FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**MAN/00BR/LSC/2017/0068**
Property	:	**Fresh Apartments** **138 Chapel Street** **Salford** **M3 6AF**
Applicant	:	**E & J Ground Rents No 11 LLP**
Representative	:	**Mr S. Allison, Counsel** **JB Leitch Ltd, Solicitors**
Respondents	:	**Various Leaseholders (see Annex)**
Representative	:	**Solis Law Limited, representing the majority of participating Respondents.**
Type of Application	:	**Landlord and Tenant Act 1985 – Sections 27A and 20C**
Tribunal Members	:	**Deputy Regional Valuer N. Walsh** **Judge J. Holbrook** **Mr L. Bottomley**
Date and venue of Hearing	:	**5 December 2017** **Manchester**
Date of Decision	:	**24 January 2018**

DECISION

DECISION

- **The cost of providing fire marshals for a 'Waking Watch' for the period of 21/07/17 to 07/08/17 from SK Protection, totalling £17,867.88, is recoverable from the lessees of the Property as part of the service charge pursuant to the provisions of the Sixth Schedule of the Lease.**

- **The cost of providing fire marshals for a 'Waking Watch' for the period of 08/08/17 to 12/10/17 from Stone Security, totalling £45,885.89, is recoverable from the lessees of the Property as part of the service charge pursuant to the provisions of the Sixth Schedule of the Lease.**

- **The cost of providing fire marshals for a 'Waking Watch' for the period of 13/10/17 to 5/12/17 from Stone Security, totalling £33,872.04, is recoverable from the lessees as part of the service charge pursuant to the provisions of the Sixth Schedule of the Lease.**

- **The estimated amounts for providing fire marshals in the 2017/2018 service charge year, which have been demanded from lessees as advance contributions towards the anticipated costs, are reasonable and payable.**

- **The application for an order under section 20C of the Landlord and Tenant Act 1985 is refused.**

- **The application for costs under Rule 13 of the Tribunal procedures (First tier Tribunal) (Property Chamber) Rules 2013 is refused.**

REASONS

Background

1. On 31 July 2017, the Tribunal received an application from E & J Ground Rents No 11 LLP ("the Applicant") under section 27A of the Landlord and Tenant Act 1985 ("the 1985 Act). The Applicant is the freehold owner of a development known as Fresh Apartments, 138 Chapel Street, Salford M3 6AF ("the Property"), which is principally a purpose-built development of residential apartments. The Respondents are the long leaseholders of those apartments, and the Applicant is their landlord.

2. The Tribunal is required to make a determination as to whether the costs incurred by the Applicant in providing a fire 'Waking Watch', in respect of the Property, are reasonable and payable by the lessees of the Property under their respective leases as part of the service charge for the 2016-17 and 2017-18 service charge years. This is the only matter to be decided and the Tribunal is not considering the question of liability for replacing the Property's external cladding, should this occur at a future date.

3. Directions were issued on 11 August 2017 for the conduct of the proceedings, in response to which bundles of written submissions, supplementary submissions, skeleton arguments, a witness statement and other documentary evidence were provided. Following an inspection of the Property, a hearing was held in Manchester on 5 December. The Applicant was represented at the hearing by Mr S. Allison, Counsel. Mr Berry of Solis Law who represented the majority of the participating Respondents, spoke on behalf of all the Respondents present at the hearing and acted as the lead representative for the Respondents. The Tribunal heard and received written and oral submissions on behalf of the Applicant from Mr Allison and from Mr Berry on behalf of the Respondents.

Inspection and description of the Property

4. The Tribunal made an external inspection of the Property and also undertook a partial internal inspection of the car park and the first-floor common parts on the morning of the hearing. We were accompanied during the inspection by the management agents, some, but not all, of the participating Respondents, and the parties' legal representatives.

5. The Property comprises of 141 residential apartments above 2 commercial units situated on the ground floor and an undercroft car park. The block, which was constructed in 2007, ranges from 3 to 10 storeys and is constructed of steel, concrete and masonry. The exterior of the building is clad principally in three different types of cladding; composite cladding panels, rain screen Aluminium Composite Cladding (ACM) panels and render. There is also a very limited area of the building which is clad in timber.

The issues in the present dispute

6. In the aftermath of the Grenfell Tower fire immediate fire safety concerns were raised in respect of all multi-storey or high-rise buildings constructed with similar external cladding. This led in many instances to interim fire protection measures being deployed either pending the results of further tests or examinations, or as a direct result of those tests. The focus of this case concerns the deployment of a 'Waking Watch' as an interim fire safety measure at the Property, the appropriateness of this action and whether the costs incurred are recoverable through the service charge.

7. It may be helpful to describe what a 'Waking Watch' is and why it would be implemented. Where a building meets the normal expected fire protection and safety standards, this usually enables a fire to be quickly detected and to be compartmentalised and contained for a reasonable period. Even in high rise buildings, effective fire breaks and fire-resistant materials such as half hour fire doors, should allow sufficient time for either the fire to be brought under control by the emergency services or for a controlled full or partial evacuation of the building, if required. Accordingly, a 'stay put' fire policy is very common where it is deemed safe for residents to stay in their flats or apartments until rescued or evacuated by the fire services.

8. Tragically it is now apparent that in certain circumstances, such as those that occurred at the Grenfell Tower fire, there is a much greater risk that the spread of fire will be more rapid and uncontrolled than previously anticipated. This poses serious risks to the safety of residents who remain in their homes and reduces the possibility of securing a safe means of escape, effectively making time of the essence. In these instances, fire authorities have been reviewing and revising the evacuation policies of these building from 'stay-put' to immediate evacuation. A 'Waking Watch' is implemented to support the early identification of fire and the quick evacuation of a building in these circumstances. This involves having trained people physically patrolling the building to detect a fire quickly. Their role is to notify and liaise with the emergency services and most importantly, to alert all the residents and to facilitate a speedy and orderly evacuation of the building. Residents are often alerted by the use of fire horns or by simply banging on their doors.

9. In considering this application the following issues were identified as being in dispute:

7.1 Whether, in principle, the provisions of the leases enable the landlord to recover the cost of this service through the service charge – this is a contractual matter.

7.2 If so, whether the relevant costs of providing the service are to be taken into account in determining the service charge having regard to S19 of the Landlord and Tenant Act 1985.

7.3 Whether the 'Waking Watch' contract is a 'Qualifying Long-term Agreement' for the purposes of S20 of the 1985 Act. The effect of which would be to limit each leaseholder's liability to £100, unless the consultation requirements have either been met or dispensed with by the Tribunal.

7.4 The Respondents have also raised two separate applications concerning costs;

a) An application for an order under S20C of the 1985 Act for the costs incurred in connection with these proceedings not to be recoverable by the Applicant through the service charge, and
b) an application for a costs order against the Applicant under Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013.

10. The Tribunal will deal with the substantive issues in dispute first before addressing the various costs applications.

Law

11. Section 27A(1) of the 1985 Act provides:

> *An application may be made to the appropriate tribunal for a determination whether a service charge is payable and, if it is, as to-*
> *(a) the person by whom it is payable,*
> *(b) the person to whom it is payable,*
> *(c) the amount which is payable,*
> *(d) the date at or by which it is payable, and*
> *(e) the manner in which it is payable.*

12. The Tribunal is "the appropriate tribunal" for these purposes, and it has jurisdiction to make a determination under section 27A of the 1985 Act whether or not any payment has been made.

13. The meaning of the expression "service charge" is set out in section 18(1) of the 1985 Act. It 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.*

14. In making any determination under section 27A, the Tribunal must have regard to section 19 of the 1985 Act, subsection (1) of which provides:

> *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;*
> *and the amount payable shall be limited accordingly.*

15. Section 19(2) provides:

> *Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, ...*

16. "Relevant costs" are defined for these purposes by section 18(2) of the 1985 Act as:

> *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.*

17. There is no presumption for or against the reasonableness of standard or of costs as regards service charges. If a tenant argues that the standard or the costs of the service are unreasonable, he will need to specify the item complained of and the general nature of his case. However, the tenant need only put forward sufficient evidence to show that the question of reasonableness is arguable. Then it is for the landlord to meet the tenant's case with evidence of its own. The Tribunal then decides on the basis of the evidence put before it.

18. Section 20(1) of the 1985 Act provides:

> *Where this section applies to any qualifying works or qualifying long term agreement, the relevant contributions of tenants are limited ... unless the consultation requirements have been either–*
> *(a) complied with in relation to the works or agreement, or*
> *(b) dispensed with in relation to the works or agreement(or on appeal from) [the appropriate tribunal].*

19. A "qualifying long term agreement" means an agreement entered into, by or on behalf of the landlord or a superior landlord, for a term of more than twelve months (section 20ZA(2) of the Act), and section 20 applies to qualifying long term agreements if relevant costs incurred under the agreement results in the relevant contribution of any tenant being more than £100.00.

The Lease

20. The Applicant supplied a specimen copy of a tri-partite lease, relating to apartment 602, made between Fresh Development (Manchester) Limited (1) and Dylan Harvey Group Limited (2) and Shewaib Akhtar (3). The lease which is dated 18 October 2007, is for a term of 999 years from 28 September 2007 and subject to a yearly ground rent commencing at £250. All parties confirmed and agreed at the hearing

that this specimen lease is, in all material respects, a mirror of the other leases granted at the Property and can be taken as such for the purposes of this hearing. References in this decision to "the lease" are to be taken as references to each individual lease of the apartments in the Property.

21. Under clause 2.2 "the Building" is defined in the Second Schedule of the lease. This equates to the Property for the purposes of this decision and the land comprised in title number MAN47479. Clause 2.6 states that the 'Financial Year' "means the period of 12 months from 1st January in each year or such other period (not being more than 24 months) as the Lessor from time to time specifies". Mr Allison for the Applicant advised that the 'Financial Year' had subsequently changed and now commenced from 29 September in each year.

22. The Lease further defines:

    a) "the Maintained Property means those parts of the Building which are more particularly described in the fifth Schedule" (clause 2.9). These include the boundary walls and fences, service installations, communal areas, the electronic entry system, the structure and the lift.

    b) "the Maintenance Expenses means all costs and expenses incurred by the Lessor during a Financial Year in or incidental to providing all or any of the Services and the specific costs expenditure and any other sums mentioned in paragraph 6 of the Sixth Schedule but excluding any expenditure in respect of any part of the Building for which the Lessee or any other lessee is wholly responsible and excluding any expenditure that the Lessor recovers or that is met under any policy of insurance maintained by the Lessor pursuant to its obligations in this Lease".

23. Clause 2.13 outlines "the service charge means the Service Charge Proportion of the Maintenance Expenses".

24. Clause 2.15 provides "the services means the service facilities and amenities set out in paragraph 6 of the Sixth Schedule".

25. The "insured Risks are defined in clause 2.16 and "means those risks which insurance shall be effected which shall include but are not limited to fire .....and such other risks as the Lessor from time to time in its reasonable discretion shall insure against or the Lessee shall reasonably request".

26. Under clause 7 the Lessor covenants at:

    7.1 "to take all reasonable steps to .... keep in good and substantial repair and condition the Maintained Property".

    7.3 "to insure and keep insured the Building (other than the plate glass in the Commercial Unit) in the name of the lessor against loss or damage by the Insured Risks.....".

7.5 "to provide such security for the Building as the Lessor considers reasonably necessary and appropriate".

27. The Sixth Schedule of the lease deals with the service charge provisions and the additional expenses which may be recouped through the service charge. Paragraph 3 of the Lease provides for the lessee to pay "for the next and each subsequent Financial Year a provisional sum calculated upon a reasonable and proper estimate". The other pertinent clauses for the purposes of these proceedings are contained within paragraph 6 and are set out below:

6. "The services shall include"

6.4 "..... keeping all the external Communal Areas on the Maintained Property and the Building and every part thereof in good and substantial repair order and condition and renewing and replacing all worn or damaged parts thereof".

6.7 "Complying with the covenants on the part of the Lessor contained in Clause 6 of this Lease". The contents of Clause 6 and its relevance are covered later in this decision at paragraph 61.

6.13 "Abating any nuisance and executing such works as may be necessary for complying with any notice served by the local authority in connection with the Building or any part thereof insofar as the same is not attributable to the lessee or any individual lessee of any of the properties".

6.15 "Generally managing and administering the Maintained Property and protecting the amenities of the Maintained Property and for that purpose employing a firm of managing agents or consultants or similar and the payment of all costs and expenses incurred by the Lessor in the running and management of the Building and the collection of the rents and service charges and in the enforcement of the covenants and conditions and regulations contained in this Lease and the leases of the Properties and any Estate Regulations including where such functions are carried out by the lessor and the Lessor's reasonable administration charge in respect thereof in making such applications and representations and taking such actions as the Lessor shall think reasonably necessary in respect of any notice or order served under any statute order regulation or bye law on the lessee or any lessee of the Properties or on the Lessor in the valuation of the Building from time to time for insurance purposes in the preparation for audit of the service charge accounts".

6.18 "Complying with the requirements and directions of any competent authority and with the provisions of all statutes regulation orders and bye-laws made thereunder relating to the Building in so far as such compliance is not the responsibility of the lessee or any of the lessees of the Properties".

6.22 "All other expenses (if any) incurred by the Lessor in and about the maintenance and proper and convenient management and running of the Building including in particular but without prejudice to the generality of the foregoing any expenses incurred in rectifying or making good any inherent structural defect in the Building or any part thereof (except in so far as the cost is recoverable under any insurance policy for the time being in force or from a third party who is or may be liable therefor) any interest paid on any money borrowed by the Lessor to defray any expenses incurred by it and any costs imposed upon it by clause 5 of this Lease any other legal or other costs reasonably and properly incurred by the Lessor but not otherwise in taking or defending proceedings (including arbitration) arising out of any lease of any part of the Building or any claim by or against any lessee or tenant thereof or by any third party against the Lessor as owner lessee or occupier of any part of the Building".

Hearing and submissions

28. Mr Allison, Counsel for the Applicant, opened by taking the Tribunal through the initial written guidance on cladding testing issued by the Department for Communities and Local Government (DCLG) on 20 June 2017, in the immediate aftermath of the Grenfell Tower fire. Mr Allison outlined that the subsequent test results (received initially verbally on 21 July 2017) for the cladding sample supplied in respect of Fresh apartments was a 'category 3' finding, which according to the Cladding Screening Test Result report meant "that it has no flame retardant properties".

29. Mr Allison then referred the Tribunal to the letter of 22 June 2017 from the Permanent Secretary of DCLG to local authorities and housing associations outlining the actions deemed necessary by an independent panel of experts in relation to "interim mitigating measures [that] must immediately be implemented to ensure the safety of residents, pending the removal of the cladding". The advice, endorsed by the National Fire Chief, outlined that "if the building is not protected by a suitable suppression system you must consider the need for interim measures. The measures adopted needed to be based on an assessment of the risk by a competent person, but the following must, at least, be considered:

- .....

- Provision of a fire watch by appropriately trained patrolling security officers/wardens".

30. Following a telephone conversation on the afternoon of 21 July 2017 between the management agents and the Greater Manchester Fire and Rescue Service (GMFRS), a 'Waking Watch' was implemented from that evening. This involved two members of staff being on site 24h hours a day with each taking it in turns to patrol the Property.

31. The witness statement of James Mawdsley, the Watch Manager of the GMFRS was taken as read, as Mr Berry, representing the Respondents did not wish to raise any questions or make any comment upon it.

32. In his statement Mr Mawdsley outlined that, along with the station manager, he undertook a Regulatory Reform (Fire Safety) Order 2005 full compliance inspection of the Property on 24 July 2017 and at the same time he also collated the information required in line with the DCLG and the National Fire Chief's Council guidance. At the date of his inspection Mr Mawdsley was aware that category 3 ACM cladding was present at the Property and that a 'Waking Watch' was already in place.

33. He found in addition to the risks posed by the cladding several other defects, which could "potentially compromise emergency escape routes". Additionally, Mr Mawdsley noted that the domestic alarms within each flat "are adequate to support a 'stay put' policy but because of the risk from the cladding are not adequate to support the change in policy which was for a full evacuation of the building". Given the co-operative approach of the management agents and the fact that a 'Waking Watch' was already in place, Mr Mawdsley was content to address these fire risks through an agreed Action plan as opposed to issuing a prohibition order. The Action plan was issued on 4 August 2017.

34. Mr Allison referred the Tribunal to the Regulatory Reform (Fire Safety) Order 2005/1541. Mr Allison sought to establish that the Applicant was a 'relevant person' and 'responsible person' within the definitions of the 2005 Order and so bound by the associated duties outlined in paragraphs 5 (2) to 5 (4). Mr Allison very helpfully took the Tribunal through each of the relevant articles contained within the Order, however as the Respondents did not raise any issues on these points, we do not believe it is necessary to repeat these in detail again here. Mr Allison concluded his submissions in respect of the Order by referring to articles 33 and 34 and stated that the onus would fall on the Applicant in any proceedings brought under this Order "to prove that it was not practicable or reasonably practicable to do more than was in fact done to satisfy the duty or requirement". The Tribunal concludes that there is no dispute that the Order applies and that the Applicant has duties arising under it.

35. Turning next to the question of whether the costs of the 'Waking Watch' met the statutory tests contained within of S19 of the Landlord and

Tenant Act 1985, Mr Allison contended that the key question was whether the expenditure was reasonably incurred, not whether it was the cheapest. Citing Hounslow LBC v Waaler [2017] HLR 16, he contended that the Applicant had chosen a reasonable course of action to protect the occupants at Fresh apartments. This was in line with its duty under the Fire Safety Order 2005 and its obligations under the leases, in the light of the advice received from DCLG and others.

36. Mr Allison accepted that the GMFRS letter of 4 August 2017 and enclosed Action Plan did not state that a 'Waking Watch' must be implemented. He did refer however to the subsequent e mail by Cardinus, the Applicant's appointed risk assessors. While this e mail is somewhat after the event it confirmed that as at the date of the Cardinus assessment, 24 July 2017 and report dated 15 August 2017, a 'Waking Watch' should be in place to comply with DCLG guidance at that time and as subsequently updated on 29 September 2017. Certainly, until an alarm system is installed.

37. The Applicant also contacted the Property's insurer, Zurich, to establish the affect that the presence of category 3 ACM panels would have on premiums, insurance cover and what additional actions may be required to ensure the Property remained appropriately covered for insurance purposes. Similar to the position in respect of GMFRS's Action plan, Mr Allison accepted that Zurich did not explicitly state in their letter of 10 August 2017 that a 'Waking Watch' must be provided, however he nevertheless contended that this was the express implication.

38. In respect of the actual costs incurred, Mr Allison advised that on receiving verbal notification from DCLG on 21st July 2017 of the outcome of test results on the cladding sample supplied, his client felt compelled to act immediately. There was insufficient time available to undertake a tender exercise to secure the best possible price. Nevertheless, Mr Allison contended that the initial contractor's, SK Fire Protection, rates of £18.75 per hour + VAT was not excessive given the short notice and the immediacy of the service provided. The Applicant's management agents then sought competitive quotes from other suppliers, securing a reduced rate of £12.39 per hour + VAT from a different supplier, which was subsequently reduced further through negotiations with the same supplier (Stone Securities) in October 2017 to £11.39 per hour excluding VAT. Mr Allison submitted that it was difficult to see how this service could be provided for less than this if using suitably trained and equipped staff, and he emphasised that the Respondents had failed to provide any comparable quotations or costings.

39. Focusing on the terms of the Lease Mr Allison referred the Tribunal to clauses 7.3 and 7.5, which require, respectively, for the Applicant 'to insure and keep insured the Building' and 'to provide such security for the Building'. He contended that the only way to comply with these clauses was and is for the Applicant to undertake the necessary interim fire safety measure of providing a "Waking Watch". Mr Allison then took the Tribunal through the general provisions of the Lease before

concentrating on Sixth Schedule which contains the service charge provisions. Mr Allison drew the Tribunal's particular attention to a number of the paragraphs contained within the Sixth Schedule and made the following points in relation to each:

Paragraph 3.	Mr Allison contended that this paragraph enabled the lessor to demand interim payments in advance.
Paragraph 4.	Mr Allison submitted similarly that this enabled the lessor to levy a balancing charge or to issue a credit towards the next quarterly payment.
Paragraph 6.4	Mr Allison outlined that this paragraph in the Lease stated the Lessor's obligation to keep the Building in good and substantial repair.
Paragraph 6.7	Mr Allison felt there was a clear drafting error in this paragraph because it cross referred to clause 6 when it should refer to clause 7. He contended that this is self-evident, as clause 7 refers to the obligations on the Lessor and so should be read as such. He cited Arnold v Britton [2015] AC 1619 in support of this contention.
Paragraph 6.13	Mr Allison felt that potentially this paragraph provided the Lessor with the right to recoup the cost of the 'Waking Watch' but he raised doubts as to whether the reference to 'local authority' within this clause could be construed sufficiently widely to encompass the notice received from the fire authority.
Paragraph 6.15	Mr Allison submitted that the last 5 lines of this paragraph provided clearly for the disputed costs to be recovered through the service charge.
Paragraph 6.18	Mr Allison cited this as being the "paradigm example" of the paragraph which provided expressly for the cost of the 'Waking Watch' to be considered a service charge item. He contended that GMFRS was a 'competent authority' and that the Fire Safety Order was clearly within the reference to "all statutes regulation orders and bye laws"
Paragraph 6.22	Mr Allison said that he regarded this as potentially a paragraph that his client could 'fall back' on but he did not seek to place much reliance on it.

40. In respect of whether the contract for the provision of a 'Waking Watch' service was a Qualifying Long-Term Agreement (QLTA) or not, Mr Allison contended that it was not, because it ran only from month to month.

41. Similar to most new build properties, Fresh apartments also benefited from a building defects policy, which may provide the opportunity for financial redress to the original purchasers of the apartments. Confusingly, this policy is provided by another firm called 'Premier'. Mr Allison however confirmed that this building defects insurance policy is not a policy maintained by his clients, as Lessor, pursuant to its obligations under the Lease.

42. Mr Berry, speaking on behalf of all the Respondents present, outlined that the subject property was different to Grenfell Tower. He contended that unlike Grenfell Tower, which was constructed in the 1960's, Fresh apartments was constructed in 2007. It was constructed with different materials and fully complied with the building regulations of that time. He submitted that this meant that it had different fire-retardant properties to those of Grenfell Tower and that there was insufficient evidence at the time the fire marshals were appointed, to suggest a risk and danger to the occupiers and Building. He disputed the Applicant's claim that it had no alternative but to implement a 'Waking Watch'.

43. Mr Berry submitted that the Applicant's actions were premature, a 'knee-jerk' reaction and not in line with DCLG's guidance, which stated "the measures adopted need to be based on an assessment of the risk by a competent person". This is supported, he contends, by the e mail of Patrick Ward at 18:11 on 21 July 2017, which records that the 'Waking Watch' was invoked prior to any inspection of the Property being undertaken. Mr Berry argues that at that time, it was unclear if the Building was unsafe and whether there was a risk of an immediate evacuation or Prohibition Order being served. In this e mail Mr Ward, who is employed by the management agents Premier Estates, was confirming his earlier conversation of the same day with the Manchester Fire Authority.

44. Turning to the Lease the Respondents do not believe that the Applicant has demonstrated that the Lease contains relevant terms to allow the recovery of the costs associated with the 'Waking Watch' within the service charge. Mr Berry submits that clause 6.15 is too vague to permit recovery of these costs and in relation to clause 6.18, he disputes that GMFRS have issued any directions.

45. Mr Berry placed significant reliance on clause 6.22. He contends that this matter is not just a question of recoverability under the general terms of the Lease but this clause specifically restricts the Lessor's ability

to recoup costs in so far that the costs are recoverable from a third party. Mr Berry contends that these costs are recoverable under the Building's warranty insurance, the Premier Building Guarantee policy, and also potentially through a claim against other parties involved with the original construction of the Property.

46. In respect of clause 6.7 Mr Berry could not offer a definitive view and said that it was unclear whether this clause was referring to clause 6, 7 or indeed paragraph 6.

47. Mr Berry contends that the contract to provide a 'Waking Watch' is a QLTA because it had been ongoing since July 2017 on a rolling monthly basis and by its inclusion within the next 12 months service charge, the contract was clearly envisaged to continue for more than 12 months. He felt that to do otherwise would provide landlords generally with a clear mechanism to subvert and abuse the legislation in respect of the consultation requirements. Given that the Applicant had not conducted an appropriate consultation exercise in respect of this service, he argued that the cost attributable, if attributable at all, should be no more than £100 per leaseholder.

48. In response, Mr Allison referred to paragraph 29 of DCLG's updated and consolidated advice for building owners of 5 September 2017:

"... the Expert panel's advice is that, they do not believe that any wall system containing and ACM category 3 cladding panel, even when combined with limited combustibility insulation material, would meet current Building Regulation guidance, and are not aware of any tests of such combinations meeting the standard set by BR135. Wall systems with these materials therefore present a significant fire hazard on buildings over 18m".

49. Mr Allison accepted that while it had not been evidenced that a Prohibition Order would definitely have been served on the Applicant, that, on the balance of probability, one would have been served in the absence of the 'Waking Watch' being in place. This, he contended, is supported by the witness statement of James Mawdsley.

50. In respect of paragraph 6.22 Mr Allison emphasised that this was a 'sweeper clause' and not a stand-alone clause, as denoted by the words "all other expenses". He expressed the view that the exception related solely to the costs outlined in paragraph 6.22 and not in the proceeding paragraphs.

51. Concerning the nature of the contract with Stone Securities, Mr Allison referred the Tribunal to paragraph 29 of the Applicant's Statement of Case, in which a "month to month basis" was confirmed. Mr Allison also submitted into evidence, via verbal confirmation from his instructing solicitor, that this contract was not a rolling month to month contract

but instead a fresh purchase order was raised each month to instruct the supplier for the month ahead.

Discussions and conclusions

53. The Tribunal is grateful to all parties for their detailed and comprehensive submissions, which were most helpful in deciding this matter. We propose to deal with the issues in dispute in the order set out in paragraph 7 of this decision.

The Lease

53. The parties do not dispute that that the Landlord is entitled to levy a service charge and seek payments in advance under the terms of the Lease. The first item in dispute relates to whether contractually the cost of providing a 'Waking Watch' is recoverable under the provisions of the Lease.

54. Mr Allison for the Applicant places most reliance on paragraph 6.18 of the Sixth Schedule in arguing that these costs are recoverable contractually. In reviewing this clause the Tribunal is persuaded, for the purposes of this clause, that the GMFRS is a 'competent authority' and indeed so is DCLG, as the central government department with ultimate responsibility for directing local government and local fire services. The Tribunal is of the view that GMFRS's letter of 4 August to the Applicant clearly directs it to comply with statute and the enclosed Action Plan:

"Under Article 9(3) of the regulatory Reform (Fire Safety) Order 2005 any changes required, based on the significant findings identified in your Fire Risk Assessment, must be undertaken".

55. While the Tribunal accepts the Respondents' submissions that the Applicant is not specifically directed to provide a 'Waking Watch', this was the mechanism chosen to satisfy the Applicant's statutory obligations under the Fire Safety Order and the Action Plan drawn up with the GMFRS. No other viable alternative actions have been suggested by either party and it is hard to see what other immediate practical steps could have been taken to address item 5 within the Action Plan:

"A reliable fire detection and warning system will be in place to protect the means of escape pending adequate controls in relation to internal and external fire spread".

56. Accordingly, the Tribunal finds that the actions taken to comply with the Applicant's duties and responsibilities under the Fire Safety Order 2005 and to comply with DCLG's guidance on receipt of the test findings on 21 July, fall comfortably within the scope of paragraph 6.18. We also find

that the Applicant's actions in providing a 'Waking Watch' for the Property were for this purpose.

57. While this finding determines that the cost of this service is, in principle, recoverable under the service charge provisions of the Lease, it may be helpful to the parties to consider if any other key clauses and paragraphs within the Lease also permit the recovery of these costs.

58. Paragraph 6.15 of the Sixth Schedule is a wide ranging clause which seeks to permit the recovery of 'generally managing and administering the Maintained Property.....and the payment of all costs and expenses incurred in the running and management of the Building". The Applicant argues that the final 5 lines, as set out below, allow and support the Lessor in recovering of these costs:

"...taking such actions as the Lessor shall think reasonably necessary in respect of any notice or order served under any statute order regulation or bye law on the lessee or any lessee of the Properties or on the Lessor in the valuation of the Building from time to time for insurance purposes in the preparation for audit of the service charge accounts".

59. The Tribunal would agree with this contention if an Enforcement Notice or Prohibition Order had been served. To date none have been and the GMFRS letter of the 4 August 2017 and Action Plan clearly states that "it does not have the same legal standing as a formal Enforcement Notice.

60. For similar reasons, the Tribunal does not believe that paragraph 6.13 assists the Applicant because no notice has been served by the local authority.

61. The Tribunal noted the confusion over sub paragraph 6.7 within the Sixth Schedule of the Lease and but finds that the clear intention of the original parties was to cross reference clause 7 and not 6, within the main body of the Lease. Clause 7 is headed 'Services' and sets out that "the Lessor Covenants with the Lessee at all times (subject to payment of the Service Charge by the Lessee as herein provided)". Clause 6 relates to peaceful and quite enjoyment, the observance and performance of covenants and conditions in other leases, and unsold apartments. It is hard to envisage any logical connection between clause 6 and the service charge provisions with the Sixth Schedule, or that this was the intention of the original parties. The Tribunal is therefore of the view that this is clearly a drafting error. The legal authorities quoted by the Applicant provide clear guidance as how the Lease should be interpreted in these circumstances.

62. Having established this point, the Tribunal is persuaded that the Applicant is obliged 'to insure and keep insured' the Building, clause 7.3, and the cost of maintaining insurance is an allowable service charge item when paragraph 6.7 of the Sixth Schedule is properly construed.

63. The question then arises whether the Applicant, as Lessor, can properly comply with this covenant without deploying the 'Waking Watch'. While the letter dated 10 August 2017 from the Building's insurers, Zurich, does not insist that a 'Waking Watch' is implemented, there is little doubt that their expectation is that the Applicant will take all reasonable steps and fully comply with the fire authorities' requirements, the key paragraph in this letter is as follows:

"Under the policy wording there is a general policy requirement that a policyholder shall take all reasonable steps to mitigate and / or avoid a claim. We have recently seen numerous similar incidents reported in high rise blocks where the authorities / fire brigade have provided and sought defined fire protection requirements on such properties (given combustibility concerns), including static fire wardens given life protection considerations. On all these our policyholder(s) have fully met these requirements we understand. Our expectation here would be that our policyholder would do likewise, to not do so would mean, in our opinion, a breach of the general policy requirements, upon which we are maintaining policy coverage, to take reasonable steps to avoid a claim under the policy"

64. In the light of this clearly very cautious steer from the insurers, no other apparent practical way to address item 5 in the GMFRS Action Plan and the risk of prohibition Notice being served, it is hard to see how the Applicant would not have run the significant risk of being in breach of the policy if it did not implement a 'Waking Watch'. We therefore consider that this was a reasonable action to take to comply with clause 7.3 and to avoid the Building and its occupants not being properly covered for insurance purposes.

65. The Applicant does not seek to rely on paragraph 6.22 of the Sixth Schedule but the Respondents submit that because the costs are or are potentially recoverable from a third party that they are not recoverable through the service charge by virtue of the exclusion contained within this paragraph. Having listened to the arguments on this point, the Tribunal considers that the exclusion applies to other expenses, not contained within the preceding paragraphs in the Sixth Schedule, and in particular, relates to the expenses incurred in making good a structural defect. The Tribunal agrees with Mr Allison's submission that this is not a stand-alone paragraph.

66. The Tribunal therefore finds that contractually under the terms of the Lease the Applicant is entitled to recoup the cost of the 'Waking Watch' through the service charge provisions. In reaching this conclusion we have touched upon and alluded to some extent on the reasonableness of this action, but this needs now to be examined within the context of the statutory requirement S19 of the Act.

S19 of the Act

67. One of the key premises of the Respondents' case is that the Applicant has not proved that it absolutely had to invoke a 'Waking Watch' and was premature in implementing it. This, however, does not strictly align with the statutory test contained within S19 of the Act. The first limb of S19(1)(a) requires two separate matters to be considered:

a. Is the decision by the Landlord to incur the costs reasonable and;
b. Is the amount of the costs actually incurred reasonable?

68. In view of the Tribunal's conclusions in paragraphs 55, 56, 63 and 64, it is hard to see how the Applicant's actions could not be seen as reasonable. Given the cladding test results, the expert advice provided through DCLG, the Applicant's duty under the Fire Safety Order and its obligations under the Lease, the Tribunal has no doubt that it was reasonable for the Applicant to incur these cost from 21 July 2017.

69. In reaching this view the Tribunal has had regard to and placed weight on the witness statement of James Mawdsley, the Watch Manager at GMFRS. He concludes in the final paragraph of his statement that "in the absence of any adequate means of raising the alarm throughout the building the service of a prohibition notice would have to be considered". Mr Mawdsley sets out the basis for this conclusion in paragraph 11 of his statement, which outlines that this conclusion was derived by inputting his "findings into the services Community Risk management System (CRMS) which calculates the risk within a building based on compliance against the Fire Safety Order".

70. The Tribunal also noted that when it asked Mr Berry what actions should the Applicant have taken at the date of the Application and more recently, he was unable to suggest any bar undertaking further investigations. The Tribunal is of the view that on the basis of the evidence before it inaction, bar undertaking investigations, was not a reasonable stance for the Applicant to adopt. We do not accept that the Applicant acted prematurely in providing a 'Waking Watch' with immediate effect when notified of the cladding test results.

71. In considering the amount of the costs incurred, the Tribunal does not find these to be excessive in the circumstances. The Tribunal understands that immediate and emergency cover will always be more expensive than that competitively sourced with a reasonable notice period. The subsequent actions of the Applicant to secure best value, detailed at paragraph 38, and the lack of any evidence to contrary from the Respondents, further supports this conclusion.

72. While no submissions were made at the Hearing as to the standard of the 'Waking Watch' service provided not being of a reasonable standard, this was raised by Mr Berry in his written submissions and separately in correspondence by other Respondents. When the Tribunal inspected the Property two fire marshals were on site and taking turns in conducting rounds of the Building. The Tribunal were informed that electronic 'check-in' points had recently been installed to ensure that regular patrols were being undertaken at the appropriate intervals and covering the required areas of the Building. The Tribunal therefore concludes that it would appear that the service is being delivered to an appropriate standard.

73. Having determined that the statutory requirements of S19(1) are met, it also follows that the requirements of S19(2) in respect of the interim advance service charge payments being demanded on account are also satisfied. The service and costings being anticipated being the same as that currently being provided.

Qualifying Long Term Agreement

74. We next need to consider whether the contract to provide a 'Waking Watch' constitutes a QLTA under the Act. The Respondents contend that it does by virtue of the fact that the service is anticipated to be required for more than 12 months, as evidenced by the fact that it is included in the service charge budget for 2017 – 2018. Notwithstanding the fact that the agreement is on a month to month basis, and not for 12 months or more, the Respondents contended that it met the statutory requirements of a QLTA and Mr Berry cited Poynders Court Limited v GCS Property Management Ltd [2012] UKUT 339 (LC) in support of his contention.

75. The Tribunal finds that the facts of the Poynders Court case differ significantly from the circumstances here and so can be distinguished. In that case, the Upper Tribunal found that:

"The Management Agreement is silent as to its term or duration in the sense that it does not explicitly define how long it is to last. However, its effect is that Bells has contracted or agreed to provide the services therein forever, or indefinitely.....It is clear from those terms that will or are intended to be provided for a period which extends beyond 12 months: they relate to the ongoing preparation and collection of the annual service charge, management and the maintenance of the building, obtaining insurance, ...".

76. The agreement in this case is for a defined term of one month and renewed on a month to month basis, as evidenced by the raising of a new purchase order number each month. While there may or may not be a need for a 'Waking Watch' for in excess of 12 months, the potentially transient nature of the contract with the individual supplier is evidenced by the fact that the Applicant has already changed suppliers once. There is no evidence to suggest that the parties to the current agreement intend it to extend beyond 12 months and the fact that this is not a rollover contract but rather a fresh contract each month, adds weight to this interpretation.

Costs

The application under section 20C of the 1985 Act

77. Section 20C(1) of the 1985 Act enables a tenant to apply for an order that all or any of the costs incurred, or to be incurred, in connection with proceedings before the 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 specified in the application. By virtue of section 20C(3), the Tribunal may then make such order as it considers just and equitable in the circumstances.

78. In the present circumstances, we do not consider it to be just and equitable to make an order preventing the Applicant from recovering the costs it has incurred in these proceedings by means of future service charges. The Applicant has been successful in its application and was entitled to bring proceedings to establish and clarify its entitlement to recover the costs concerned by means of service charges.

The application under Rule 13 of the Tribunal procedures (First tier Tribunal) (Property Chamber) Rules 2013.

79. The general principle (set out in Rule 13(1)(b)) is that the Tribunal may only make an order in respect of costs if a person has acted unreasonably in bringing, defending or conducting proceedings before the Tribunal. The application of Rule 13 was considered and explained by the Upper Tribunal (Lands Chamber) in the case of Willow Court Management Company (1985) Ltd v Alexander [2016] UKUT 290 (LC). The correct application of the rule requires the Tribunal to adopt the following approach when determining an application for costs:

a. Is there a reasonable explanation for the behaviour complained of?

b. If not, then, as a matter of discretion, should an order for costs be made?

c. If an order for costs should be made, what should be the terms of that order?

80. The starting premise in relation to costs is that this is a 'no costs' Tribunal, where parties should expect to be able to instigate proceedings and defend cases on the basis that each party will bear their own costs. While the Tribunal has powers under Rule 13 to award costs, where a person has acted unreasonably, these powers should not be exercised lightly and generally only in connection with behaviour related to the conduct of the proceedings themselves.

81. The Respondents' view is that the Applicant has been unreasonable in bringing these proceedings. Further, they contend that the Applicant is a large business with considerable resources at its disposal and it has sought to use the proceedings to justify a precipitous and unreasonable approach in deploying a 'Waking Watch'. On the basis of the Tribunal's findings above, we can find no grounds to determine that the Applicant has acted other than reasonably at all times both in bringing these proceedings and in their conduct throughout. It follows that the Tribunal has no power to make a costs order in this case, and the Respondents' application for one is accordingly refused.

Annex

List of leaseholders

Name
Mr D Addabbo
Ms M Aire
Mr S Akhtar
Mr L O Almond
Mr Amanjy
Mr & Mrs Arora
Mr F Ashraf
Mr & Mrs Aziz
Mr Bano
Mr Barnett
Mr Best
Mr D Bhai
Ms I Bila
Ms I Bila
Mr & Mrs Bithell
Mr Bloomfield
Mr & Mrs Brannan
Bright Issue Ltd
Mr Carroll
Mr Carter
Mr Caza
Mr J Chipp
Mr M J Chipp
Mr QZ Chong
Mr Cornish
Mr Craddock
Mr M D Crisp
Ms Dang
Mr G S Davis
Mr Dibb
Mr & Mrs Dunlop
Mr Fiaz
Mr & Mrs Gammons
Dr K Giannopoulos
Mr K Giannopoulos
Mr Gilbert& Ms Riva
Mr & Mrs Gregory
Mr A R Griffiths
Mr P Griffiths
Mr Haider
Mr M Halsall
Mr Haralambous
Mr & Mrs Harper
Mr J Hart
Mr Mulvany
Ms Murphy
Mr Naughton
Mr & Mrs Neumark
Mr L Nigri
Mr & Mrs Nolan
Mrs Vowles
Mr C W Wan
Ms Wan

Name
Mr Hussain
Mr I Hussain
Mr Z Hussain
Mr Y C Hee
Impereo Ltd
Mr Imran
Mr & Mrs Iqbal
Ms Iseli
Mr A Islam
Mr Jones
Ms Jackson
Mr Jabreel
Mr & Mrs Karimjee
Mr & Mrs Karolia
Mr Kenyon
Mr & Mrs Khalil
Mr I Khan
Mr G Khurana
Mr A Kureshi
Mr T Lui
Mr Lee & Mr Young
Mr J Li
Mr Locking
Mr Y Long
Mr Lynch
Mr Mackay
Mr Mackey
Dr Majeed
Mr G J Martin
Mr ZA Masood
Mr Matthews
Mr McAuley
Mr N Miran
Mr & Mrs Mistry
Mr M Moran
Mr & Mrs O Connor
Mr O Kane
Mr EBL Ong
Mr & Mrs Pandit
Ms Pang
Dr Papoutsos
Park First Ltd
Mr Parveen
Mr & Mrs Pate
Mr Purohit
Mr Purohit
Mr Ramsay
Mr Walmsley
Mr O Rashid
Mr Vawda
Mr Vollans
Mr Wightman
Mr Yeend

Name
Mr S N Ang & Ms S H Chuah
Mr M Ahmed & Mr Z Khanum
Brooklands Trustees Ltd
Balan Properties Ltd
Mr & Mrs Campbell
Mr & Mrs Price Milne & Mr Curling
Green Bean Properties Ltd
The John Dunning ARF
Berkeley Burke Trustee Co Ltd
Guiness Mahon Trust Corporation Ltd
Experience Information Security Ltd
Higher Street Properties Limited
NHS Property Services
Mr R S Sanghera & Mr S B Young
Mr Mashnouk & Ms Al-Chakaki
Mr Howard & Mr Wilson
Mr Martin & Ms Thompson
Mr S Nam & Ms S H Chauh
On Site Truck Repairs Limited
Mr & Mrs Ramcharan
Mr A Renshawe-Strack & Ms Strack
Mr Zhang & Mr Liang
Mr Singh & Mr Tamber
Mr & Mrs Taylor
Mr Taylor & Ms Wragg
Dr Safa
Mr A Saleem
Mr H Saleem
Mr M Saleem
Dr S Saleem
Stadia Trustees Ltd
Mr Stanton
Mr T Taj
Mr BHT Tan
Mr Ridley & Ms Wake
Mr A Ridley
Mr D E Robinson
Mr J Rooney
Mr Roscoe
Mr Roylance & Ms Owen
Shaf J Ltd
Mr S Shah
Mr & Mrs Shahbaz
Mr Sharma
Mr & Mrs Seth
Ms Sethi
Mr & Mrs Sewell
Ms Shi
Mrs Tsang
Mr Uppal
Mr B Usher
Mr A D Wooderson
Mr & Mrs Wood