FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00BJ/LSC/2018/0286**
Property	**:**	**High Rise Blocks within the London Borough of Wandsworth**
Applicant	**:**	**London Borough of Wandsworth**
Representatives	**:**	**Mr N Grundy QC** **Mr B Malz (counsel)** **South London Legal Partnership**
Respondents	**:**	**Multiple Leaseholders**
Representatives	**:**	**Various but including:** **Mr T Polli QC** **Ms A Gourley (counsel)** **Ms H Lennox** **Housing & Property Law Partnership (solicitors)**
Type of Application	**:**	**Landlord and Tenant Act 1985, s.27A(3)**
Tribunal Members	**:**	**Judge Siobhan McGrath** **Judge Tim Powell** **Mrs Helen Bowers BSc(Econ) MSc MRICS**
Date of hearing	**:**	**11 November 2019**
Date of Decision	**:**	**18 December 2019**

ORDER

ORDER

1. The request to strike out the application by the London Borough of Wandsworth for a determination of the payability of proposed service charge costs by leaseholders in high rise blocks of 10 or more storeys succeeds.

2. **The council's application to the Tribunal will not proceed and the case is at an end.**

3. On or before 23rd December 2019, the council must upload an electronic copy of this order and the written reasons for the decision on to its website and must notify the Tribunal that it has done so.

4. On or before 10th January 2020, the council must send a hard copy of this order to all respondents and must notify the Tribunal that it has done so.

5. A hard copy of the reasons for the Decision is available on request from the First-tier Tribunal (Property Chamber) at 10, Alfred Place, London WC1E 7LR. Any request should quote the case reference number LON/00BJ/LSC/2018/0286. Additionally, the council must provide a hard copy of the reasons for the Decision on request.

6. A copy of the Tribunal's order and the reasons for its Decision will also be available on its own web-site at https://www.gov.uk › residential-property-tribunal-decisions

7. The time for appealing this decision will run for 28 days from 17th January 2020.

Appeal

If you disagree with this decision you may wish to appeal. Appeals from the First-tier Tribunal (Property Chamber), are made to the Upper Tier Tribunal (Lands Chamber). Before you can appeal to the Upper Tier you must first ask for **permission to appeal** from the First-tier Tribunal ("the Tribunal"). There is a form on the Property Chamber website that you may wish to use.

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DECISION

DECISION

The application by London Borough of Wandsworth for a determination as to liability of leaseholders to pay for the retro-fitting of sprinkler systems within blocks of flats with 10 or more storeys is struck out and may not proceed.

REASONS

Introduction

1. This case concerns an application by the London Borough of Wandsworth (Wandsworth). The council seeks a Tribunal ruling that they are entitled to retro-fit sprinklers in every room of all leasehold flats in council- owned buildings which are 10 or more storeys high. They seek a ruling that they are entitled to enter the leasehold flats without the leaseholder's consent and to include both the cost of fitting and maintaining the sprinkler systems as part of the service charge which the leaseholders will have to pay. The application affects about 2,500 leasehold properties in the London Borough of Wandsworth. All the leaseholders are respondents to this application.

2. A number of leaseholders have applied to the Tribunal to strike out the application. This decision relates only to that application to strike out. As described more fully below, the broad basis of the strike-out application is that the council are not entitled to ask for a blanket determination of leaseholder rights. It is said that if the council wish to fit the sprinkler systems then they must consider each block of flats individually and if necessary make an application to the Tribunal on a block by block basis.

3. Strike-out applications were received from: Paddy Keane; Nigel Summerley; Andrew Hirons; James Burgess; Eleanor Van den Haute; 14 lessees all represented by HPLP solicitors and Steve Fannon. The applications were listed for a hearing where the HPLP leaseholders were represented by Timothy Polli QC and Amanda Gourlay, who are barristers, Mr Kean and Mr Hirons were represented by Hannah Lennox, who is a trainee solicitor, Mr Summerley appeared in person and the other leaseholders made written representations. Wandsworth were represented by Nicholas Grundy QC and Ben Maltz, who are also barristers. We are grateful for the assistance provided by all concerned.

4. The Tribunal wishes to make it very clear that it is not making a decision about whether or not fitting sprinklers into each room of each flat is the correct way to proceed. The fire at Grenfell Tower occurred in June 2017 and the impact of that

tragedy has been felt across the whole country. Many leaseholders and their landlords are still deciding how best to make their buildings safer. In common with other councils and private freeholders of high rise residential buildings, Wandsworth are seeking to ensure the safety of all residents. The focus of this case, is whether the leases between the council and the individual lessees allows Wandsworth to charge the leaseholders for their proposals. The high-rise blocks are occupied by both leaseholders and by secure tenants.

5. For the reasons set out in detail below, the Tribunal has decided that the application must be struck out. This means that the application cannot proceed further. The Tribunal has decided that the procedure in making a single application in respect of all of the affected lessees is wrong. Our decision does not mean that the council cannot make different applications to the Tribunal in the future but it may not seek a blanket determination in respect of all the flats in this way. The council have made it clear that they will not add any of the costs of this case to the leaseholder's service charges. Accordingly, the case is now closed.

6. The remainder of this decision sets out why we have reached this conclusion.

Background

Wandsworth's Decision to Take Tribunal Proceedings

7. On 14th June 2017, the Grenfell Tower fire occurred. The effect of the fire was devastating and tragic. The need to review and where necessary improve fire safety in other high-rise buildings became a priority for landlords including Wandsworth. They properly considered that they needed to work quickly.

8. Council decision-making depends upon its constitution and the work of committees. In committee council members deal with information and recommendations made by council officers. Sometimes committees have the power to make decisions and sometimes they make recommendations to the council Executive for a decision to be made. For some decisions the Executive must refer decisions to full Council meetings.

9. Wandsworth has a committee known as the "Housing and Regeneration Overview and Scrutiny Committee (HROSC)." On 20th June 2017, the HROSC considered a paper from the Director of Housing and Regeneration[1]. That paper explained that Wandsworth council has 100 blocks of ten storeys or more containing 6,420 residential flats and maisonettes and that in order to secure safety in the buildings Wandsworth would act on the advice and recommendations that would

[1] HROSC Paper 17-239

come out of the investigation into the Grenfell Tower fire. On 28th June 2017 HROSC made a recommendation to the Executive Committee that:

> "the Director of Housing and Regeneration brings a report back to the Housing Overview and Scrutiny Committee once the investigation at Grenfell Tower has progressed sufficiently to provide some clarity on the cause and unprecedented spread of the fire, including any required or potential improvement which could include but is not limited to sprinklers for fire safety in Wandsworth Council housing block"

10. Wandsworth also has a committee known as the "Finance and Corporate Resources Overview and Scrutiny Committee (FROSC)." On 28th June 2017, it considered another paper from the Director of Housing and Regeneration[2] which detailed actions taken since 20th June 2017. Unlike the earlier paper, this document initiates a consideration of the installation of sprinklers. It states "…it is clear that the installation of water sprinklers would give a measure of re-assurance to the 6,400 tenants and leaseholders who live within the 100 affected blocks managed by the Council and, as such, it is proposed that a programme of works be drawn up and prioritised. The cost of the work is estimated at £24 million and a budget variation is sought to cover this work. The position regarding leasehold owned flats requires clarity and legal advice is being sought on this…" The recommendation to the Executive was as follows:

> "3(a) Executive is recommended to instruct the Director of Housing and Regeneration, in conjunction with the Director of Resources, to prepare an urgent procurement plan for the undertaking of the installation of a water sprinkler system to tenants and leasehold units in all the council's residential blocks that are ten or more storeys high and that the appointment of any consultants or contractors be authorised as a matter of urgency, including the waiving of relevant provisions of the Council's Procurement Regulations as may be necessary in the circumstances, under the Standing Order No.83(A) procedure""

11. On 3rd July 2017, the Executive Committee met and accepted the recommendations from both the HROSC and from the FROSC.

12. In September 2017, the HROSC was provided with a further paper[3] from the Director of Housing and Regeneration. This referred back to the previous paper from the FROSC and added information that national, London and local fire services had identified the benefits of sprinkler systems in dwellings and had given comprehensive advice on their benefits. It also referred to advice on sprinkler systems contained in

[2] FROSC Paper 17-243
[3] HROSC Paper 17-269

the Building Regulations 2010. Having considered the paper the HROSC recommended that:

> "3(b) 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"

13. Additionally, the HROSC recommended that the Executive agree to: ensuring consultation with residents; giving appropriate priority to the most vulnerable buildings; and reviewing the programme in the light of the Grenfell Tower Inquiry and recommendations arising from the Inquiry. At an Executive meeting on 18th September 2017 those recommendations were accepted.

14. During the Autumn of 2017, concerns about the plans were expressed by and on behalf of leaseholders. A further paper[4] was therefore prepared for an HROSC meeting on 22nd January 2018, it summarised the position as follows:

> "In recognition of concerns raised by some leaseholders over the proposed works, the report recommends that the Council make a proactive application to a First Tier Property Tribunal to ensure that the leaseholders' voice is listened to and to seek a clear decision on the Council's ability to undertake the works. The Council would fund this application and leaseholders would be encouraged to submit their views to the Tribunal…"
>
> The recommendation to the Executive was to approve "that the Council makes a proactive application to a First-tier Property Tribunal to seek a clear decision on the Council's ability to undertake the works."

The Tribunal Proceedings

15. At the end of July 2018, Wandsworth applied to the Tribunal. In the application form they gave a summary of what they wanted the Tribunal to decide as follows:

> "The Applicant 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. 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).

[4] HROSC Paper 18-12

.....
The Applicant wishes the Tribunal to decide, in respect of each type of lease, whether the costs of the proposed installation of the sprinkler system is contractually recoverable from each of the leaseholders as part of the service charge.

There has been no statutory consultation undertaken at this time and the costs of the proposed works are not yet available. Accordingly, the Tribunal is not asked to determine the reasonableness of any estimated costs for the proposed works in this application."

16. Following receipt of the Application the Tribunal decided that it would be necessary to hold a case management conference which was fixed for October 2018. In September 2018 a further HROSC paper had been presented to the Executive meeting on 17th September 2018 where approval was given to "the extension of the sprinkler installation programme to the Council's sheltered housing stock and appropriate hostel accommodation. Additionally, the Executive resolved to:

"(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, particulary retro-fitting sprinklers."

17. The Tribunal's case management hearing was convened in Wandsworth Civic Centre on 16th October 2018 to allow as many leaseholders as possible to attend. About 200 leaseholders attended and some were represented by Amanda Gourlay and Wandsworth were represented by Mr Maltz. The Tribunal asked Wandsworth to give an outline of their case and heard about a number of concerns from the leaseholders. These were summarised in the Tribunal's subsequent directions as follows:

"5. On behalf of her leaseholder clients, Ms Gourlay said that the council's application was misconceived. She said that any decision to install sprinklers inside flats should have been made on a block by block basis. She submitted the leaseholders needed to understand the council's argument in more detail before the case could proceed. She said that when that detail had been made available, she would consider whether to advise her leaseholder clients that they should apply to have the council's application struck out.

6. A number of leaseholders made important observations about the case. These included pointing out that the various blocks of flats were different from each other. They were constructed differently and had different provision to deal

with outbreaks of fire and that this must have an impact on whether the proposed works should be carried out and also who should pay. It was disputed whether the works were necessary at all in some blocks and the question was posed whether other fire precaution measures might be more effective. Councillor Gilbert, who is ward councillor for Roehampton & Putney Heath, which includes nearly half of the affected blocks, said that following the Grenfell Tower fire, some leaseholders in blocks of flats of a similar construction to Grenfell Tower had suffered a great deal of stress brought on by the uncertainty of fire precautions in their homes. She said that this application augmented that stress."

18. On behalf of Wandsworth, Mr Malz had indicated that although it was originally indicated that the application was urgent, it had been decided that no further steps would be taken towards implementation of the planned works until after the Chairman of the Grenfell Tower Inquiry had issued his report.

19. After the hearing the Tribunal gave directions as to how the case should be prepared. The first Direction given by the Tribunal was to require Wandsworth to provide a comprehensive statement of case including the following: an explanation of its reasons for saying that the leases made provision for the works to be done and paid for, details of its decision-making process and copies of all relevant documents. The Directions also gave the leaseholders the opportunity to consider the statement of case and the option of asking the Tribunal to strike out the council's application. The Tribunal was very concerned that not all the leaseholders affected had received a copy of the application and also that in a case affecting so many different and diverse respondents, it was a real challenge to ensure that everyone had a full opportunity to understand and participate in the proceedings. It therefore set up a communications group for leaseholders and required all documents to be put on a website.

20. In February 2019, a number of leaseholders asked the Tribunal to order a stay of Wandsworth's claim and others asked for an extension of six months to comply with the directions. On the basis of the information provided, the Tribunal was concerned that there had been real difficulties for the leaseholders in securing effective representation and in their ability to deal effectively with the documentation provided by Wandsworth in support of its statement of case. This was because of the very high number of leaseholders who are respondents to the application, the fact that they are dispersed across numerous properties and the complexity of the issues in the case.

21. In responding, Wandsworth again did not indicate that the matter was urgent and it appeared they still wished to await the recommendations from the Grenfell Tower Inquiry. The Tribunal decided not to grant a general stay of the proceedings, instead it extended time for compliance with its Directions until September 2019. In the event the Tribunal received the 7 strike-out applications set out in paragraph 3 above.

The Submissions and Consideration

The Reasons for the requests to Strike-out Wandsworth's Application

22. The leaseholders advanced three reasons for the application to be struck out. Those reasons are all derived from rule 9 of the Tribunal Procedure (First-tier Tribunal) Property Chamber Rules 2013. They are:
(a) That the Tribunal has no jurisdiction to deal with the application;
(b) That the application is an "abuse of process"
(c) That there is no reasonable prospect of the application succeeding.

23. We propose to deal with each of these grounds. Some of the arguments are quite technical and some are based on practicalities. In making our decision we have taken into account all of the submissions made by and on behalf of the leaseholders and Wandsworth but have not set all of those out in this decision. Instead we have concentrated on the main reasons for our determination that the application should be struck out.

Does the Tribunal have jurisdiction, is there a reasonable prospect of success and are the proceedings an abuse of process.?

24. Because of the way the cases were argued we deal with the three grounds together. Rule 9(2) of the 2013 rules states that the Tribunal must strike out the whole or a part of the proceedings or case if the Tribunal does not have jurisdiction in relation to the proceedings or case or that part of them. Under this ground the Tribunal does not have any discretion, it either has the jurisdiction and therefore the power to decide the case or it does not.

25. Rule 9(3)(d) states that the Tribunal may strike out the whole or part of the proceedings if it considers the proceedings or case, or the manner in which they are being conducted is an abuse of the process of the Tribunal. Rule 9(3)(e) states that the Tribunal may strike out the whole or part of the proceedings or case if it considers there is no reasonable prospect of the applicant's proceedings or case, or part of it succeeding. The Tribunal therefore has a discretion in either case.

26. The Tribunal's jurisdiction, or power, to decide issues about service charges is contained in section 27A of the Landlord and Tenant Act 1985. A Tribunal can make a determination about costs that have already been incurred (whether they have been paid or not) or it can make a determination about costs that are to be incurred. Section 27A(3) provides:

> "(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."

27. This section tells a landlord or a leaseholder that they can make an application to the Tribunal about the "payability" of future service charges. It tells the Tribunal that if it receives an application about future service charge costs, it must decide the application in stages. As a first stage, it must look at the lease and consider whether the proposed costs for services or repairs or maintenance or improvements or insurance or management "of any specified description" fall under the lease clauses so that the leaseholder will be liable to pay for those costs as "a service charge."

28. If the Tribunal decides at that first stage that service charge costs are payable, then it can then go on to decide who would pay those costs, to whom they would be payable, the amount which would be payable and the date and manner in which they should be paid.

29. When the Tribunal looks at the lease and decides whether costs are service charges under the lease it must confine its consideration to service charges falling within section 18 of the 1985 Act. These are service charges payable by a tenant (which is another way of describing a leaseholder) for services, repairs, maintenance, improvements, insurance or management which vary or may vary according to the relevant costs.

30. The purpose of an application under section 27A is to ask the Tribunal to decide the amount of costs payable by a tenant. Although an application can be made in relation to a service charge fund payable by a group of leaseholders, it must be possible at the end of the application to be able to ascertain how much each leaseholder will pay by dividing the total amount of the service charge costs by each tenant's individual service charge percentage.

31. For applications under section 27A(3) it is possible for a Tribunal to make a partial or conditional determination. For example, if the Tribunal is satisfied that the specified works fall under the lease clauses and that it would be reasonable to incur the costs, they can decide that service charges would be payable but that the actual cost payable might be assessed again for reasonableness when the works are carried out or the services are provided. However, the ultimate aim of the section is to determine how much each leaseholder must pay by way of service charges.

32. The issue of the payability of service charges under section 27A(3) therefore depends on what the lease says about the particular works or services and what it says about a leaseholder's obligation to pay.

33. In this case, Wandsworth says that for the purposes of deciding the application there are three types of lease: Type 1, Type 2 and Type 2A. All three types of lease include obligations on Wandsworth to repair and maintain the structure etc. of the block in which the flat to which the lease relates is situated. The council does not rely on these clauses as giving it the right to install sprinkler systems. Instead it relies on clauses which it says allow Wandsworth to do more extensive works.

34. So far as the application to strike out is concerned the relevant wording in the leases is as follows:

(a) In the Type 1 leases, a clause entitling Wandsworth "To do such things as the Council may decide are necessary to ensure the efficient maintenance and administration of the Block"
(b) In the Type 2 leases, a clause entitling Wandsworth "To do such things as the Council may decide are necessary to ensure the efficient maintenance, administration and security of the Block" and/or
(c) In the Type 2A leases, a clause entitling Wandsworth "To do such things as the Council may decide are necessary and to ensure the efficient maintenance and administration and security of the Block or to enhance the quality of life within the Block due regards being given to the wishes or aspirations of the majority of the tenants in the Block."

35. The leaseholders in this case say that the council have failed to show that Wandsworth has made a valid decision to install sprinklers and, they say, if there is no decision then the service charges cannot be recovered under the leases which depend on the council "deciding" that sprinklers are necessary. They say that the series of meetings, recommendations and Executive decisions set out above are insufficient.

36. Firstly, it is said that it is not clear the appropriate financial authority was sought or given for the work. The cost of the sprinkler works is said to be £24 million but other cladding works would add a further £6 million. In order to have authority to spend such a high unbudgeted figure it is argued that it would be necessary to take the issue to a full Council meeting. The Tribunal was referred to the Council's constitution. Article 13 deals with decision making. Part 3 of Annex A makes provision for functions which must be carried out by the full Council. Item A14 is "Determination of any matter for which the Executive is responsible, concerning the budget, borrowing or capital expenditure, where the Executive is minded to determine the matter contrary to, or not wholly in accordance with, the budget, or plan or strategy for borrowing or capital expenditure and is not authorised by executive arrangements, financial regulations, standing orders or other rules or procedures to do so."

37. At the meeting on 3rd July 2017, the proposal from the FROSC for a commitment by the Executive to proceed with procurement was adopted. Paper 17-243 also dealt with the requirement for a budget variation. Paragraph 17 states:

> "17. The HRA business plan and budget framework is set by the Council each year together with a controlling parameter to limit the expenditure and consequential reduction in forecast reserves that the Executive can commit to within each framework period. In January 2017 this limit was set at a level of £40 million. The cumulative effect of budget variations being recommended for approval in this committee cycle results in a breach of this parameter. Approval of these budget variations must, therefore be referred to the Council for decision…"

38. Recommendation 3(d) of the paper specifically asked for approval of "Housing Revenue Account capital budget variations totalling £30 million in 2017/18 to undertake the above works, subject to approval by the Council." Executive approval was given but it is unclear whether the matter was then referred to the full Council.

39. Secondly, it is said that it is unclear that a decision to actually proceed with the work was made. At the Executive meeting on 3rd July 2017 there was a decision to prepare a procurement plan. At the Executive meeting on 18th July 2017 there was a decision to embark on a programme of retro-fitting sprinklers in blocks of flats or ten or more storeys but also to consult with tenants and review the programme in the light of the recommendations from the Grenfell Tower Inquiry. In September 2018 the Executive resolved to 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.

40. The leaseholders say that this is insufficient. Although it appears that a decision was made to proceed with the work, the finality of that decision is brought into doubt when later resolutions suggest that the decision will be reviewed in the light of the Tribunal's findings and the Grenfell Tower Inquiry (GTI) recommendations. There is, therefore, they say no decision.

41. The Tribunal acknowledges that the information provided about Wandsworth's decision-making is not wholly satisfactory. Although it was part of the Tribunal's requirement that the statement of case dealt with decision-making, the information initially provided was incomplete. However, on the material now available we are satisfied that there is sufficient evidence of a conditional decision having been made. It was acknowledged at an early stage that the position of leaseholders and their liability to pay for the sprinkler works needed to be separately considered. The manner in which this was to be resolved was by an application to the Tribunal. Any final decision was suspended both on that ground and whilst awaiting the GTI

recommendations. In this case we consider that a conditional decision is sufficient. On that basis we do not consider that these grounds alone would have been sufficient to dismiss the application for want of jurisdiction.

42. However, on another aspect of the Council's decision the Tribunal takes a different view. We consider that the decision to proceed without any consideration of the properties on a block by block basis is made in error. To understand why the Tribunal takes this view it is necessary to look again at the specific wording of the leases. In every case the council as landlord is allowed "do such things as the Council may decide are necessary to ensure the efficient maintenance [and] administration [and security] of the Block." The council here is seeking to exercise a discretion to do something that is not specified in the lease, it is taking an action which will result in a change for the leaseholders and will result in additional expenditure. We consider that before exercising that discretion they must be specifically satisfied that the works are *necessary* and they have to be additionally satisfied that the necessity relates to the efficient maintenance, administration and security of *the Block*.

43. In this decision on strike out, it is not our task to consider whether sprinkler works are actually "necessary" for any of the blocks. In some blocks Wandsworth may properly take the view that they are necessary. However, if, as is acknowledged by Wandsworth to be case, there has been no consideration of "necessity" on a block by block basis, then there is no reasonable prospect of Wandsworth succeeding in showing that the service charge costs will be recoverable under the terms of the leases.

44. On behalf of Wandsworth, it is argued that for the purposes of section 27A(3), the Tribunal is able to make a decision on the *principle* of whether or not the proposed service charge costs will be recoverable under the terms of the leases and, for that purpose, to decide whether Wandsworth may enforce their decision to carry out the works by entering the flats to carry out the works without a leaseholder's consent. It is said that we can look at the near-identical common wording of the leases and say whether they are *capable of* supporting Wandsworth's interpretation.

45. We reject that contention. A Tribunal determination in principle would be of little or no value. It would not be binding on any of the leaseholders and it would be necessary, if there were a challenge, to make a further application to the Tribunal for a final decision. To ask the Tribunal to make such a determination is in our view an abuse of process. We should explain, that "abuse of process" is a technical term and by this we do not mean that Wandsworth have acted with impropriety, instead we mean that it would be meaningless for the Tribunal to make a decision that is neither specific nor enforceable.

46. Mr Grundy referred the Tribunal to a previous case, decided by the Upper Tribunal (Lands Chamber) which he said supported his contention. The case is *The Royal Borough of Kensington and Chelsea v Lessees of 1-124 Pond House* [2015]

UKUT 395. That case also concerned an application under section 27A(3) where Kensington and Chelsea sought a determination of the payability of proposed works to six blocks of flats in South Kensington. The blocks were mixed tenure with 39 held on long leases and the remaining 85 being held on secure tenancies. The main purpose of the council's application was to ascertain from the Tribunal whether it was following the correct consultation process under section 20 of the 1985 Act.

47. It is worth explaining that section 20 represents a safeguard for leaseholders by requiring landlords to consult with them before carrying out works to a building. It is supported by complex consultation regulations which set out five different procedures which apply in five different sets of circumstances. In the *Pond House* case the council had entered into a framework agreement with a number of contractors and wanted reassurance that when they called on a contractor from the framework agreement, they would only need to carry out limited consultation on the nature of the proposed works rather than the full consultation that would usually be required.

48. The difficulty for Kensington and Chelsea was that there is no power for the Tribunal simply to give declaratory relief, the Tribunal cannot simply make a determination about rights in a vacuum, it can only decide cases where there is a substantive issue between the parties. The council therefore brought the section 27A(3) case as a test case to find out the true position on consultation. The cost of the proposed works was put at roughly £170,000 and the cost to each leaseholder was about £6,000. The Tribunal was aware that the application was partly a device for the council to obtain reassurance about consultation. At paragraphs 66 and 67 it said as follows:

> "66. It is important first to consider the scope of this application and the extent of the jurisdiction of the Tribunal. The application is made under section 27A(3) of the Landlord and Tenant Act 1985. This provides for an application to be made to the Tribunal for a determination of the liability to pay costs "if costs" were to be incurred. It is therefore not an examination of whether costs have been reasonably incurred or whether works and services are of a reasonable standard. It may however, include a consideration of whether, at a particular point in time, the correct consultation has been carried out in accordance with the consultation regulations.
>
> 67. In *London Borough of Southwark v Leaseholders of the London Borough of Southwark*, the question of how a landlord might seek a determination that it has complied with the regulations could be achieved. … At paragraph 53 of that decision the President noted that the council made its application for dispensation 'in an attempt to achieve assurance that it would not be visited with the ruinous consequences of failing to comply with the Regulations.' There is no power for the First-tier Tribunal or indeed this Tribunal to give declaratory relief. A suggestion was made in that case that the most convenient course

would be for the landlord to apply under section 27A(3) for a prospective determination of compliance. In the Southwark case itself, the President doubted whether the procedure would be appropriate in a case where no specific description of the works to be carried out to each of the many properties was available. In this case the applicant seeks a section 27A(3) determination on the basis that it has provided sufficient information on the works to be carried out."

49. In Pond House, the Tribunal accepted that sufficient information had been provided for it to accept jurisdiction and proceeded to consider the case. It decided the section 20 point; however, having heard the evidence it decided that it could not make a section 27A(3) determination and stated in paragraph 82:

> "82…Since a determination under section 27A(3) is made *before* works are carried out it cannot be determinative of the standard of the work when finally completed. However, precision as to the extent of the work is still required to support a section 27A(3) determination. On the information before it, the Tribunal cannot be satisfied of any of those matters. …In our view Mr Gould's evidence put into doubt the detail of most of the proposed works. As a result, it is impossible to say whether any of the works fall under the terms of the lease …"

50. The Tribunal therefore refused to make a determination under section 27A(3). The difference between the Pond House case and the case for Wandsworth is that here there is no information at all about the specific work that is to be carried out to each block to enable the sprinklers to be fitted. In Pond House although there was ultimately insufficient information to make a determination, there had been sufficient information to cross the jurisdictional threshold so that the Tribunal could hear the evidence. In our view that is not the case here. There is a real concern that the works may not be necessary in some blocks and may cause damage to compartmentation in others. It is impossible to say as, apart from a brief description, no works are specified. In the absence of proper specification, the Tribunal could not begin to consider the merits of the application. Mr Grundy questioned how closely specified works would need to be? The answer is that they need to be specific enough for the Tribunal to be satisfied that they are payable under the lease. Here that detail is missing and for that reason we find both that there is no jurisdiction to hear the case and no realistic prospect of the case succeeding.

51. This conclusion is supported by the structure of section 27A(3) itself. As explained in paragraph 27 above, the Tribunal's job is to consider the payability of service charges for works or services "of any specified description." Mr Grundy contended that the Tribunal may make a partial section 27A(3) determination, for example limiting itself to deciding, by whom and to whom a service charge would be payable. That may well be correct but only when the first stage of section 27A(3) has

been completed and the Tribunal is satisfied that a service charge is payable at all. The Tribunal cannot make that determination of payability unless it has a "specified description" of the works to be carried out or the services to be provided. In this case the Tribunal does not accept that a broad assertion that sprinkler systems will be installed fulfils that requirement.

52. It was Mr Grundy's contention that, by analogy with the Civil Procedure Rules, the Tribunal ought only to strike out a case that was bound to fail. In our view, and for the reasons set out above, that is clearly the case here.

53. Finally, the Tribunal is concerned about the level of knowledge about the application amongst the leaseholders. There are a very large number of leaseholders who are respondents to this application. It was said at the hearing that a number of leaseholders had not received copies of the applications and that others would not be able to deal with its complexity. The leaseholders are diverse. A very high proportion do not live in the properties but have sub-let their flats. In those circumstances there is a very real danger that leaseholders have not received notice of the application or that leaseholders do not understand the application. We consider that Wandsworth have worked hard to ensure that everyone affected has been served and has access to the information. However, we consider that it is inevitable that some leaseholders have been missed.

Conclusion

54. In all the circumstances therefore, insofar as we need to exercise our discretion whether or not to strike out the application, we have decided to do so. We wish to make it clear once more that we are not deciding whether or not sprinklers should be retro-fitted into the 100 blocks affected. Our decision is that Wandsworth are not entitled to seek a blanket determination that service charges would be payable for that cost.

Judge Siobhan McGrath

18 December 2019