FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00BG/LSC/2019/0048**
Property	**:**	**Ironworks, 58 Dace Road, London E3 2NX**
Applicant	**:**	**Wallace Estates Limited**
Representative	**:**	**Mr G Stevenson of Stevensons Solicitors**
Respondent	**:**	**The leaseholders of the Property as per the application**
Representative	**:**	**Mr Foxcroft of Devonshires Solicitors**
Type of application	**:**	**For the determination of the reasonableness of and the liability to pay a service charge**
Tribunal members	**:**	**Judge Carr** **Mr H Geddes RIBA** **Mr A. Ring**
Venue	**:**	**10 Alfred Place, London WC1E 7LR**
Date of decision	**:**	**24th July 2019**

DECISION

Decisions of the tribunal

(1) The tribunal determines that the 'waking watch' charges of £74,649 for each of the two service charge years 2018 – 19 and 2019 - 20 are not payable by the Respondents as they are not recoverable through the service charges under the terms of the lease.

(2) The tribunal makes the determinations as set out under the various headings in this Decision.

(3) The tribunal makes an order under section 20C of the Landlord and Tenant Act 1985 so that none of the landlord's costs of the tribunal proceedings may be passed to the lessees through any service charge.

(4) The tribunal issues directions in connection with the Respondents' Rule 13 Application.

The application

1. The Applicant seeks a determination pursuant to s.27A of the Landlord and Tenant Act 1985 ("the 1985 Act") as to the amount of service charges payable by the Respondents in respect of the service charge years .

2. The relevant legal provisions are set out in the Appendix to this decision.

The hearing

3. At the Case Management Conference on 16th April 2019 the Tribunal ordered that the matter would be determined on the basis of the papers. Both parties were given the opportunity to request an oral hearing. No such request having been made the application is determined on the basis of the documentation and submissions provided by the parties.

The background

4. The property which is the subject of this application is a purpose built block of flats which in parts extends to nine floors. The report of the fire engineering consultants commissioned by the Applicant indicates that the property is of concrete construction with structural steel frame and render finish with ACM cladding on upper floors and timber cladding on the 5th floor balcony section with concrete floors under a part pitched profiled sheet roof and part modern flat roofing system. The 9 storey section has internal stairs plus access to the balcony areas of the 6 storey section.

5. Neither party requested an inspection and the tribunal did not consider that one was necessary, nor would it have been proportionate to the issues in dispute.

6. The Respondents hold a long lease of the property which requires the landlord to provide services and the tenant to contribute towards their costs by way of a variable service charge. The specific provisions of the lease and will be referred to below, where appropriate.

The issues

7. In the Applicant's summary of its position dated 3rd July 2019 the Applicant indicated that of the three issues raised on its application only one issue required determination:

   (i) The payability and/or reasonableness of service charges arising from the costs of surveillance for a fire occurring (waking watch) for the service charge years 2018 – 19 and 2019 – 20.

8. Having read the evidence and submissions from the parties and considered all of the documents provided, the tribunal has made determinations on the issue as follows.

The relevant terms of the Lease

9. Clause 2.1 The landlord lets the property to the Tenant with full title guarantee for 125 years starting on 29th September 2003 (lease period) on the Tenant agreeing to pay £100 a year (the rent) and as further rent (the service charge) the Tenant's proportion of the service costs as defined in the Third Schedule

10. Clause 3 The Tenant agrees with the Landlord:

    (i) 3.2 To pay the service charge calculated in accordance with the third schedule without any sum set off against it

    (ii) 3.7 If the occupiers of the property and occupiers of other property share the benefit of any of the following:

    Party walls, party structures, gates, yards, gardens, roads, paths, gutters, cisterns, tanks, sewers, drains, pipes, wires, duct, cables, and other conduits

Clause 4.3 The Landlord agrees with the Tenant to provide the services listed in the Fourth Schedule for all the occupiers of the building, and in doing so

(iii) The Landlord may engage the services of whatever employees, agents, contractors, consultant and advisers the Landlord reasonably considers necessary

11. The Third Schedule Clause 1 'service costs' means the amount the Landlord spends in carrying out all the obligations imposed by this lease (other than the covenant for quiet enjoyment for other tenants) and not reimbursed in any other way including the cost of borrowing money for that purpose and an appropriate sum as a reserve fund for or towards those matters in the Fourth Schedule which are likely to give rise to expenditure either only once during the unexpired part of the lease period or at intervals of more than one year …

12. The Fourth Schedule clauses 1 – 6

1. Repairing the roof, main structure and foundations of the building

2. Repairing, maintaining, renewing and cleaning any building, access ways, property or sewers, drains, pipes, wires, aerials and cables of which the benefit is shared by the estate or by the Tenant or other occupiers of the building with occupiers of other property

3. Decorating the outside of the building once every three years

4. Repairing and where appropriate and whenever necessary decorating and furnishing the common parts

5. Lighting maintaining repairing and cleaning the common parts

6. Repairing and maintaining those services in the building and its grounds which serve the property and other parts of the building and the estate including if any lifts and electric or other gates

The arguments of the Applicant

13. Following the Grenfell Tower disaster on 14th June 2017 the Applicant commissioned a Cladding & Building Management Report. This was not prepared until 9th May 2018 given the requirement of the specialists to give greater priority to buildings thought to be of higher risk.

14. Prior to 28th September 2018 the local council (Tower Hamlets) and others had advised the Applicant that it was acceptable to leave small or partial amounts of ACM cladding on the Property. The Applicant had been advised that there was a very small amount of ACM cladding on the Property – the ratio of ACM cladding to the façade is only 8.02 per cent.

15. The Applicant jointly with its management agents reassessed the position after 28th September 2018, when government advice was published, and determined to implement a waking watch. This involved having one permanent member of staff constantly on patrol for fire watch.

16. Competing quotations were obtained and it was decided to choose the OCS Ltd option at about £75,000 per year including VAT because it was felt that this option provided the leaseholders best value for money. This provides cover from 7 pm to 7 am Monday to Saturday and 24 hour cover on a Sunday, taking into account that at other times a caretake /concierge who is a trained fire marshal is on site.

17. In connection with the payability of the 'waking watch' charges, the Applicant argues that the costs are payable as part of the service charged under clauses 3.2 and 3.7 of the lease linked with the Third Schedule and the Fourth Schedule, particularly paragraphs 1 – 6 of the Fourth Schedule.

18. In response to the Respondents' response to the Applicant's statement of case that the pleading of the payability argument is insufficient and is in any event not correct, the Applicant expands its argument.

19. The Applicant argues that it is clear that employing staff to constantly monitor the building to see that no fire is occurring is a 'service provided to the building and its grounds which serve the Property, other parts of the building and the estate' and is therefore part of the obligation of the Applicant under clause 6 of the Fourth Schedule and is a liability to which the Respondents should certainly contribute as one of their obligations.

20. It also argues that it is relevant to consider that 4.3(i) of the lease states as an obligation for the Applicant 'to provide services listed in the Fourth Schedule for all of the occupants of the building and in doing so the landlord may engage the services of whatever employees, agents, contractors, consultants and advisors the landlord reasonably considers necessary'.

21. In terms of the Respondents' obligations, the Applicant argues that clause 3.2 states that the lessees are 'to pay the service charge

calculated in accordance with the Third Schedule without any sum set off against it'.

22. Under the Third Schedule clause 1 defines 'service costs' as 'the amount the landlord spends in carrying out all of the obligations imposed by this lease (other than the covenant for quiet enjoyment) for other tenants and not reimbursed in any other way including the cost of borrowing money…' [Is this right? Definitions normally appear in the clauses to a lease, not in the schedules]

23. In connection with the reasonableness of the charges the Applicant relies on having obtained competing quotations.

The arguments of the Respondents

24. The Respondent relies on clauses 2.1 and 3.2 of the lease and clause 1 of the Third Schedule to argue that the Applicant can only recover the costs it spends in carrying out its obligations under the lease and an amount towards a reserve fund in relation to those matters in the Fourth Schedule which give rise to expenditure either only once during the term of the lease or at intervals of more than one year.

25. The Respondent argues that it is only the covenants at clause 4 of the lease that can require the landlord to incur any costs which would then be recoverable by way of service charge.

26. The Fourth Schedule provides an exhaustive list of what services the landlord must provide and which the leaseholder is contractually obliged to contribute to by way of service charge [as these will defined as service costs???]. The schedule is exhaustive as it contains no clause allowing the landlord to add, remove or vary the services provided as it sees fit or considers reasonable. Further there is no such clause contained elsewhere in the lease.

27. The list of services provided at the Fourth Schedule does not contain services such as, carrying out improvements to the Building, ensuring that the Building is safe, complying with the requirements and directions of any competent authority and with provisions of all statute and regulations, orders and bylaws relating to the building, or a general sweeping-up clause or 'management' clause allowing the landlord to recover any costs reasonably incurred in the proper management and running of the building.

28. The Respondents therefore argue that if the 'waking watch' costs do not fall within any of the services listed in the Fourth Schedule or alternatively cannot be linked to any other obligation of the landlord under the lease, then they are not service costs which can be legitimately recovered from the Respondents as service charges.

29. The Respondents argue that the Applicant's statement of case makes it clear that the decision to put in place a waking watch was one taken based on the government's advice and the interim fire safety advice from the specialists consulted by the Applicant.

30. However the Respondents argue that this does not mean that the costs can be legitimately recovered by the Applicant via the service charge from the Respondents automatically. The Applicant must show that the waking watch costs are service costs as defined in the lease.

31. The Respondents argue in relation to clause 3.2, that that clause is merely a covenant on behalf of the tenant to pay the service charges in accordance with the Third Schedule. Clause 3.7 is a covenant on behalf of the Leaseholder to contribute a fair and reasonable proportion (to be determined by a surveyor nominated by the Landlord) of the cost of the repair, maintenance and cleaning of any of the items listed in that clause. The Respondents argue that the waking watch costs do not relate to the repair, maintenance or cleaning any part of the Building and accordingly the Applicant cannot rely on this clause in order to recover the waking watch costs as service charges.

32. The Third Schedule referred to merely lays out how the service charge mechanism in the Lease operates and also defines the 'service costs' as being the costs incurred by the Landlord in complying with their obligations under the Lease so does not assist the Applicant.

33. The Respondents do not consider that any of the services listed in the Fourth Schedule and in particular paragraphs 12 – 6 referred to by the Applicant, can be interpreted as include the waking watch costs.

34. The Respondents therefore argue that the waking watch costs incurred from December 2018 to date and the proposed future costs are not payable by the Respondents under the terms of their leases as part of their service charges or at all. As such there is no need to consider whether those costs are reasonable in their amounts.

The tribunal's decision

35. The tribunal determines that the waking watch costs incurred during the service charge years 2018-19 and 2019 – 20 are not payable by the Respondents under the terms of their leases.

Reasons for the tribunal's decision

36. The starting point for determining liability is the terms of the lease.

37. The tribunal accepts the argument of the Respondents that the terms of the particular leases in question do not provide for waking watch costs.

38. Although neither party referred any decisions on the point, the tribunal has itself considered three decisions made by the First Tier Tribunal in relation to the costs of 'waking watch'. The decisions are Fresh Apartments 138 Chapel Street Salford (MAN/00BR/LSC/2017/0068) Citiscape (LON/00AH/LSC/2017/0435), and Cypress Place and Vallea Court Manchester (MAN/00BR/LSC/2018/0016.

39. In each of those cases there were terms in the lease that were sufficiently broad in scope so that charges for waking watch provision were payable. For instance in Fresh Apartments, paragraph 18 of the Sixth Schedule to that lease provided that services shall include, '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', and at paragraph 22 of the Schedule, '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 …'

40. In 'Citiscape' there was a similar provision in the lease (at paragraph 10 of the 6th Schedule) in relation to complying with the requirements and directions of any competent authority. There was also a clause, at paragraph 15 of the 6th Schedule as follows: 'All other reasonable and property expenses (if any) incurred by the Manager in and about the maintenance and proper and convenient management and running of the Development 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(s) or any other part of the Development…. '

41. In Cypress Place there was a clause at paragraph 1.3 of the Second Schedule to that lease which included within the service charge the costs of, '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' and at paragraph 1.4, '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'.

42. As the Respondents made clear in their submissions, there were no similar terms in the leases under consideration in this case.

43. Moreover the Tribunal determines that none of the terms referred to by the Applicant provided for the costs of the waking watch to be payable under the terms of the leases.

Application under s.20C and refund of fees

44. In the statement of case the Respondents applied for an order under section 20C of the 1985 Act. Although the landlord indicated that no costs would be passed through the service charge, for the avoidance of doubt, the tribunal nonetheless determines that it is just and equitable in the circumstances for an order to be made under section 20C of the 1985 Act, so that the Applicant may not pass any of its costs incurred in connection with the proceedings before the tribunal through the service charge.

Application under Rule 13

45. The Respondents have made an application under Rule 13 of the Tribunal Procedures (First Tier Tribunal) (Property Chamber) Rules 2013. The Applicant is directed to provide a response to that application to the Tribunal copied to the Respondents within 21 days of the date of this decision. The tribunal will then make a determination of the Respondents' Application.

Name: Judge Carr **Date:** 24th July 2019

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

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.

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.

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.

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.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).

Appendix of relevant legislation

Landlord and Tenant Act 1985 (as amended)

Section 18

(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.

Section 19

(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 provisions 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.

(2) Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise.

Section 27A

(1) 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.

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

(3) An application may also be made to the appropriate tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to -
(a) the person by whom it would be payable,
(b) the person to whom it would be payable,
(c) the amount which would be payable,
(d) the date at or by which it would be payable, and
(e) the manner in which it would be payable.

(4) No application under subsection (1) or (3) may be made in respect of a matter which -
(a) has been agreed or admitted by the tenant,
(b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
(c) has been the subject of determination by a court, or
(d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

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

Section 20

(1) Where this section applies to any qualifying works or qualifying long term agreement, the relevant contributions of tenants are limited in accordance with subsection (6) or (7) (or both) 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 by (or on appeal from) the appropriate tribunal .

(2) In this section “relevant contribution”, in relation to a tenant and any works or agreement, is the amount which he may be required under the terms of his lease to contribute (by the payment of service charges) to relevant costs incurred on carrying out the works or under the agreement.

(3) This section applies to qualifying works if relevant costs incurred on carrying out the works exceed an appropriate amount.

(4) The Secretary of State may by regulations provide that this section applies to a qualifying long term agreement—

(a) if relevant costs incurred under the agreement exceed an appropriate amount, or
(b) if relevant costs incurred under the agreement during a period prescribed by the regulations exceed an appropriate amount.

(5) An appropriate amount is an amount set by regulations made by the Secretary of State; and the regulations may make provision for either or both of the following to be an appropriate amount—
(a) an amount prescribed by, or determined in accordance with, the regulations, and
(b) an amount which results in the relevant contribution of any one or more tenants being an amount prescribed by, or determined in accordance with, the regulations.

(6) Where an appropriate amount is set by virtue of paragraph (a) of subsection (5), the amount of the relevant costs incurred on carrying out the works or under the agreement which may be taken into account in determining the relevant contributions of tenants is limited to the appropriate amount.

(7) Where an appropriate amount is set by virtue of paragraph (b) of that subsection, the amount of the relevant contribution of the tenant, or each of the tenants, whose relevant contribution would otherwise exceed the amount prescribed by, or determined in accordance with, the regulations is limited to the amount so prescribed or determined.]

Section 20B

(1) If any of the relevant costs taken into account in determining the amount of any service charge were incurred more than 18 months before a demand for payment of the service charge is served on the tenant, then (subject to subsection (2)), the tenant shall not be liable to pay so much of the service charge as reflects the costs so incurred.

(2) Subsection (1) shall not apply if, within the period of 18 months beginning with the date when the relevant costs in question were incurred, the tenant was notified in writing that those costs had been incurred and that he would subsequently be required under the terms of his lease to contribute to them by the payment of a service charge.

Section 20C

(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 a court, residential property tribunal or the Upper Tribunal, or in connection with arbitration proceedings, 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) The application shall be made—
- (a) in the case of court proceedings, to the court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to a county court;
- (aa) in the case of proceedings before a residential property tribunal, to that tribunal;
- (b) in the case of proceedings before a residential property tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any residential property tribunal;
- (c) in the case of proceedings before the Upper Tribunal, to the tribunal;
- (d) in the case of arbitration proceedings, to the arbitral tribunal or, if the application is made after the proceedings are concluded, to a county court.

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

Commonhold and Leasehold Reform Act 2002

Schedule 11, paragraph 1

(1) In this Part of this Schedule "administration charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent which is payable, directly or indirectly—
- (a) for or in connection with the grant of approvals under his lease, or applications for such approvals,
- (b) for or in connection with the provision of information or documents by or on behalf of the landlord or a person who is party to his lease otherwise than as landlord or tenant,
- (c) in respect of a failure by the tenant to make a payment by the due date to the landlord or a person who is party to his lease otherwise than as landlord or tenant, or
- (d) in connection with a breach (or alleged breach) of a covenant or condition in his lease.

(2) But an amount payable by the tenant of a dwelling the rent of which is registered under Part 4 of the Rent Act 1977 (c. 42) is not an administration charge, unless the amount registered is entered as a variable amount in pursuance of section 71(4) of that Act.

(3) In this Part of this Schedule "variable administration charge" means an administration charge payable by a tenant which is neither—
  (a) specified in his lease, nor
  (b) calculated in accordance with a formula specified in his lease.

(4) An order amending sub-paragraph (1) may be made by the appropriate national authority.

Schedule 11, paragraph 2

A variable administration charge is payable only to the extent that the amount of the charge is reasonable.

Schedule 11, paragraph 5

(1) An application may be made to the appropriate tribunal for a determination whether an administration 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.

(2) Sub-paragraph (1) applies whether or not any payment has been made.

(3) The jurisdiction conferred on the appropriate tribunal in respect of any matter by virtue of sub-paragraph (1) is in addition to any jurisdiction of a court in respect of the matter.

(4) No application under sub-paragraph (1) may be made in respect of a matter which—
  (a) has been agreed or admitted by the tenant,
  (b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
  (c) has been the subject of determination by a court, or
  (d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

(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) An agreement by the tenant of a dwelling (other than a post-dispute arbitration agreement) is void in so far as it purports to provide for a determination—
  (a) in a particular manner, or

(b) on particular evidence,

of any question which may be the subject matter of an application under sub-paragraph (1).