

Can property law help?

Robert Bowker

TANFIELD

Q: Can property law help?

A: a qualified 'yes'

This presentation will -

- assume facts
- consider the law of landlord and tenant

TANFIELD

Assumed facts

- Residential block >20m with 100 flats
- No commercial parts
- Flats let on identical 125 year leases
- Lease bipartite (no manco)
- No headlease – landlord is freeholder
- Freeholder GR investment vehicle with no other assets
- Building constructed 1990 with ACM cladding eligible for funding
- Landlord/builder will not meet any costs

Assumed facts

Lease contains 3 significant covenants –

- Landlord's obligation to repair
- Landlord's obligation to comply with statutes etc.
- Tenant's obligation to pay service charge for cost of landlord performing repairs (but not cost of landlord complying with statutes etc.)

Assumed facts

- Landlord's repair obligation says –

To keep the Building in good repair throughout the Term

- “Building” is defined in the lease as including the cladding system

Assumed facts

- The covenant requiring the landlord to comply with statutes etc. says

To observe and comply with the provisions and requirements of any present or future statute enactment statutory instrument or bye-law law or any present or future notice order or direction of any statutory public local or other competent authority

- The fire authority has served an enforcement notice on the freeholder requiring it to remove the cladding

Does the remediation fund help?

The Full Fund Application Guidance states –

The fund will be available for the benefit of leaseholders who would otherwise have an obligation to meet the cost of cladding remediation by virtue of provisions in their leases

Assumed facts

The landlord –

- obtained 3 quotations for the cost of replacing the cladding system and has selected the lowest price which is £1m (50% removing / 50% replacing)
- successfully applied for an order from the First-tier Tribunal (Property Chamber) dispensing with the need to carry out any part of the statutory consultation process
- served on each tenant in accordance with the lease a demand to pay an advanced interim service charge in the sum £10,000

TANFIELD

Does property law help the tenants?

- Whether the cost of the replacement cladding falls within the landlord's repairing obligation and, therefore, is recoverable from the tenants as a service charge will depend on the 5-stage analysis in *Dowding & Reynolds*
- The cladding system is obviously unsafe but it is not out of repair and, consequently, the cost of replacement is not a service charge item under the lease
- The cost of the landlord complying with the notice is not a recoverable service charge item under the lease

What will the tenants do?

- Section 27A of the Landlord and Tenant Act 1985 entitles the tenants to apply to the First-tier Tribunal (Property Chamber) for a determination that work such as this is or would not payable as a service charge
- The tenants may collectively apply to the FTT using a surveyor, a solicitor, a barrister or as litigants in person
- The FTT will issue directions for statements of case and list the application for a hearing

What will the FTT do?

- The Tribunal will probably comprise a full-time judge who is legally qualified, a surveyor and a lay member
- Although applications of this type are generally conducted by professional advocates, the FTT is intended to be informal and Tribunal members are familiar with cases being run by litigants in person
- The FTT may determine that the interim charges are not payable, any final demand if made would not be payable and the landlord may not put the cost of the proceedings through the service charge

But what will happen next?

- The tenants are not liable to pay for the cost of the replacement cladding as a service charge
- The cost of the work cannot be claimed under the remediation fund
- The landlord is required to remove the cladding in accordance with the enforcement notice served by the fire service
- The landlord has no assets other than the freehold and is therefore unable to pay for the work
- The tenants will have to consider their rights against the landlord – SP? / RTM? / enfranchisement?