FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**MAN/00BR/LSC/2018/0016**
Property	:	**Cypress Place and Vallea Court New Century Park Manchester M4 4FE**
Applicant	:	**Pemberstone Reversions (5) Limited**
Representative	:	**JB Leitch Ltd, Solicitors**
Respondents	:	**Various Leaseholders**
Type of Application	:	**Landlord and Tenant Act 1985 – Sections 27A and 20C**
Tribunal Members	:	**Judge C. Wood Deputy Regional Valuer N. Walsh Mrs H. Clayton**
Date of Decision	:	**18 July 2018**

DECISION

Decision

1. The Tribunal determines as follows:

1.1 that the costs incurred in providing the "Waking Watch" at Vallea Court, ("VC"), are recoverable as service charge expenditure under the terms of the VC Leases, and the VC Leaseholders are liable to pay the same;

1.2 that the costs to be incurred in replacement of the cladding at VC and Cypress Place, ("CP"), are recoverable as service charge expenditure under the terms of the VC Leases and the CP Leases respectively and the VC Leaseholders and the CP Leaseholders are liable to pay the same;

1.3 that the costs incurred in providing the "Waking Watch" at VC for the period from August 2017 – April 2018 have been reasonably incurred and are payable as service charge by the VC Leaseholders.

1.4 The Tribunal further determines that it is not just and equitable in the circumstances to grant the Respondents' application for an order under section 20C of the Landlord and Tenant Act 1985.

2. The terms "VC Leases", "CP Leases", "VC Leaseholders" and "CP Leaseholders" are defined in paragraph 5.2 of this Decision.

Background

3.1 Following the tragic events surrounding the Grenfell Tower fire in June 2017, the Government recognised that action was required to ensure the safety of residents living in multi-storey and high rise buildings constructed and/or refurbished using similar external cladding.

3.2 A compulsory testing regime for multi-storey and high rise buildings was introduced. Where the cladding is identified as being of a type identical to that at Grenfell Tower, action must be taken for its removal.

3.3 Further, the landlord is also required to consider whether interim fire safety measures are required pending removal of the cladding. This involves reviewing each affected building's current fire safety procedures to see if they remain appropriate in the light of these newly-identified risks to the safety of the residents.

3.4 It was common in multi-storey and high rise buildings to operate a "stay put" policy in the event of a fire. This policy recommended that residents in flats, other than those in the immediate vicinity of a fire, remain in their flats. This was predicated on the belief that the fire-retardant properties/features of the building e.g fire breaks, half hour fire doors etc, would compartmentalise each of the individual flats within a building containing a fire and allowing the fire service sufficient time to extinguish it without necessitating a full-scale evacuation of the building.

3.5 The events at Grenfell Tower made it clear that there is a real risk that the spread of the fire will be much more rapid and uncontrolled than anticipated. As a consequence, in many cases, the "stay put" policy has been replaced by an evacuation policy.

3.6 To support this change in policy, it has been necessary for Landlords to introduce interim mitigating fire protection measures. One of those frequently introduced is the "Waking Watch". Essentially, this is the deployment of trained fire marshal(s) to patrol a building to aid in the detection of fire, to notify and liaise with the emergency services, to alert residents and to assist in their evacuation. Another possible measure may be the installation of a temporary communal fire alarm system.

The Application

4.1 By an application dated 6 March 2018, ("the Application"), the Applicant sought determinations from the Tribunal under section 27A of the Landlord and Tenant Act 1985, ("the 1985 Act), regarding:

4.1.1 the liability of the VC Leaseholders to pay, as service charge, costs incurred in providing a "Waking Watch";

4.1.2 the reasonableness of the costs incurred in providing a "Waking Watch" for the period from August 2017 – April 2018; and,

4.1.3 the liability of the VC Leaseholders and the CP Leaseholders to pay, as service charge, costs to be incurred in replacing ACM cladding at the Premises.

4.2 The Respondents are the leaseholders of the 130 apartments at VC and the leaseholders of the 245 apartments at CP. Of these, the following Respondents actively participated in the proceedings by the submission of written and/oral submissions to the Tribunal:

4.2.1 the 6 leaseholders named in Appendix I to the Response of the Leaseholders, ("the Appendix I Respondents"). The leaseholders listed in Appendix II to the Response of the Leaseholders are stated, in paragraph 1, to have funded the Appendix I Respondents, and to have been consulted regarding its contents;

4.2.2 Ms P. Chalmers; and

4.2.3 Ms B. Reynolds-Logue.

4.3 In the Response of the Leaseholders, the Appendix I Respondents make an application under section 20C of the 1985 Act for an order limiting the Applicant's right to recover its costs incurred in these proceedings from the Respondents by way of service charge.

4.4 Directions were issued on 19 March 2018, in response to which the following written submissions were received:

4.4.1 the Applicant's Statement of Case, and the Applicant's Statement of Case in Response;

4.4.2 the Response of the Leaseholders;

4.4.3 the written submission entitled "Defence" submitted by Ms.P.Chalmers.

4.5 Prior to the hearing, Mr.S.Allison, Counsel for the Applicant, submitted a skeleton argument to the Tribunal and to certain of the Respondents. Further copies of this were made available at the hearing to all of the Respondents represented and/or in attendance.

4.6 A hearing of the Application was scheduled for 11:30 on Wednesday 13 June 2018, following an inspection of the Premises at 10:00 on the same date.

The Leases

5.1 The Applicant is the registered proprietor of the leasehold titles of:

5.1.1 VC under the terms of a lease dated 22 December 2006 made between Crosby Homes (North West) Limited (1) and Crosby Homes (North West) Limited and Crosby Group Nominees Limited (2) for a term of 999 years (less 3 days) from 1 August 2006, ("the Superior Lease"); and of:

5.1.2 CP under the terms of an under-lease dated 25 June 2012 made between Lend Lease Residential (North West) Limited and Crosby Group Nominees Limited (1) and Lend Lease Residential (North West) Limited for a term of 999 years (less 7 days) from 1 August 2006, ("the Under-Lease").

5.2 A copy of the lease of flat 804 VC and of flat 1.05 CP were provided to the Tribunal. For the purposes of its Decision, it was accepted by the Tribunal that the leases held by the Respondents of the apartments within VC and CP are in substantially similar form. These are referred to in this Decision as the "VC Leases" and the "CP Leases". A "VC Leaseholder" means the owner of a VC apartment held under the terms of a VC Lease; a "CP Leaseholder" means the owner of a CP apartment held under the terms of a CP Lease.

5.3 The following definitions which appear in clause 1.1 of the VC Leases and the CP Leases are referred to in the Applicant's submissions and in the Tribunal's reasons:

5.3.1 "Building": the building on the Development;

5.3.2 "Development": the land and premises off Lord Street and Redbank Manchester and the buildings and other structures for the time being erected upon the same...";

5.3.3 "Estimated Service Charge": such sum to be paid on account of the Service Charge in respect of each Accounting Year...";

5.3.4 "Service Charge": a fair and proper proportion properly certified in accordance with paragraph 3 of Part II of the Second Schedule as being payable by the Tenant in respect of the Services";

5.3.5 "Services": the services set out in Part I of the Second Schedule;

5.3.6 "Structural Parts": the foundations of the Building, the main structural frame and the exterior of the Building including (without limitation) their external walls...";

5.3.6 "Superior Tenant's Covenants": the obligations conditions and covenants in the Superior Lease to be complied with by the tenant of the Superior Lease from time to time.

5.4 The following clauses in the VC Leases and the CP Leases, the Under-Lease and the Superior Lease are referred to in the Applicant's submissions and in the Tribunal's reasons:

5.4.1 the "Services" as set out in Part I of the Second Schedule which include:

(i) "...renewal repair maintenance...of...the Building", (paragraphs 1,1.1);

(ii) the "[P]rovision...of any other amenities that the Landlord deems reasonable or necessary for the benefit of the Flats", (paragraphs 1,1.6);

(iii) "the costs incurred by the Landlord in...the performance and observance of the covenants...on the part of the Landlord...in clause 6...insofar as they relate to the Building...or to obligations relating to...the Structural Parts or their occupation and imposed by operation of law...", (paragraphs 4,4.1);

(iv) "the costs incurred by the Landlord in...the provision of services...and other works where the landlord in its reasonable discretion from time to time considers the provision to be for the general benefit of the apartments in the Building and whether or not the Landlord has covenanted to make such provision...", (paragraph 4,4.2).

5.4.2 the costs which form part of the "Service Charge" as set out in Part II of the Second Schedule and which include the costs of:

(i) "performing and carrying out such other works and services in connection with the Building as the Landlord shall deem necessary in accordance with the principles of good estate management", (paragraph 1.3);

(ii) "employing such persons as the Landlord may in its absolute discretion consider desirable or necessary to enable them to perform or maintain the said services...or for the proper management or security of the Building", (paragraph 1.4).

5.5 Clause 6.12 (VC Lease) and clause 6.13 (CP Lease) require the Landlord "...to comply with the terms of the relevant Superior Lease..." including:

5.5.1 in clause 4 of the Under-Lease (which relates only to CP):

(i) "[T]o comply with every statute having effect during the Term and all other obligations imposed by law which affect the property its use and occupation regardless of whether the statute or other obligation requires compliance by the owner, landlord, tenant or other occupiers of the Property", (clause 4.10.1);

(ii) "[T]o comply with the requirements and recommendations of the Landlord and the fire or other enforcing authority relating to fire safety at the property and/or the Building", (clause 4.12).

5.5.2 in clause 6 of the Superior Lease (which relates only to VC):

(i) "to keep the Building in good and substantial repair and condition and to reinstate the same as and when necessary...", (clause 6.5);

(ii) "...to comply with all requirements of or made under or deriving validity from local or national legislation and regulations...relating to the Demised Premises...", (clause 6.23).

5.6 Paragraph 1 of Part II of the First Schedule to the VC Leases and the CP Leases provides as follows:

5.6.1 "The right for the Landlord...at reasonable times...and whenever possible on giving reasonable notice to enter the Flat for the purpose of executing works of ...alteration addition or improvement to or upon any other part of the Development...".

Law

6.1 Section 18 of the 1985 Act provides:

"(1) in the following provisions of this Act "service charge" means "an amount payable by a tenant of a dwelling as part of or in addition to the rent -

(a) which is payable directly or indirectly for services, repairs, maintenance, improvements or insurance or the landlord's costs of management, and

(b) the whole or part of which varies or may vary according to the relevant costs.

(2) The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable.

(3) For this purpose –

(a) "costs" includes overheads, and

(b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

6.2. Section 19 provides that –

"(1) relevant costs shall be taken into account in determining the amount of a service charge payable for a period –

(a) only to the extent that they are reasonably incurred, and

(b) where they are incurred on the provision of services or the carrying out of works only if the services or works are of a reasonable standard;

6.3 Section 27A provides that:

"(1) an application may be made to an 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 date at or by which it is payable, and

(d) the manner in which it is payable.

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

(3) .....

(4) No application under subsection (1)...may be made in respect of a matter which –

(a) has been agreed by the tenant.....

(5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

6.4 In *Veena SA v Cheong* [2003] 1 EGLR 175, Mr. Peter Clarke comprehensively reviewed the authorities at page 182 letters E to L inclusive. He concluded that the word "reasonableness" should be read in its general sense and given a broad common sense meaning [letter K].

6.5 Section 20C of the 1985 Act provides as follows:

"(1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before...the First-tier Tribunal...are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.

(2) ...

(3) The...tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.

Inspection

7.1 The inspection was attended by Mr.M.Reynolds and Mr.P.Mondon of the Applicant, representatives from the managing agents, Livingcity Limited, ("Livingcity"), Mr.P.Atkins, Mr.I.Hodgson and Mr.B.Hale, and by the Applicant's legal representatives, Ms.K.Edwards of JB Leitch, Solicitors, and Mr.S.Allison of Counsel. Mr.S.Harrison and Mr.J.Sharp attended from the Appendix I Respondents.

7.2 The Premises comprise two purpose-built high-rise apartment blocks within a larger development known as the Green Quarter. VC comprises of 130 flats over 14 residential floors. CP comprises of 245 flats over 18 residential floors. Construction of VC was completed in 2008 and CP in 2012. The blocks share an underground car park sited over 3 floors. VC and CP are inter-connected by a communal garden/open space area between the two buildings, beneath which is the car park.

7.3 The Tribunal made an external inspection of both VC and CP and also undertook a partial internal inspection of the car park and the first-floor common parts of both VC and CP. Each building is constructed of steel, concrete and masonry. The representatives from Livingcity pointed out to the Tribunal three different types of cladding present on the exteriors of both VC and CP and the various sites where samples had been taken for testing.

7.4 It was confirmed at the inspection that because there is a sprinkler system within CP, it had not been necessary to implement a "Waking Watch".

Hearing

8.1 The parties who attended the inspection were also present at the hearing. In addition, the following Respondents also attended or were represented at the hearing:
Mrs.I.Wilcox – Apt. 1001, CP
Ms.B.Reynolds-Logue – Apt. 1405, VC
Ms.K.Kelly – Apt. 1603, CP
Miss C.Goldsborough and Miss B.Turner – Apt. 909, CP
Mr.A.Brook – Apt.907, CP

The Applicant's Submissions

8.2 Mr Allison, Counsel for the Applicant, made oral submissions for the Applicant, following the Applicant's skeleton argument. These are summarised as follows:

Chronology of Events

8.2.1 He set out the chronology of events which led to the introduction of the "Waking Watch" at VC at the beginning of August 2017.
This is set out in detail in the Applicant's Statement of Case. The salient points for the purpose of this Decision are as follows:

(i) in accordance with the compulsory testing regime introduced by the Government following the Grenfell Tower tragedy, Livingcity, on behalf of the Applicant, arranged for samples of cladding from VC and CP to be submitted for testing as required;

(ii) the test results confirmed that some of the cladding was category 3 ACM cladding of a type identical to that present at Grenfell Tower. Category 3 is defined as material having "...no flame retardant properties";

(iii) this meant that it was necessary to introduce interim mitigating measures to ensure the safety of residents;

(iv) following a meeting between Livingcity and Greater Manchester Fire and Rescue services, ("GMFRS"), on 11 July 2017, it was agreed that, in respect of VC, the "stay put" policy should be changed to an evacuation policy;

(v) in determining what were the appropriate measures to be introduced in respect of VC and CP, the Applicant had reference to the guidance issued by the (then) Department for Communities and Local Government, ("DCLG") attached to its letter dated 22 June 2017. These include, where the property is not protected by "a suitable suppression system:

- "the provision of a temporary communal fire alarm system comprising...fire detectors...in conjunction with fire alarm sounders in each flat"; and
- "provision of a fire watch by appropriately trained patrolling security officers/wardens";

(vi) a "Waking Watch" was implemented at VC from the beginning of August 2017. It was not necessary to implement the same at CP as it has a sprinkler system in the event of fire;

(vii) following DCLG and GMFRS guidance, and having regard to the fire risk assessments carried out in December 2017 on VC, and in January 2018 on CP, (pages 306-349), and to the advice of surveying consultants, it is accepted by the Applicant that the ACM cladding at both VC and CP must be replaced;

(viii) investigations are ongoing as to the need/desirability of replacing other non-ACM cladding which has been identified at VC and CP. The Application concerns the costs of replacement of the ACM cladding only;

(ix) Stage 1 Section 20 consultation notices in respect of the replacement of the ACM cladding were issued in January 2018. It is hoped that work will begin in October/November 2018. Because the "Waking Watch" must remain in place at VC until the ACM cladding has been replaced, it is intended that the VC works should be started first.

The Application

8.2.2 He said that the Application had been made to clarify the issues which had been raised by:

(i) Ms P.Chalmers in her written submissions; and,

(ii) the Appendix I Respondents in the Response of the Leaseholders.

Issues raised by Ms Chalmers

8.2.3 Ms Chalmers, (a CP Leaseholder), was opposed in principle to the Applicant recovering the costs of the replacement of the ACM cladding as service charge.

Her objections are summarised as follows:

(i) as CP had been built in compliance with building regulations, the cladding is compliant;

(ii) if this is not correct, then she should not be held liable for failure to comply with building regulations or incorrect specification of materials;

(iii) it was morally wrong to ask leaseholders to pay for the replacement costs; and,

(iv) if leaseholders were to be held liable, the costs should be capped at the difference between the replacement costs and the original costs and repayment should be spread over the remaining term of the lease.

Issues raised by the Appendix I Respondents

8.2.4 In the Response of the Leaseholders, whilst it was accepted, in principle, that the costs of the "Waking Watch" at VC and the costs of replacing the ACM cladding at VC and CP are recoverable as service charge, the following objections to the costs incurred in connection with the "Waking Watch" were made:

(i) following an initial 2 month period when it was reasonable to implement a "Waking Watch", the ongoing costs incurred were too high and/or the Applicant should have installed a temporary communal fire alarm system recognised in these circumstances as an alternative appropriate interim measure;

(ii) the Applicant's arguments regarding their inability under the terms of the VC Leases to install such a fire system within a VC Leaseholder's apartment, and/or the practical difficulties of installation were disputed; and

(iii) the acceptability of the use by Livingcity of a related company to provide the fire marshals was questioned.

The Applicant's Response – the Applicant's Title and Lease Provisions

8.2.5 Mr.Allison first summarised the Applicant's title to the Premises, (as set out in paragraph 5.1 of this Decision) and referred to the following provisions in the VC Leases and the CP Leases:

(i) the definitions of "Building", "Development", "Estimated Service Charge", "Service Charge", "Services", "Structural Parts" and "Superior Tenant's Covenants",(clause 1.1), (all of which are set out in full in paragraph 5.3 of this Decision);

(ii) the leaseholder's obligation to pay Service Charge, (clause 5.1);

(iii) the Applicant's obligation to provide the Services, (clause 6.1.2);

(iv) the Applicant's obligation to comply with the terms of the Superior Lease and/or the Under-Lease, (clause 6.13 in the CP Leases and clause 6.12 in the VC Leases);

(v) the works and/or services which constitute "Services" as set out in Part I of the Second Schedule;

(vi) the costs incurred in the carrying out of works and/or the provision of services which are recoverable as Service Charge are set out in Part II of the Second Schedule; and,

(vii) paragraph 2 of Part II of the Second Schedule sets out the mechanism for payment of the Service Charge.

Mr.Allison confirmed that the final accounts for the 2017 service charge year are ready for distribution and include the costs of the "Waking Watch" incurred during that year.

8.2.6 In support of the Applicant's position that the costs of replacement of the ACM cladding are recoverable as service charge under the VC Leases and the CP Leases, and the costs of provision of the "Waking Watch" are recoverable as service charge under the terms of the VC Leases, Mr.Allison made the following submissions:

(i) paragraphs 1 and 1.1 of Part I of the Second Schedule which refer to the "...renewal repair maintenance...of the Building" would include works to replace the cladding at the Premises;

(ii) paragraphs 1 and 1.6 which refer to "...the provision of...any other amenities that the Landlord deems reasonable or necessary for the benefit of the Flats" would include provision of the "Waking Watch";

(iii) paragraphs 4 and 4.1 which relate to costs incurred by the Landlord in the performance and observance of its obligation to provide the Services "...insofar as they relate to the Building...or to obligations relating to...the Structural Parts or their occupation and imposed by operation of law..." would include the costs to be incurred in the replacement of the cladding, providing the "Waking Watch" and in the performance and observance of covenants in the Superior Lease and Under-Lease;

(iv) the general "sweeper clause" in paragraph 4.2 which relates to the provision of services "...for the general benefit of the apartments..." would also cover provision of the "Waking Watch";

(v) where it was established that costs were incurred in connection with works to be carried out/services provided to avoid the risk of service of a prohibition order, for example, such costs would fall within paragraph 1.3 of Part II of the Second Schedule, which relates to costs incurred "...in accordance with principles of good management...", whilst the provision of the "Waking Watch" could be categorised as action under paragraph 1.4, namely, the employment of persons "...for the proper management or security of the Building..."; and,

(vi) finally, Mr. Allison referred to the Applicant's covenants in the VC Leases and the CP Leases which require it to comply with the Superior Tenant's Covenants in the Under-Lease and the Superior Lease. The Under-Lease covenants make specific reference to compliance with statutory obligations and requirements and recommendations of a fire safety enforcement authority whilst the covenants in the Superior Lease make more general reference to maintenance and repair of the Building and compliance with laws and regulations affecting the Premises. Mr. Allison submitted that both would include compliance with the The Regulatory Reform (Fire Safety Order) 2005, ("FSO"), the provision of

the "Waking Watch" and the works to replace the cladding, and the associated costs.

Response to Ms Chalmers

8.2.7 Having regard to this analysis of the provisions of the CP Leases, Mr.Allison concluded that it was clear that the Applicant was entitled to carry out the works to remove the ACM cladding at CP as part of the Services, and to charge and recover as Service Charge the costs to be incurred in doing these works, and that this fully addressed the issues raised by Ms Chalmers in the Defence.

Response to the Appendix I Respondents

8.2.8 Mr.Allison then addressed the objections made in the Response of the Leaseholders relating to the reasonableness of the costs incurred in respect of the "Waking Watch" at VC, as follows:

(i) the appropriate "starting point" was the FSO. Mr Allison directed the Tribunal to the relevant articles in the Order. None of the Respondents had raised any points in respect of the application of the FSO, and the Tribunal does not consider it necessary to re-state its detailed provisions in this Decision;

(ii) in summary, he stated that, for the purposes of the FSO, the Applicant was, together with Livingcity, a 'responsible person' within the FSO definitions and so bound by the duties set out in paragraphs 8-22;

(iii) these include obtaining fire risk assessments and observing their recommendations. It was noted that the Applicant obtained updated fire risk assessments on both VC and CP in December 2017/January 2018;

(iv) whilst it was acknowledged that the DCLG Guidance itself was not of statutory effect, it was considered reasonable to assume that failure to abide by it might constitute a breach of the FSO which could result in both enforcement action by GMFRS and criminal sanctions for the Applicant;

(iv) it was acknowledged that the fire marshals were provided by LivingCity Works Limited, ("LCW"),a company related to the Applicant's managing agents, Livingcity;

(v) he said that efforts had been made to minimise costs where possible. The costs relate only to the watch periods from 17:00–07:00 (weekdays), week-ends and bank holidays as at all other times, the "Waking Watch" service is provided by LivingCity employees who are already on-site (having received appropriate additional training). Costs have been further limited by the employment of a sole fire marshal during the "out-of-hours" periods;

(vi) the Application relates to the costs incurred during the period from August 2017 – April 2018. Market testing was carried out in February 2018; the results, (page 348), show a range of hourly rates from £11.50 - £18.75 (standard) and from £23 - £25 (bank holiday). LCW's hourly rates were £12.25 and £24.50 respectively, which it was commented were neither the most expensive nor the cheapest;

(vii) the hourly rate had increased with effect from 1 April 2018 to £13.25 per hour (weekdays and week-ends) and £26.50 per hour (bank holidays). No further market testing was carried out in or about April 2018. It was noted that the service is provided on a month-by-month basis;

(viii) it was noted that none of the Respondents had provided any comparator evidence to support their contention that the costs incurred were too high as claimed.

Installation of a Temporary Communal Fire Alarm System

8.2.9 Mr. Allison acknowledged that, initially, the installation of a temporary communal fire alarm system was the Applicant's preferred option as it was thought that this would be possible at relatively low-cost. Further investigation revealed the following issues:

(i) the Applicant considered that the original specification had to be upgraded from 1 sounder/1 heat detector in each flat to 2 sounders/2 heat detectors with a consequential and significant increase in cost from the original estimate of £62,328.10, to a figure in the region of £110,500;

(ii) the original estimate was based on "unhindered access to each apartment". In considering this option, the Applicant now considered that it had under-estimated the logistical difficulties of securing timely access to all of the VC flats in order to install the system. It was noted that VC is 74% sub-let; and the legal restrictions on obtaining access where co-operation of the leaseholder/occupant was not forthcoming;

(iii) the Applicant considered it impossible to put a definitive figure on the possible wasted costs/costs resulting from delays but the risk was that it could be substantial;

(iv) he referred to the Appendix I Respondents' suggestion that the right of entry in paragraph 1 of Part II of the First Schedule would entitle the Applicant to enter individual flats for the purpose of installing a fire alarm system. Mr. Allison questioned whether the installation within a flat of fire alarm equipment for the use and benefit of that flat came within the stated purpose of this right of entry, namely, "...for the purpose of executing works of...addition or improvement to or upon any part of the Development". It was also not clear how costs incurred in exercise of this right could be recoverable as they would not constitute costs incurred as part of the Services;

(v) further, it was not clear whether in requiring "full coverage" , GMFRS meant that the system had to be installed in every flat. If this was required, then the Applicant could be in the position that, notwithstanding that it had installed the system in all but a very small number of flats, the installation costs would have been incurred for no purpose as the "Waking Watch" would have to continue unless and until it had been installed in all of the flats;

(vi) following replacement of the ACM cladding at VC, it was assumed that it would revert to a "stay put" policy, meaning that the fire alarm system would then have to be disabled; and,

(vii) the "Waking Watch" costs are currently £7-8000 per month and, having regard to the proposed timetable for the cladding replacement works at VC and the unquantifiable costs/risk of wasted costs of installation of a fire alarm system, it was considered unlikely that there would be any appreciable saving.

(viii) the Applicant disputed that a fire alarm system could have been installed by August 2018 as suggested in the Response of the Leaseholders having regard to the need to obtain tenders, to carry out a s20 consultation and to the logistical difficulties in securing access;

(ix) Mr.Allison referred the Tribunal to the further guidance issued by NFCC, with particular reference to the revised requirements for heat detectors in all rooms with a window overlooking an exterior wall fitted with a material which constituted a "...significant or notable fire hazard...", which had led to the revised specification for the fire alarm system.

(x) Mr.Allison concluded that the revised specification for a temporary communal fire alarm system, the legal and logistical difficulties inherent in its installation and the resulting uncertainty as to costs and cost-effectiveness as compared to the "Waking Watch" had ultimately dissuaded the Applicant from pursuing it as a practical alternative.

Adjournment and Resumption

9. The hearing then adjourned and resumed at 14:15.

The Appendix I Respondents' Submissions

10. On resumption, Mr.Harrison made the following submissions:

10.1 he stated that the Appendix I Respondents (of which he was the spokesman) represented the views of 103 leaseholders, c26% of the leaseholders;

10.2 it had always been their position that they accepted that, under the terms of their leases, the costs of the "Waking Watch" and of the replacement of the ACM cladding were recoverable as service charge;

10.3 whether the actual costs of the "Waking Watch" were recoverable depended on whether they were to be regarded as reasonable. Only following the Applicant's submissions made at the hearing had they fully understood the consideration given by the Applicant to the installation of a communal fire alarm system and the reasons why they had decided not to pursue this as an alternative to the "Waking Watch". They now accepted these reasons and that the costs of the "Waking Watch" were reasonable as incurred for the period from August 2017 – April 2018;

10.4 they still wished to pursue the s20C application.

Ms Reynolds-Logue's Submissions

11. Ms.Reynolds-Logue (VC Leaseholder) made the following submissions challenging whether the costs of the "Waking Watch" had been reasonably incurred. In particular, she challenged certain of the Applicant's submissions which had led to the conclusion that the "Waking Watch" was a preferable alternative to the installation of a communal fire alarm system:

11.1 she referred to the letter dated 11 December 2017, which was sent to all of the VC residents, advising them of the Applicant's intention to install an audible fire alarm system;

11.2 she said that, following receipt of the letter, no access requests were sought and no other communications sent. In the absence of any such efforts, she questioned how the Applicant could have determined the extent of the logistical difficulties referred to by Mr.Allison in his submissions;

11.3 having regard to the size of most of the VC flats, she also questioned the evidence that led to the Applicant's conclusion that one sounder in each flat was insufficient;

11.4 she questioned the Applicant's conclusion as to the greater cost-effectiveness of the "Waking Watch" bearing in mind that it would remain in place until at least October/November 2018 at the current cost of £8-9000 per month.

11.5 she referred to:

11.5.1 the e-mail correspondence between Simon Whittaker, Fire Safety Enforcement Officer and Ian Hodgson of Livingcity, regarding the required specification for the alarm system;

11.5.2 to paragraph 8 of Merlyn Forrer's witness statement, and to his opinion that the installation of a common fire alarm system was a "....more effective way of ensuring the safety of residents".

11.6 She concluded that most residents would have welcomed its installation.

Applicant's Response to Ms Reynolds-Logue

12. Mr.Allison for the Applicant and Mr. Mark Reynolds, director of the Applicant responded to Ms.Reynolds-Logue's submissions as follows:

12.1 the attachment to the letter dated 11 December 2017 was a generic specification for a communal fire alarm system;

12.2 Mr.Reynolds explained that, whilst GMFRS would not require or carry out sound testing, they did provide links to further guidance which led the Applicant to commission further testing in about 3 flats in or about December 2017/January 2018. Following this testing, the Applicant was satisfied that it was necessary to increase the specification to include two sounders in each flat. The NFCC guidance, (page 361), referred to by Mr.Allison in his previous submissions, had led to an upgrading of the specification regarding the number of heat detectors in each flat. Together these revisions significantly increased the system costs.

Section 20C Application – Respondents' Submissions

13. With regard to the section 20C application, Mr.Harrison made the following submissions:

13.1 there has been a failure on the Applicant's part to communicate adequately with the leaseholders;

13.2 it is 10 months since the Grenfell Tower tragedy and the leaseholders have still not received any estimate of the costs of replacement of the ACM cladding;

13.3 meanwhile rumours are circulating about the possible costs;

13.4 no re-mortgages or mortgages are available on their flats meaning that they are unable to sell or obtain finance for the costs;

13.5 only following the submissions made at the hearing did they fully understand the detailed rationale for not proceeding with the installation of a communal fire alarm system in preference to the "Waking Watch";

13.6 if the Applicant had more effectively communicated with the leaseholders, then it would not have been necessary to bring the

Application and it is therefore unreasonable to allow them to charge the costs of doing so as service charge to be borne by the leaseholders.

14. On behalf of Mr.A.Brook, Mr.S.Brook made the following submissions in support of the section 20C application:

14.1 reiterating Mr.Harrison's submissions, had there been full and frank disclosure and consultation with leaseholders, it is reasonable to assume that they would have agreed that the Applicant is entitled to charge as service charge the replacement costs of the ACM cladding;

14.2 their failure to make such disclosure, and their failure to engage with leaseholders, means that they should not be entitled to charge as service charge their costs of the Application.

Section 20C – Applicant's Response

15. In response, Mr.Allison for the Applicant made the following submissions:

15.1 there is an enormous amount of sympathy for the Respondents' position;

15.2 the frustration with the delays in being able to provide them with definitive information is understood;

15.3 the situation remains very uncertain for the Applicant eg until the final specification is known for the replacement cladding, it is impossible to provide more than a "ball-park" figure for the replacement costs; guidance is still awaited regarding the non-ACM cladding;

15.4 it is not a question of information having been withheld; rather much is not, as yet, available for the Applicant to disseminate;

15.5 nonetheless, not all of the Respondents' criticisms are justified: communication has also been made eg through the FAQs sheet, (pages 611-614), sent out in February 2018 to all respondents to the s20 consultation notice, and information has been made available via the portal. (Mr.Harrison responded to this point by stating that the portal was an inappropriate method of communication for this kind of information.);

15.6 the Application was not pre-emptive, not being made until March 2018;

15.7 in view of the disparity in response eg many leaseholders have not responded at all, others have raised specific and different objections, it was reasonable to make the Application to ensure clarity so that all parties are clear as to the costs which are recoverable under the terms of the leases and where liability to pay these costs lies;

15.8 despite the pragmatic approach adopted by the Appendix I Respondents in the Response of the Leaseholders and in Mr. Harrison's submissions at the hearing, without a determination from the Tribunal, it is wholly unrealistic to expect that the Applicant would have been able to secure confirmation from all leaseholders regarding the liability to pay for the costs of replacement of the ACM cladding, for the costs of the "Waking Watch" and of the reasonableness of the costs incurred in respect of the "Waking Watch" for the period from August 2017-April 2018;

15.9 he confirmed that no costs would be re-charged as an administrative charge.

Reasons

Section 27A(4) of the 1985 Act

16. The Tribunal noted that:

16.1 in the Response it was acknowledged, as a matter of principle, that the costs of the "Waking Watch" at VC and of the replacement of the ACM cladding at VC and CP were recoverable as service charge under the terms of the VC Leases and the CP Leases; and,

16.2 at the hearing, Mr Harrison acknowledged that the costs incurred in the provision of the "Waking Watch" at VC during the period from August 2017 – April 2018 had been reasonably incurred.

16.5 The Tribunal regards both of these acknowledgements as admissions within s27A(4) of the 1985 Act made by those of the Respondents who are party to the Response and/or who had authorised Mr. Harrison to speak at the hearing on their behalf and, accordingly, no determination may be made by the Tribunal on the Application in respect of them.

16.6 The Tribunal is required to make determinations on the Application in respect of all other Respondents who were not party to these admissions.

Determinations

Recovery of Costs as Service Charge

17.1 The Tribunal notes that it is only necessary for a landlord to establish its right to provide services and/or carry out works and to charge the costs thereby incurred as service charge expenditure under a single provision in the lease. In their submissions, the Applicant has referred to a multiplicity of provisions in the VC Leases and the CP Leases under which it asserts these rights are established. The Tribunal considered that, in some cases, it was to strain the plain meaning of the lease provisions to assert that they covered the provision of the "Waking Watch": for example, whether the "Waking Watch" can be regarded as an "amenity" within paragraph 1.6 of Part I of the Second Schedule; or whether the provisions of paragraph 1.4 of Part II of the Second Schedule (which appear to relate to the employment of management and security staff) can also extend to the employment of fire marshals.

17.2 After consideration of the Applicant's submissions, the Tribunal was satisfied that adopting a common sense interpretation of the following paragraphs in Parts I and II of the Second Schedule to the VC Leases and the CP Leases, the provision of the "Waking Watch" and the works to replace the cladding and the associated costs are (as appropriate):

17.2.1 costs incurred in compliance with the Applicant's covenants under clause 6 relating to the Building and to the Structural Parts and including compliance with the Superior Tenant's Covenants under the Under-Lease and the Superior Lease, (paragraphs 4 and 4.1, Part I);

17.2.2 works and/or services considered by the Landlord to be for "the general benefit of the apartments in the Building", (paragraphs 4 and 4.2, Part I); and,

17.2.3 works and/or services deemed necessary by the Landlord in accordance with "the principles of good estate management", (paragraph 1.3, Part II).

17.2.4 costs incurred in connection with "...employing such persons as the Landlord may in its absolute discretion consider desirable or necessary to enable them to perform or maintain the...services..." ,(paragraph 1.4, Part II).

17.3 The Tribunal considered the objections raised by Ms Chalmers in her Defence to the Applicant's right to charge and recover as Service Charge the costs of replacement of the cladding, and concluded as follows:

17.3.1 the points relating to whether or not the cladding materials used were or were not compliant with building regulations and/or whether it was morally right for the Applicant to seek to recover the costs from the leaseholders were matters outside of the Tribunal's jurisdiction as they related to matters outside of the contractual relationship established between landlord and tenant under the CP Leases. Whatever may be the merit or otherwise of these objections, they do not alter or affect the right of the Applicant, as a matter of contract under the CP Leases, to charge and recover the costs to be incurred in replacement of the cladding as Service Charge; and,

17.3.2 the Tribunal notes that there is no provision in the CP Leases which would require the Applicant to limit its recovery to the difference between the cost of the replacement cladding and the original cost, as suggested by Ms Chalmers in the Defence, or to require it to seek recovery of the costs over the remaining term of the CP Leases.

17.4 The Tribunal therefore rejected Ms Chalmers' objections to the Applicant's rights to carry out the works to replace the cladding at CP and to recover the costs as Service Charge under the CP Leases.

17.5 The Tribunal therefore concludes that:

17.5.1 under the terms of the VC Leases, the provision of the "Waking Watch" constitutes part of the Services to be provided by the Landlord, and the costs of its provision are costs to be included within the Service Charge which the leaseholders are liable to pay; and,

17.5.2 under the terms of the VC Leases and the CP Leases, the carrying out of the works to replace the ACM cladding at VC and CP constitute part of the Services to be provided by the Landlord, and the costs of such works are costs to be included as Service Charge which the leaseholders are liable to pay.

Reasonableness of Costs Incurred

17.6 With regard to the reasonableness of the costs incurred in respect of the provision of the "Waking Watch" for the period from August 2017-April 2018, the Tribunal is required under Section 19 of the 1985 Act to limit costs to those that are "reasonably incurred", and "...where incurred on the provision of services only if the services...are of a reasonable standard".

17.7 The Tribunal noted that none of the Respondents had raised any issues regarding the standard of the "Waking Watch" service.

17.8 With regard to Ms Reynolds-Logue's at the hearing to the effect that the costs were not reasonably incurred because the installation of a communal fire alarm system would have been a cheaper and better alternative, the Tribunal acknowledged that, as initially proposed by the Applicant, it did appear to offer a more cost-effective measure than the "Waking Watch". However, on balance, the Tribunal accepted the Applicant's evidence that there were unacceptable financial risks in pursuing this as an alternative which could lead to greater costs being incurred than in the provision of the "Waking Watch". In particular, the Tribunal accepted that:

17.8.1 there were logistical difficulties in securing access to all of the flats to install the communal fire system equipment which had prevented the Applicant from obtaining a definitive quotation for the costs of installation;

17.8.2 the uncertainty as to what would be regarded as a "complete" installation by the fire safety authorities could result in significant wasted and duplication of costs; and,

17.8.3 there were legal uncertainties regarding the Applicant's right of access to install the fire alarm equipment within a flat both under the terms of the VC Leases and any sub-leases, and regarding the recoverability of such costs.

17.9 The Tribunal did not consider that there was any merit in the complaint regarding the engagement of LCW to provide the "Waking Watch". No evidence had been produced to the Tribunal to show that the relationship between Livingcity and LCW (which was acknowledged by the Applicant) had caused any financial or other disadvantage to the VC Leaseholders. The Tribunal was satisfied by the Applicant's evidence that it had sought to limit the costs of the "Waking Watch" by the use of site staff to provide the "Waking Watch" during the working week, and limiting the "out of hours" service to one fire marshal.

17.10 The Tribunal therefore concluded that it was satisfied that the costs incurred in the provision of the "Waking Watch" for the period August 2017 – April 2018 had been reasonably incurred because:

17.10.1 the Applicant's evidence of "benchmarking" showed that the rates charged by LCW were within an acceptable range of costs;

17.10.2 although there was no similar evidence of benchmarking following the increase in April 2018, the Tribunal considered the level of increase to be reasonable;

17.10.3 the Tribunal noted that, in determining the reasonableness of costs, there was no obligation on the Applicant to show that the rates charged were the cheapest available;

17.10.4 the absence of any comparator evidence by the Respondents;

17.10.5 it accepted the Applicant's evidence the lack of certainty of the installation costs of a communal fire alarm system; and,

17.10.6 there was no evidence before the Tribunal that the Respondents had suffered any disadvantage by the engagement of LCW to provide the "Waking Watch" service.

Section 20C

17.11 In making its determination under section 20C of the 1985 Act, the Tribunal must decide what is "just and equitable in all the circumstances". In this case, the Tribunal had regard to the following circumstances:

17.11.1 the number of Respondents;

17.11.2 the evidence before it of the disparity of response/engagement from the Respondents, ranging from no response/engagement to a variety of different and specific objections which it considered reflected the mix between the Respondents of "buy to let" owners and owner-occupiers; and,

17.11.3 having regard to the costs already incurred in respect of the "Waking Watch" and the expectation of significant financial outlay in respect of the cladding removal works, the Applicant's need for clarity and certainty which only a Tribunal determination could provide.

17.12 As the Tribunal's determinations were in the terms sought by the Applicant in the Application, the Tribunal determined that it would not be just and equitable to grant the s20C application.

Judge C Wood
25 July 2018