First-tier Tribunal
Property Chamber
(Residential Property)

Case Reference	**:**	**CAM/00MD/LSC/2018/0050**
Property	**:**	**Nova House,** **1 Buckingham Gardens,** **Slough,** **SL1 1AY**
Applicant **Represented by**	**:**	**Ground Rent Estates 5 Ltd.** **Simon Allison of counsel (JB Leitch Ltd.)**
Respondents **Represented by**	**:**	**The long leaseholders listed in the Application** **Pell Buy It Investments Ltd, represented by Cheryl Jones & Antonida Kocharova of counsel (direct access)**
Date of Application	**:**	**2nd August 2018**
Type of Application	**:**	**to determine reasonableness and payability of service charges and/or administration charges**
The Tribunal	**:**	**Bruce Edgington (Lawyer Chair)** **David Brown FRICS**
Date and place of Hearing	**:**	**28th November 2018 at 10 Alfred Place London WC1E 7LR**

DECISION

---

1. The Tribunal determines that the costs of the trained fire marshals/walking fire marshals at the property (known as fire watch or waking watch) up to September 2018 , amounting to £277,518.16, are recoverable from the long leaseholders as service charges under the terms of the long leases held by the Respondents.

2. The Tribunal has made no determination in contract or tort as to who may be ultimately responsible for the cost of rectifying existing and admitted defects to the structure of the property which may or may not include the costs referred to in paragraph 1 of this decision.

3. The Tribunal refuses the application by Pell Buy It Investments Ltd. ("PBIL") for an order that the Applicant's costs of representation before this Tribunal shall not be a relevant cost when determining service charges (section 20C **Landlord and Tenant Act 1985** ("the 1985 Act")).

Reasons

Introduction

4. This is an application made by the owner of the property for this Tribunal to determine whether the costs of "*the trained fire marshal/walking fire marshal*" employed at the property are payable up to September 2018 by the long leaseholders of the 68 residential flats as part of their service charges.

5. Following the tragic events of the Grenfell disaster, investigations were made and it was found that the outside cladding on this building was similar to that at the Grenfell Tower. Further investigations revealed that there were also severe compartmentation issues which increased the risk of any fire spreading from flat to flat.

6. In consultation with the fire service and the local authority, safety conditions were imposed including the provision of fire wardens and a fire engine on site. Some measures have been undertaken including the provision of additional heat detectors in common parts and some flats. This has enabled the fire engine to be withdrawn although a smaller vehicle is still on site. It is now said (page 572 of the bundle supplied for the hearing) that the fire wardens will have to remain in place until "*all required remedial works have been completed*". It is also said (page 35) that a provisional works programme should have been agreed by the middle of September 2018.

7. A brief history of the significant events is as follows:

Early 1990's	property built with underground car park and commercial premises on ground to 3rd floors
2014/2015	conversion to residential use with additional 4th, 5th and 6th floors with new cladding - 68 apartments let on long leases
19.11.15	lease to PBIL 'off plan'
14.06.17	Grenfell Tower disaster
22.06.17	letter of advice from DCLG to local authorities (page 100)
Unknown	Ringley Chartered Surveyors cladding screening test result (page 97) (possibly 30.06.17 – page 920)
14.08.17	freeholder transfers property to Applicant
06.10.17	Slough Borough Council agree to acquire the shares of the Applicant
29.08 – 06.12.17	Bob Richard Associates fire compartmentation survey
24.10.17	Savills (UK) Ltd. building survey

07.03.18	Slough Borough Council acquire the shares of the Applicant at a cost of £1
21-23.03.18	Bob Richard Associates common parts compartmentation survey
21-23.03.18	RSK first survey and testing the fire rating to structure and floors
12-15.06.18	RSK second such survey and testing
02.08.18	this application

The Lease

8. The bundle produced for the hearing included a copy of the lease to PBIL which is dated 19th November 2015 and is for 999 years commencing on 29th September 2015 with a ground rent of £260 per annum which is subject to review under clause 7 (not clause 8 as stated in the definitions clause). It is said that all the leases are in the same basic relevant terms.

9. A great deal is said by the only participating Respondent (PBIL) about the lease terms including a suggestion, without evidence, that they may not all be in the same basic relevant terms. However, those comments concede their lease terms and argue only about their relevance to this application.

10. In essence, the lease says that the landlord has to keep the structure in repair. Both parties agree that the structure includes the cladding and the compartmentalisation.

11. The contentious clauses are those which allow the landlord to include the cost of structural improvements in the service charge and, so far as services are concerned, to "*extend vary or alter the services from time to time so long as in doing so the Landlord complies with the principles of good estate management and acts reasonably in all the circumstances*". PBIL's case is that the wrong cladding was installed by the then landlord and the long leaseholders should not have to pay for either a repair or an improvement. Therefore, they should not be responsible for the costs of the wardens.

12. It is argued that there has been no good estate management or reasonable behaviour on the part of the Applicant, its predecessors in title and/or agents. It is further argued that the long leaseholders cannot possibly be responsible for the cost of the required work to the structure and therefore they cannot be liable for the fire watch costs.

The Law

13. Section 18 of the 1985 Act defines service charges as being an amount payable by a tenant to a landlord as part of or in addition to rent for services, insurance or the landlord's costs of management which varies 'according to the relevant costs'.

14. Section 19 of the 1985 Act states that 'relevant costs', i.e. service charges, are payable 'only to the extent that they are reasonably incurred'. This Tribunal has jurisdiction to make a determination as to whether such a charge is reasonable and, if so, whether it is payable.

15. Section 20 of the 1985 Act requires a landlord to consult with long leaseholders if 'qualifying works' are to be undertaken which involve a cost

of more than £250 in a service charge year. Otherwise, the cost to the leaseholder is capped at £250. Section 20ZA allows this Tribunal to grant dispensation from consultation if an application is made. It also defines qualifying works as "*works on a building or any other premises*".

The Tribunal's Directions Order

16. The application form submitted on behalf of the Applicant had virtually no information to support the application sought. On the 3rd August 2018 i.e. the same day as the application was received, a Directions order was made which included a requirement to provide the following information:-

> "*(i) when was it discovered that the building needs recladding?*
> *(ii) if the present cladding is part of the structure and is defective, why it is being suggested that the long leaseholders have to pay for fire wardens?*
> *(iii) why is the cost so high i.e. what efforts have been made to reduce the cost?*
> *(iv) is the Applicant asking for a payment on account and, if so, what?*
> *(v) when is it anticipated that the costs will stop?*
> *(vi) if the Respondents are expected to pay for the cladding, when does the consultation process start?*"

17. In the papers supplied to the Tribunal in the bundle, answers were provided which, in essence, said:-

> (i) No clear evidence supplied to say when the cladding was known to need replacing but presumed to be mid/late 2017
> (ii) The cladding can be replaced at the expense of the long leaseholders because the leases allow the landlord to recover the cost of repairs and improvements. As the work and wardens are safety requirements, the landlord can recover these addition services as part of good estate management
> (iii) There is no information about cost save for the invoices
> (iv) As for payments on account, the service charges which are the subject of this application are up to September 2018
> (v) In view of the answer to (iv) this is not relevant
> (vi) This was dealt with at the hearing

The Hearing

18. The hearing was attended by the witnesses Messrs. England and Townson together with Simon Allison, counsel for the Applicant. Cheryl Jones and Antonida Kocharova appeared as counsel for the PBIL. This somewhat unusual arrangement was accepted by the Tribunal as it was clear that counsel for BPIL had been instructed late in the day and sharing the representation task with Ms. Jones as the lead was clearly in the interests of justice. A gentleman said to be a director (unidentified) of PBIL was also in attendance to give instructions. A number of others were present whose identity or purpose in attending was unknown.

19. The Tribunal chair started proceedings, after introductions, by setting out a number of queries he had arising from a consideration of the papers and counsel were helpful in clarifying their positions.

20. Mr. England then gave evidence. He formerly worked for Slough Borough Council and had been involved in matters at quite an early stage. He took over as a director of the Applicant after its shares had been acquired by the Council but had been liaising closely with the former directors since at least October 2017 when Slough Borough Council had agreed to take over the company. He was able to give evidence as to what had happened since the defects in the cladding had been identified.

21. Between September 2017 and March 2018 there had been a fire engine at the property paid for by Slough Borough Council together with the fire watch. Interim measures were put in place including the heat detectors which, in liaison with the fire service, permitted the removal of the fire engine and its replacement with something smaller and less expensive. That coincided with the change of providers of the fire watch from Abbatt Property Services to Event Fire Solutions Ltd.

22. The current situation is that an outline programme of works has been prepared but cannot be implemented without the approval of the fire service and a meeting has been arranged with them on the 5th December 2018. No specification has yet been prepared but if the fire service approves the programme, then he would anticipate the consultation process starting in the new year. Doing the best he can, and assuming that the fire service agrees the programme, he would anticipate the work starting in June/July 2019 and lasting about a year.

23. Dealing with the question of fire watch contracts with the service providers, he said that the contracts were for 3 months and then from month to month. In other words, they could be terminated on a month's notice. For this reason the Applicant had not employed people under contracts of employment.

24. Mr. England was, quite properly, questioned at some length about whether there had been unjustified delays in commissioning reports and in the conduct of the claims against third parties and insurers. He denied this emphatically and explained that this was a complex and developing problem. Slough Borough Council had already paid over £200,000 in fees and expenses so far and had agreed a loan for the repair work.

25. Mr. Townson then gave evidence. He is a building surveyor. He, too, was challenged about the time taken for the investigations and work so far. He denied any undue delay and said that he agreed with Mr. England, particularly with regard to the estimated future timetable.

Discussion

26. The Respondent PBIL has submitted its case upon the basis that the general conduct of the Slough Borough Council, the Applicant and its predecessors in title throughout should be considered by the Tribunal. It should also find that the Applicant and its predecessors in title have been in breach of contract because the cladding put on in 2014/15 was clearly wrong and this should have been detected at the time. Finally, the Tribunal should find that as there has been mismanagement throughout, the long leaseholders should not have to pay either for the cladding or the fire wardens.

27. It should be recorded that 2 long leaseholders have written to the Tribunal at pages 1323 and 1328 in the bundle. The first claims to be the leaseholder owner of flat 16 and the second says that he is 'Owner of Nova House, Slough'. Both complain about the fact that they are being required to pay for the fire wardens. They do not add anything to PBIL's case.

28. The Tribunal can see that the 3 Respondents who have contacted them with regard to this case are frustrated about how matters are being handled. There has been a disaster with many people being killed in a fire in Grenfell Tower and, nearly 18 months later, they are being told that they have to pay large amounts of money both for fire wardens and, possibly, for cladding.

29. There are promises by the Applicant that efforts are being made to pursue third parties (including the firm which certified compliance with Building Regulations in relation to the conversion) and insurers with positive legal advice about the chances of such claims being successful.

30. The problem is that this Tribunal is not a civil court and it should not get involved in matters which may turn out to be determined by a civil court judge in due course – almost inevitably in the High Court. All this Tribunal can do is make a determination as to (a) whether, contractually, the cost of these wardens can form part of a service charge, i.e. are they payable on the face of the contract, and, if so, (b) whether the cost indicated is reasonable. Obviously, this decision will not determine how any court would resolve the issue of a possible breach of contract arising from the conversion to apartments and the installation of the cladding. It will also not affect any insurance claim.

31. If any Respondent wants to claim under the insurance mentioned in the bundle, seek an injunction or claim damages from the Applicant or anyone else, that is entirely a matter from them. This is an expert Tribunal, not a court, and it cannot be expected to adjudicate on a complex breach of contract dispute when little, if any, evidence has been produced upon which such an adjudication could take place. Equally, this application has been made and the Tribunal does not see that it is just and equitable to just dismiss it or put off a decision which is within its jurisdiction.

32. PBIL says that the application should be struck out because either (a) the Tribunal should not make any determination until it is known whether the developers, the Applicant or its predecessors or insurers will have to pay the bills or (b) as it is clear that the long leaseholders who bought 'off plan' cannot be liable to pay anything, they should not have to contribute to the fire watch. It also alleges that the specification of the cladding was changed at the time of the conversion with the consent of the Borough Council.

33. As far as quantum is concerned, Mr. Allison referred the Tribunal to another First-tier Tribunal decision involving Cypress Place and Vallea Court in Manchester (MAN/00BR/LSC/2018/0016) dated 18th July 2018 where the market was tested with regard to the rates paid for this sort of fire watch. They are set out at paragraph 8.2.8(vi) of the decision. These cannot, of course, be 'evidence' in this case but it is noted that the rates recorded as being charged in the north west of England are remarkably similar to those

being paid in Slough.

34. PBIL may want to challenge the rates paid and/or the qualifications of the people working on the fire watch but they have not produced any evidence to support their challenge either to show that a lesser form of qualification would suffice, and be acceptable to the fire service, or that the rates paid would or should be less. It is trite law to say that the Applicant is not required to seek out the cheapest possible quote.

35. The Tribunal raised the issue of whether there should have been a section 20 (of the 1985 Act) consultation with regard to the fire watch claims now being made.

Conclusions

36. It is clear to the Tribunal that the leases do allow for this claim to be made, as was, in effect, agreed by counsel for both parties at the outset of the hearing. The landlord must not only keep the structure in repair but it can claim for improvements and additional services provided that reasonableness and good estate management can be established.

37. Grenfell was a national disaster and, at the time of this hearing, the public enquiry is still in progress without any determinations having been made. Before June 2017, no purchaser of a flat 'off plan' would have investigated the nature or construction of the cladding to a block of flats. Such a purchaser would have just assumed that the 'authorities' would have set safety standards to protect occupiers. Even on the day after the disaster, people allegedly in authority were denying that the cladding was to blame. That misunderstanding was soon challenged and shown to be wrong.

38. The public perception of the evidence at the moment seems to be that the fire authority's 'stay put' policy for residents was thwarted because the cladding let fire encapsulate much of the building very quickly. That policy had to be changed during that night to enable people to be evacuated but many people still lost their lives. The reason why it is necessary to set this scene is to show that the cladding problem seems not to have been understood even by the fire authorities. They now have an understanding and in respect of Nova House the 'stay put' policy has been changed to an 'evacuate' policy.

39. It is clear that a number of blocks of flats throughout the country, such as Nova House, have been found to have the same or similar problems as those at Grenfell. Any reasonable and sensible owner of a block of flats must co-operate with its local authority and fire service to resolve any problem. Apart from anything else, Slough Borough Council is obliged to take enforcement action under section 5 of the **Housing Act 2004** should it find a category 1 hazard in respect of a dwelling.

40. Arguably, this type of cladding could constitute a category 1 hazard and, despite the protestations of PBIL, they could have been faced with a prohibition order preventing them allowing the flat to be occupied with an obvious affect on their income from the flat.

41. It seems clear to this Tribunal that the landlord of Nova House has already

incurred a huge debt as a direct result of the problems arising from the cladding at Grenfell which were even unknown to the fire service at the time the conversion took place at Nova House some 2/3 years before the disaster. The actions which have been taken and are being taken are with the full cooperation of, and sometimes at the direction of, the relevant authorities. The only focus is on the safety of the occupants.

42. The Tribunal accepts that the lack of progress to date in beginning a scheme of remedial works is due to the need to carry out extensive investigations in order to establish exactly what works are required. Following the meeting with the fire service in December, the Applicant ought to be able to move things forward more quickly.

43. For these reasons, the Applicant is acting reasonably, responsibly and in the interests of good estate management. It is unfortunate that no competitive quotes have been obtained for the work involved, but there are no competing quotes produced by PBIL and the information available would tend to suggest that the rates charged are not unreasonable. As the contracts are individual and short term involving less than £250 per flat per year per contract, the Tribunal is satisfied that no section 20 consultation was necessary for 'qualifying works'. Clearly the contracts are not qualifying long term agreements.

Costs

44. PBIL put in a late application for an order pursuant to section 20C of the 1985 Act which would, in effect, prevent the Applicant from including its costs of representation before this Tribunal in any future service charge demand. The test is whether such an order is 'just and equitable'.

45. It is quite clear that the Applicant is taking matters extremely seriously and this includes taking legal advice. This has been a complex case. No arguments have been considered as to whether such costs would form part of the 'sweep up' provisions in paragraph 2 of Part II of the Sixth Schedule but it would seem, on the face of it, that they would.

46. It would be hoped that these costs would not be demanded immediately but the Tribunal does not consider it to be just and equitable for the order to be made as requested.

.....
Bruce Edgington
Regional Judge
3rd December 2018

ANNEX - RIGHTS OF APPEAL

i. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) then a written application for permission must be made to the First-tier Tribunal at the Regional office which has been dealing with the case.

ii. The application for permission to appeal must arrive at the Regional office within 28 days after the Tribunal sends written reasons for the decision to the person making the application.

iii. If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.

iv. The application for permission to appeal must identify the decision of the Tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal, and state the result the party making the application is seeking.