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 SKELETON ARGUMENT FOR THE HEARING OF STRIKE-OUT APPLICATIONS LISTED ON 11th AND 12th NOVEMBER 2019

Introduction

A summary of the Substantive Application

1. The London Borough of Wandsworth ("**the Council**") is the freeholder of *a large number* of blocks of flats of ten storeys or more ("**The Blocks**").

2. Historically, the Council has let flats in the Blocks to people requiring housing assistance. Tenancies granted by the Council are secure tenancies; governed since 1.4.1986 by the Housing Act 1985 ("HA 85").

3. Since the HA 85 came into force secure tenants of flats have had the right to buy ("RTB") the flat of which they are the tenant. Where a secure tenant of a flat exercises their RTB they are granted a long-lease of that Flat.

4. A large number of the Council's tenants of flats in the Blocks have, since 1985, exercised their RTB; consequently, the Blocks have mixed tenure.

5. The leases granted by the Council govern the Council's relationship between itself and the relevant lessees. This includes the circumstances in which the Council has a right to enter into any flat let on a lease to carry out any works to that flat or the Block.

6. The leases that the Council has granted have, since 1985, been subject to occasional variation. For the purposes of this application the Council has identified three different variations of leases granted by the Council; referred to in this case as Type 1, Type 2A and Type 2B leases.

7. After the Grenfell Tower fire the Council decided to retro-install sprinklers in the Blocks as a fire safety measure. Such sprinklers will only provide full coverage in any case if they are installed in every flat in any Block.

8. It follows that the Council needs to know whether or not it has the right, under the leases of the flats to enter into their respective flats to carry out the necessary works to install the relevant parts of the sprinkler system and to recover service charges from the lessees in respect of its costs of doing those works. The Council's right to recover service charges in respect of any works is consequential on its right to do those works: i.e. if the Council has the contractual right to enter the flats to do the works it also has the right to recover service charges in respect of its costs of those works.

9. Accordingly, on 26.7.2018 the Council issued its Application herein for a decision by the First-tier Tribunal ("**The Tribunal**") as to whether or not it has the right to recover service charges under the terms of Type 1, Type 2a and Type 2b Leases in respect of its costs of installing sprinkler systems in the Blocks ("**The Council's Application**").

10. Every lessee of a flat in one of the Blocks is a Respondent to the Council's Application; they are referred to herein as "**the Lessees**" or as "Respondents".

11. Pursuant to Directions made by the Tribunal the Council's case is set out in a document entitled **Full Statement of Case**.

Legal basis of the Council's Application

12. The Council's Application is brought under the Landlord and Tenant Act 1985, section 27A(3); 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.*

13. Subsection 27A(3)(a) gives the Tribunal the power to determine who is liable for service charges in respect of costs that have not yet been incurred by the landlord, in the event that those costs are incurred.

Strike-Out Applications

14. At a Case Management Hearing on 16.10.2018 a number of the Lessees indicated that after receipt of the Council's Full Statement of Case they might make an application to 'strike-out' the Council's Application.

15. Accordingly, the Tribunal gave Directions for the conduct of any such strike-out applications: see Direction 6.

16. The Council has been advised by the Tribunal that it has received 8 strike-out applications; in chronological order, these are

16.1 By Paddy Keane ("the Keane Application").

16.2 By Nigel Summerley ("the Summerley Application");

16.3 By Andrew Hirons ("the Hiron's Application")

16.4 James Burgess ("the Burgess Application");

16.5 One purporting to be from The Alton Leaseholders' Association, but otherwise unidentified[1]; ("the Alton Application");

16.6 By Elenora Van den Haute ("the EVdH Application");

16.7 By 14 Lessees all represented by HPLP Solicitors ("The HPLP Application"); and

16.8 By Steve Fannon ("the Fannon Application").

17. Pursuant to tribunal Directions the Council has provided responses to these 8 applications to strike-out the Council's Application:

17.1 A response, dated 31.5.2019, to the HPLP Application; and

17.2 A response, dated 1.10.2019, to the 7 other Applications.

18. The Tribunal and Council have received further written submissions in relation to the Strike-Out Applications from Andrew Hirons and Paddy Keane.

Hearing Date for Strike-Out Applications

19. By further Directions, dated 5.9.2019, the Tribunal listed the hearing of the strike-out applications on 11th and 12th November 2019.

Skeleton Arguments

20. Paragraph 11 of the Tribunal Directions, dated 5.9.2019, stated that:

> 11. If [the Council] or any Respondent leaseholder wishes to rely upon any skeleton arguments (i.e. documents that summarise their case in outline setting out key facts and the arguments they wish to put forward at the hearing) these must be sent by 4th November 2019

And then set out to whom any such skeleton should be sent.

[1] An email, dated 4.10.2019, from Mr Nieves Carazo of the Alton Leaseholders Association states that this application was not made on behalf of that Association.

21. This is the Council's Skeleton Argument it deals with the following:

21.1 **The power of the Tribunal to strike out any application;**

21.2 **The tests to be applied for such strike-out;**

21.3 **The Council's case why the various strike-out applications do not meet the relevant tests.**

The Tribunal's Power to Strike-Out an Application

The Tribunal Procedure Rules 2013

22. Procedure in the First-tier Tribunal is governed by the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ("**the 2013 Tribunal Rules**").

23. Rule 9 of 2013 Tribunal Rules is titled 'Striking-Out a Party's Case and Rules 9(2) and 9(3) provide the circumstances in which the Tribunal has power to strike-out a case.

Outside the Tribunal's Jurisdiction

24. Rules 9(2)(a) and (b) of the 2013 Tribunal Rules provide as follows:

> *(2) The Tribunal must strike out the whole or a part of the proceedings of case of the Tribunal –*
> *(a) does not have jurisdiction in relation to the proceedings or case or that part of them; and*
> *(b) does not exercise any power under rule 6(3)(n)(i) (transfer to another court or tribunal) in relation to the proceedings or case or that part of them.*

In effect, under the 2013 Tribunal Rules, Rule 9(2)(a), the Tribunal must strike-out any application that is not within its jurisdiction if it doesn't transfer it.

25. The HPLP Strike-Out Application, at paragraphs 11 to 20, asserts that the Tribunal does not have jurisdiction to determine that Council's Application.

Frivolous or vexatious applications or no reasonable prospect of success

26. Rule 9(3)(d) and (e) of the 2013 Tribunal Rules provide the circumstances in which Tribunal has power to strike-out a case or part of a case. Rules 9(3)(d) and (e) provide that the Tribunal has such power on a merits-based approach.

27. Rules 9(3)(d) and (e) provide as follows:

> *(3) The Tribunal may strike out the whole or a part of the proceedings or case if-*
> *(d) the Tribunal considers the proceedings or case (or part of them), or the manner win which they are being conducted, to be frivolous or vexatious or otherwise an abuse of process of the Tribunal; or*
> *(e) the Tribunal considers that there is no reasonable prospect of the applicant's proceedings or case, or part of it, succeeding.*

28. Under Rule 9(3)(d) the Tribunal may strike out frivolous or vexatious applications, or ones that are being conducted vexatiously or frivolously.

29. It is the Council's understanding that none of the applications to strike-out are made on the basis that the Council's Application is vexatious or frivolous or that the Council's conduct of that application thus far has been vexatious or frivolous.

30. If the Council is wrong about this; i.e. some of the applications to strike-out are made on the basis that the Council's Application is vexatious or frivolous then it is clear that neither the Council's Application (nor the Council's conduct of it) are vexatious or frivolous.

31. Under Rule 9(3)(e) the Tribunal can strike out all or part of a case which it considers has no reasonable prospects of success.

32. As far as the Council understands it, the Strike-Out Applications are (insofar as any of the applicants are aware of the correct test) made on the basis that the Council's Application has 'no reasonable prospect of success.

The correct approach to these Tests

Introduction

33. Although Rule 9(3(e) is not identical to equivalent rules relating to strike-out and summary judgment under the Civil Procedure Rules ("CPR") the jurisprudence in relation to the Courts' powers under the relevant CPR provisions provides

guidance as to what is required for a Tribunal to 'consider that there is no reasonable prospect of (an application) succeeding'.

Civil Procedure Rules: Rules 3.4 and 24.2

34. CPR Rule 3.4 sets out the circumstances in which a court can strike-out a civil claim or defence and Rule 24.2 sets out the circumstances in which a court can give summary judgment to one party.

CPR Rule 3.4: 'Strike-Out'

35. CPR Rule 3.4(1) and (2) provide as follows:

> ***3.4 Power to strike out a statement of case***
> *(1) In this rule and rule 3.5, reference to a statement of case includes reference to part of a statement of case.*
>
> *(2) The court may 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.*

36. CPR Rule 3.4(2)(a) provides that a case may be struck out if it appears to the Court that it discloses no reasonable cause of action; i.e. it is very similar to Rule 9(3)(e) of the 2013 Tribunal Rules in that the power to strike out arises where the claim (or application) reveals no 'reasonable' case.

37. A case should not be struck-out under CPR Rule 3.4(2)(a) unless the court is certain that the case is 'bound to fail': see *Hughes v Colin Richards & Co*. [2004] EWCA Civ 266; per Peter Gibson LJ, at paragraph 22 [22].

CPR Rule 24.2: 'Summary Judgment'

38. CPR Rule 24.2 provides as follows:

> ***24.2 Grounds for summary judgment***
> *The court may give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if–*
> *(a) it considers that–*

(i) that claimant has no real prospect of succeeding on the claim or issue; or

(ii) … and

(b) there is no other compelling reason why the case or issue should be disposed of at a trial.

39. The correct approach to the assessment of whether or not, for the purposes of CPR Rule 24.2 a case has a 'real prospect' of success is whether there is an absence of reality (of any prospect of success) and not one of probability: see *Three Rivers DC v Bank of England (No. 3)* [2003] 2 AC 1 HL, per Lord Hobhouse at paragraph 158. A court considering a summary judgment application should not conduct a mini trial: *Swain v Hillman* [2001] 1 All ER 91.

The Test to be applied in this Case?

40. Rule 9(3)(e)of the 2013 Tribunal Rules invests the Tribunal with a power to 'strike-out' an application on the basis that there is no reasonable prospect of the applicant succeeding if the application goes to a full hearing: it should therefore be treated as analogous to the power of the Court under CPR Rule 3.4(2)(a).

41. It follows that the test is a high one and only cases which are 'bound to fail' should be struck out under Rule 9(3)(e).

42. If and insofar as the Tribunal considers that its power under Rule 9(3)(e) is less stringent that that under CPR Rule 3.4(2)(a); i.e. that the Tribunal has wider powers to strike-out a case than the court does under CPR Rule 3.4(2), then:

42.1 The least stringent that the Tribunal's power could be is analogous to the power of the court to grant summary judgment under CPR Rule 24.2;

42.2 However, it is more likely to be somewhere between the CPR Rule 3.4(2)(a) strike-out test and the CPR Rule 24.2 summary judgment test.

43. The test that the Strike-Out Applications have to meet is a high one; in effect the Council's Application must be one that has no arguable prospect of success.

The Council's Submissions

The Tribunal's Jurisdiction

44. The Council relies on the Tribunal's jurisdiction under the LTA 85, ss. 27A(3)(a) to determine by whom service charges would be payable if it incurred relevant costs for services, repairs, maintenance, improvements.

45. It is the Council's case that this gives the Tribunal the power to determine, in principle, whether, if the Council was to incur the costs of installation of sprinklers in the Blocks the lessees (under the three different types of lease) would be liable to pay service charges. In effect, the Tribunal's power under LTA 85, ss. 27A(3) is a power to construe leases.

45. The HPLP Application asserts that the Tribunal requires more detail of what the Council intends to do before it can determine that issue: see the HPLP Strike-Out Application, at paragraph 16.

46. The HPLP Application states that at the very least an application under LTA 85, s. 27A(3) requires:

    46.1 A specification of works that is sufficiently clearly defined for the Tribunal to reach a view as to whether or not the lease permits recovery of the costs through the service charge provisions; and

    46.2 A sufficiently clear estimate of the costs of those works for the Tribunal to be able to reach a view as to whether or not those costs are or would be reasonable in amount.

47. Insofar as the estimate of the costs is concerned, this is clearly not necessary for a determination of whether or not any particular lessee would be liable for service charges incurred in relation to costs incurred for the type of work envisaged.

48. Insofar as the specification of works requirement proposed by HPLP is concerned, the difficulty that proposal faces is: What level of detail is sufficient in any case?

49. LTA 85, s. 27A(3) expressly states that the Tribunal can determine the lessees' liability for service charges in respect of relevant landlord's costs *incurred for services, repairs, maintenance, improvements, insurance or management of any specified description*.

50. It is the Council's case that the installation of sprinkler systems in the Blocks as a fire-safety measure are works of a 'specified description': The Council refers to page 10 of its Application Notice herein which states, in relation to the works in respect of which the Council's Application was made, as follows:

> The Applicant [the Council] is proposing to install automatic sprinkler systems in each of its high-rise residential blocks. Each block will require an independent, pressurised water supply to be provided which will require the installation of additional pumps and tanks. Pipework will be run through the communal areas at high level and into each property [Flat]. The pipework will be enclosed in a duct and sprinkler heads will be located in each room of the property with the exception of the bathroom. No sprinkler heads will be fitted in the communal means of escape (corridors, lobbies and staircases).

51. It is the Council's case that on the basis that the Council intends to install sprinkler systems as a fire safety measure the Tribunal has sufficient detail to determine the Council's application: i.e. does the installation of sprinklers come within the works which the Council is obliged or permitted to carry out to the Blocks and the flats under the relevant leases?

52. The HPLP Application refers to two cases which it is asserted are authority for the proposition that the Tribunal requires greater detail of the works etc. on which the relevant costs are to be incurred that the Council has provided in this case: Those two cases are:

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

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

53. Both these cases concerned framework agreements which the relevant Council in each case was proposing to enter into for the purpose of carrying out unspecified works relating to the repair and maintenance of its housing.

54. The judgment in the *Southwark Case,* para. 6 sets out the Council's Notice of Intention which described the works as follows:

> … major works required to properties across the borough over the next five years, with an option to extend the agreements for a further five years.

And

> The work that could be carried out under this agreement would include any substantial repair and renewal work to the block, including repairs and the renewal of roofs, windows, doors brickwork and concrete repairs, external decorations, repair and renewal to pipe work and rainwater goods. It may also include some mechanical and electrical work, such as district heating boilers, electrical mains door entry systems where they are integral to a contract.

54. In the *RBKC Case* the work covered under the framework agreements is described in the Judgment at para. 18 as follows:

> By 2013 the TMO had resolved to enter into framework agreements to support the delivery of repairs, maintenance and improvement works within [RBKC's] housing stock over the next four to six years. About £50 million of those costs are to be referable to external and communal works to buildings which include both tenanted and leasehold flats.

56. The *RBKC Case* related to a single estate, known as Pond House. The work that was to be carried out to Pond House under the framework was considered in the judgment at para. 33; it is clear from the paragraph that the Upper Tribunal ("the UT") had evidence from an expert, Alex Gould. Of Mr Gould's evidence the UT stated as follows:

> The schedule of works to be carried out on Pond House and the estimates of costs were based on pre-tender surveys together with asset intelligence rather than a specific detailed survey of the properties themselves. The expert report prepared by Alex Gould was written on instructions by [RBKC] to inspect Pond House and to summarise the existing condition of the property in order to give his expert opinion on the need for works to each block. He had been informed (and this was confirmed at the hearing) that the precise extent of the necessary works will be the subject of a final survey by the appointed contractor and other consultants. Mr Gould confirmed that he did not carry out an internal inspection of the property. It is not proposed to examine Mr Gould's report in detail but it will suffice to say that in a number of respects it did not support the schedule of works annexed to the applicant to the Tribunal. Most significantly, it was conceded by Mr Bhose that the proposed window replacement could not be justified without a detailed

> survey of each unit internally. Additionally, the extent of some of the other works, for example to the brickwork was put into question by Mr Gould who additionally identified other areas of concern that had not yet been addressed.

57. What is clear from this passage of the UT judgment is:

57.1 The works that were to be carried out were repairs;

57.2 The works set out in the schedule of works were to a number of items; e.g. windows and brickwork;

57.3 The surveyor's evidence, in some respects, did not confirm that all of the items to which work was, under the schedule, to be carried out were in disrepair was not available.

58. RBKC was seeking to recover service charges from its lessees of Pond House on the basis that the works were 'repairs'. It is trite law that for an obligation to repair to arise the item to be repaired must be out of repair.

59. Notwithstanding this the UT held at para. 69, that RBKC's application was properly made under LTA 85, ss. 27A(3).

60. At paragraph 82 the UT stated, in relation RBKC's application that any costs incurred under the framework agreement in respect of 'repairs' to Pond House would be recoverable the UT stated as follows:

> However, precision as to the extent of the works, the duration of the works and the terms of the lease which support the obligation to carry out the work is still required to support a section 27A(3) determination. On the information before it, the [UT] cannot be satisfied of any of those matters.

<u>Conclusion</u>

61. In the current case HPLP has not identified any further information that the Tribunal requires before it can be satisfied whether or not the Council can recover the costs of installation of sprinkler systems from the lessees under the terms of the three different types of lease.

No Reasonable Prospect of Success

62. The Council's case is that on a construction of the three types of leases it has the right to enter into the flats let on the relevant leases to install sprinklers.

63. The Council's case on construction of the Leases is set out in the Council's Statement of Case in Section 4; i.e. at paragraphs 36 to 81.

64. The Council's arguments in relation to the construction of the relevant terms of the leases are not ones that are unarguable.

65. Otherwise the Council's response to these strike-out applications are set out in its responses to the HPLP Application and to the other strike-out applications.

Conclusion

66. These Applications to strike out the Council's Application should be dismissed.

Directions

67. The Tribunal should now make directions for the expeditious hearing of the Council's Application.

68. The Lessees have had plenty of time since the Council's Statement of Case was filed, served and uploaded on to the Council's website in December 2018 to decide how to respond to the Council's Application.

1st November 2018

Nicholas Grundy QC
Ben Maltz

five paper

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