costs to which the leaseholders of both Type 1 and Type 2A and 2B leases are obliged to contribute include the costs of installation of a sprinkler system in the relevant Block; i.e. the Block in which their flat (or flats) are situated.

The Tribunal's Power to determine the Council's Application

10. The jurisdiction of the Tribunal is set out in the Landlord and Tenant Act 1985 ("**LTA 85**"), section 27A.

11. Sub-sections 27A(1), (2) and (3) provide as follows:

27A Liability to pay service charges: jurisdiction

(1) An application may be made to the appropriate tribunal for a determination whether a service charge is payable and, if it is, as to —

- (a) the person by whom it is payable,*
- (b) the person to whom it is payable,*
- (c) the amount which is payable,*
- (d) the date at or by which it is payable, and*
- (e) the manner in which it is payable.*

(2) Subsection (1) applies whether or not any payment has been made.

(3) An application may also be made to the appropriate tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to—

- (a) the person by whom it would be payable,*
- (b) the person to whom it would be payable,*
- (c) the amount which would be payable,*
- (d) the date at or by which it would be payable, and*
- (e) the manner in which it would be payable.*

12. For the purposes of this Introduction it is sufficient to point out that subsection 27A(3) gives the Tribunal the power to determine whether costs that have not yet been incurred by the landlord would, if they were incurred, be payable.

The Conduct of the Proceedings

Directions, dated 5th November 2018

13. Following a Case Management hearing on 16th October 2018 the Tribunal issued Directions, dated 5th November 2018 ("**the First Directions**"¹).

¹ A copy of the First Directions is available on the Council's Website at: http://www.wandsworth.gov.uk/downloads/file/13625/first_tier_property_tribunal_-_preliminary_directions

14. By paragraphs 3 and 4 of the First Directions the Council was required to produce what was called by the Tribunal a '**Full Statement of Case**' by 11th December 2018, although that was extended to 21st December 2018. The Council produced the Full Statement of Case² by 21st December 2018.
15. By paragraph 6 of the First Directions the Leaseholders were given the opportunity, by 5th February 2019, to apply either:
 - (1) For the strike-out the Council's Application, or
 - (2) For the transfer of the Council's Application to the Upper Tribunal.The date for compliance with this Direction was extended to 22nd March 2019.
16. By paragraph 8 of the First Directions, if the Leaseholders did not make any application to strike-out the Council's Application or for transfer to the Upper Tribunal the Leaseholders were required to produce their Statements of Case in response to Council's Full Statement of Case. The date for compliance with this direction was 19th February 2019. Again, the time period for compliance with this Direction was extended, in this case to 3rd April 2019.

Directions, dated 21st March 2019

17. During early 2019 the Tribunal received various applications from Leaseholders to adjourn the Council's Application.
18. On 21st March 2019 the Tribunal issued further Directions, adjourning the case for 6 months, until September 2019 ("**the March 2019 Directions**"³).
19. In paragraph 3 of a pre-amble to the March 2019 Directions under the heading 'Decision' the Tribunal stated as follows (emphasis in bold added):
 3. Having regard to the submissions of all parties, the Tribunal does not consider at this time, that a general stay of the proceedings pending the final recommendations of the Grenfell Inquiry is appropriate. **The issue to be determined concerns the**

² The Council's Full Statement of Case is on the Council's Website at: http://www.wandsworth.gov.uk/downloads/file/13870/statement_of_case_-_wandsworth_sprinklers

³ A copy of the March 2019 Directions is available on the Council's Website at: http://www.wandsworth.gov.uk/downloads/file/14057/decision_from_tribunal_22_march_2019

construction of the leases. At this stage the Tribunal is not persuaded that this cannot be considered independently of the GTI [Grenfell Tower Inquiry] inquiry.

20. By paragraph 2 of the March 2019 Directions the Tribunal stated as follows:
2. By 26th September 2019 the parties shall write to the Tribunal with a copy to the other side with an indication how they consider the case ought to be progressed. In particular the Tribunal may consider:
- (a) Whether to give further directions for hearing;
 - (b) Whether there should be a further stay of the proceedings;
 - (c) Whether to consider applications for strike out.

Current Position

21. Currently, the Council's Application is adjourned until September 2019.

Application to Strike-Out/Stay the Council's Application

Introduction

22. On 25th March 2019 14 Leaseholders represented by Housing & Property Law Partnership ("HPLP") ("**the HPLP Leaseholders**") made an application to strike out or stay the Council's Application ("**The Strike-Out Application**"⁴)
23. The Strike-Out Application is out of time and no application has yet been made by HPLP to extend the time for the Strike-Out Application.

The Leaseholders represented by HPLP

24. The names of HPLP Leaseholders are set out in a Schedule to the Strike-Out Application. The HPLP Leaseholders own the leasehold interest in 58 relevant flats. Two of the HPLP Leaseholders are limited companies.

Summary of the Basis of the Application to Strike Out

25. The Strike-Out Application is made on three bases:
- 25.1 That the Tribunal does not have jurisdiction to determine the Council's

⁴ A copy of the Strike-Out Application is available on the Council's Website at: http://www.wandsworth.gov.uk/info/200570/safety_in_your_council_home/2294/fire_safety/10

- Application (“the Jurisdiction Argument”);
- 25.2 That the Application has no real prospects of success (“the Prospects Argument”); and
- 25.3 That the application is so premature that it amounts to an abuse of process (“the Abuse Argument”).
26. Alternatively, the Strike-Out Application asserts that the proceedings should be stayed.
27. The way in which the HPLP Leaseholders put these arguments is summarised herein below as follows:
- 27.1 The Jurisdiction Argument at paragraphs 33 and 34;
- 27.2 The Prospects Argument at paragraphs 48 and 49; and
- 27.3 The Abuse Argument at paragraphs 55 to 57.

Email, dated 7th May 2019

28. By an email dated 7th May 2019⁵ the Tribunal notified the parties as follows:

Dear Sirs,

The Tribunal issued a Decision and Further Directions on 21 March 2019 that stayed the main case until 26 September 2019. However, the Tribunal has received a number of applications for the case to be struck out and in particular an application from HPLP, representing a number of leaseholders. The stay will continue until 26 September 2019. However, it is envisaged that the applications for a strike-out will be considered in late November or early December 2019. It is envisaged that the hearing of these applications will take one day. However the Tribunal would like to allocate two days to the matter to prevent any application being part heard and to allow the Tribunal time to make its determination.

Therefore, by 31 May 2019 the Applicant, HPLP and anyone interested in these applications should notify the Tribunal of any dates to avoid in November and December 2019. The Tribunal asks that by the same date, Wandsworth also provide the Tribunal with any availability dates of the Civic Suite at The Town Hall in Wandsworth for a period of two days during that period.

In respect of the application from HPLP, Wandsworth should make any initial response to the Tribunal, HPLP and copied onto the website by 31

⁵ A copy of the email dated 7th May 2019 is available on the Council's Website at: http://www.wandsworth.gov.uk/downloads/file/14162/email_from_the_tribunal_7_may_2019

May 2019. The Tribunal will issue Directions for the consideration of the strike out applications in September 2019.

Regards,
Stuart Tancred,
Case Officer

This Document

29. This document is the Council's 'Initial Response' to the Strike-Out Application as required by the email from the Tribunal dated 7th May 2019.
30. This document is not intended to be the Council's Skeleton Argument in response to the Strike-Out Application; rather it sets out the Council's position in relation to the Strike-Out Application and summarises the Council's response to the arguments raised by the HPLP Leaseholders in the Strike-Out Application.

The Council's Position in response to the Strike-Out Application

31. The Council opposes the Strike-Out Application insofar as it is an application to strike out the Council's Application.
32. The Council also opposes the application in the Strike-Out Application to further stay the Council's Application; it is the Council's position that the Council's Application should be heard with reasonable expedition.

The Jurisdiction Argument

The HPLP's Leaseholders' Jurisdiction Argument

33. The HPLP's Leaseholders' Jurisdiction Argument is set out in the Strike-Out Application, at paragraphs 11 to 20 (inclusive). The crux of the argument is summarised in paragraph 16 of the Strike-Out Application as follows:
 16. Any application under s. 27A for a determination that, if costs were incurred, a service charge would be payable, must therefore be founded upon both:
 - 16.1 A specification of works that is sufficiently clearly defined as to permit the Tribunal to reach a view as to whether or not the lease permits recovery of the cost of such works

through the service charge provisions (and therefore whether the costs of those works would constitute 'relevant costs'); and

- 16.2 A sufficiently clear estimate of the costs of those works such that the Tribunal can reach a view as to whether the relevant costs that the landlord proposes to incur are reasonable.

34. The Strike-Out Application then refers to two cases which the HPLP Leaseholders rely on as support for the propositions in paragraph 16. Those two cases are:

34.1 *LB Southwark v Lessees of Southwark* [2011] UKUT 438 (LC); and

34.2 *RB Kensington & Chelsea v Lessees 1-124 Pond House* [2015] UKUT 395 (LC).

Summary of the Council's Response to the Jurisdiction Argument

35. Under section 27A(3) the Tribunal has power to determine whether any landlord's costs are in principle recoverable; in effect the Tribunal has the power to construe (or interpret) the terms of a lease or leases.
36. It follows, that the question is only at what stage the Tribunal's power arises; i.e. how detailed must the landlord's proposals as to any works be?
37. In addition to determining whether any landlord's costs are payable (in principle) the Tribunal also has power under LTA 85, ss. 27A(3)(a) to (e) to determine other more particular issues including the amount of the service charge: ss. 27A(3)(e). However, the Tribunal's power to determine the question in principle is not dependent on also determining the amount of any service charges.
38. The HPLP Leaseholders assert that the Tribunal's powers only arise where there is:
- 38.1 A sufficiently detailed specification of works to allow the Tribunal to decide whether the lease permits the landlord to recover the costs; and
- 38.2 A sufficiently clear estimate of the costs of the works so that the Tribunal can reach a view as to whether the landlord's relevant costs are reasonable.

39. Dealing with the first of these alleged requirements the statutory provisions do not include such requirement. There are clearly matters of construction of a lease which could be determined without a specification of works: e.g. ‘whether under the terms of a lease the tenant is obliged to contribute towards the landlord’s for the costs of a caretaker?’
40. If in some cases the Tribunal has power to construe a lease to determine whether in principle any head of service charge expenditure is recoverable it follows that the Council’s Application is not beyond the Tribunal’s jurisdiction.
41. Dealing with the second of the HPLP Leaseholders alleged requirements; i.e. that there is an estimate showing that the costs are reasonable, this clearly conflates (or confuses) the contractual recoverability of any service charges and the separate statutory limitation on the recoverability of the landlord’s costs by reference to whether they have been reasonably incurred or are reasonable in amount: see LTA 85, s. 19.
42. If the Tribunal finds that the Council is entitled to recover the costs of installation of sprinkler systems under the terms of the Leases that does not mean that it has also found that the costs incurred are reasonable.
43. The two cases that the HPLP Leaseholders rely on are not authority for the proposition that the Tribunal’s jurisdiction to determine, in principle, whether any head of service charge is recoverable requires specification of works and estimates.
44. *LB Southwark v Lessees of Southwark* (“the *Southwark Case*”) was an application for dispensation from the consultation requirements in relation to entry into Qualifying Long Term Arrangements (“QLTAs”). In that case the application for dispensation was dismissed because the necessary level of detail required in relation to the proposed QLTA had been provided.
45. The HPLP Leaseholders rely, apparently on paragraph 53 of the decision in the *Southwark Case*. In that paragraph the judge, George Bartlett QC (then the

president of the UT) responded to LB Southwark's suggestion that a landlord seeking dispensation could apply for a prospective determination that it had in fact complied with the consultation requirements. The consultation requirements that applied in that case⁶ include a cascading level of detail that is to be provided in relation to the costs that might be incurred under the QLTA; where a higher level of detail is not yet available to the landlord it can provide a lower level of detail.

46. The issues in the *Pond House Case* also initially concerned consultation. However, in that case the UT held that it could not prospectively decide whether the relevant costs were recoverable because of disquiet about the quality of historic works.
47. Neither the *Southwark Case* nor the *Pond House Case* are relevant to the construction issue in this case.

The Prospects Argument

The Prospects Argument

48. The HPLP's Leaseholders' Prospects Argument is set out in the Strike-Out Application, at paragraphs 21 to 38 (inclusive) and has the following line of argument:
 - 48.1 The Council's right to recover service charges depends in any case on a decision made by the Council to install sprinklers;
 - 48.2 The Full Statement of Case has not particularised the decision that it has taken to install sprinklers;
 - 48.3 In any event, after it made the decision on which it does rely the Council made a further decision delaying the method of implementation of the decision to install sprinklers.
49. The Strike-Out Application, at paragraph 38, summarises the Prospects Argument as follows:
 38. The Council is quite literally using this F-TT application and the recommendations that will be made by the Grenfell Tower Inquiry

⁶ The Service Charges (Consultation Requirements) (England) Regulations 2003, Schedule 2

as part of the process at the end of which it will make a decision. But a prior decision on these works are necessary is a precondition to any possibility that the costs of these works might be payable as a service [charge] under the leases pursuant to the provisions on which the Council relies. Accordingly, the application has no reasonable prospect of success and should be struck out pursuant to F-TT rule 9(3)(e).

Summary of the Council's Response to the Prospects Argument

50. The Council has made a decision to install sprinklers in the Blocks: see the Full Statement of Case, paragraphs 82 to 102 (inclusive). It follows that the premise on which the Prospects Argument is based is wrong. The Council will rely in support of its position that it has made a decision to install sprinklers in the Blocks on its Constitution⁷.
51. The Council made a decision to install sprinklers in the Blocks on 29th June 2017 by the Council's Finance and Corporate Resources Overview and Scrutiny Committee ("FCROSC"): see Full Statement of Case, paragraph 87.
52. On 14th September 2017 the Council's Housing & Regeneration Overview and Scrutiny Committee (HROSC) endorsed the recommendation that the Council embark on a programme of retro-fitting sprinkler systems to all residential units within Council housing blocks of ten storeys or more and that the cost of these works be recharged to leaseholders through their service charges: see Full Statement of Case, paragraph 93.
53. Councillor White's proposal at the meeting of the HROSC on 18th January 2018 that retro-fitting of sprinklers in the Blocks be reconsidered on the basis of the views of the leaseholders in each Block was rejected by the HROSC: see Full Statement of Case, paragraph 98 to 101 (inclusive).
54. It is correct that the Council is making this Application prior to embarking on the programme of works of install sprinkler systems in the Blocks.

⁷ A copy of the Council's Constitution is available on line at: <https://democracy.wandsworth.gov.uk/ie/ListDocuments.aspx?CId=679&MId=6417&Ver=4&Info=1>

The Abuse Argument

The Abuse Argument

55. The HPLP's Leaseholders' Abuse Argument is set out in the Strike-Out Application, at paragraphs 39 to 51 (inclusive).
56. The basis of the Abuse Argument is that the Council's Application is not urgent because, the HPLP Leaseholders' assert that: '... the Council wishes to shape any sprinkler installation policy in the light of any recommendations emerging from the Grenfell Tower Inquiry': see Strike-Out Application, paragraph 40.
57. The HPLP Leaseholders also assert that the Council's Application is premature when 'viewed in the context of the requirement' that the Council will have to consult on any works before the costs are recoverable: see Strike-Out Application, paragraphs 46 to 49 (inclusive).

Summary of the Council's Response to the Abuse Argument

58. As the March 2019 Directions recognise, the issue for determination on the Claimant's Application turns on a construction of the Leases and that issue can be considered independently of the results of the Grenfell Tower Inquiry: see the extract from the March 2019 Directions set out in paragraph 19 above.
59. On 13th September 2018 HROSC resolved that following additional recommendations be made to the Council's Executive in relation to the Council's decision to install sprinklers in the Blocks, that the Council ⁸:
 - (a) Initially focus the Council's sprinkler programme on sheltered schemes and homeless hostels to safeguard our most vulnerable residents first;
 - (b) Allow directions from the First Tier Property Tribunal and recommendations made by the Grenfell Tower Inquiry to shape whether, and how, the programme is progressed across the Council's high-rise stock; and
 - (c) Continue to seek additional funding from government to pay for fire-safety improvements, particularly retro-fitting sprinklers.

⁸ A copy of the Minute of the HROSC Meeting that took place on 13th September 2018 are available on the Council's Website at:
<https://democracy.wandsworth.gov.uk/documents/g5860/Printed%20minutes%2013th-Sep-2018%2019.30%20Housing%20and%20Regeneration%20Overview%20and%20Scrutiny%20Committee.pdf?T=1>

60. This resolution does **not** overturn the Council's decision, summarised in paragraphs 50 to 54 herein above, to install sprinklers in the Blocks. In any event, the Tribunal can determine the issue it identified in the March 2019 Directions
61. The argument that the Application is premature because the Council will have to consult on any works before it can recover relevant costs, like the reasonableness argument, conflates the contractual entitlement to recover service charges and the statutory limitations on the amount of service charges that can be recovered.

Request for a Stay

The Request for a further Stay

62. In paragraph 52 of the Strike-Out Application the HPLP Leaseholders request that if the Council's Application is not struck out that it be stayed 'until such time as the Council has made a decision that can be relied upon in [the Council's] Application.

Summary of the Council's Response to the Request for a Stay

63. As set out above, the Council's position is that it has made a decision to install sprinklers in the Blocks which is sufficient for the purposes of this application.
64. The Tribunal has already declined to stay the Council's Application until after the Grenfell Tower Inquiry Report is published and the Tribunal should maintain this position.

Conclusion

65. The Strike-Out Application should be dismissed.

31st May 2019

Nicholas Grundy QC

Ben Maltz

