**FIRST-TIER TRIBUNAL PROPERTY CHAMBER**
**(RESIDENTIAL PROPERTY)**

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| Case Reference : | CHI/00MS/LSC/2020/0051 |
| Property : | Hawkins Tower & Moresby Tower, Admirals Quay, Ocean Way, Southampton SO14 3LH |
| Applicants : | Chris Richardson, David Roath & other leaseholders |
| Representative : | --- |
| Respondent: | Brigante Properties Limited |
| Representatives : | J B Leitch Solicitors |
| Type of Application: | Section 27A Landlord and Tenant Act 1985 ("the 1985 Act") service charge determination |
| Tribunal Members : | Judge P J Barber<br>Mr J Reichel BSc, MRICS |
| | Hearing by Video Link |
| Venue & Hearing Date: | 29 & 30 September 2020 |
| Date of decision: | 6 October 2020 |

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**DECISION**

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## Decision

(1) The Tribunal determines that the sums demanded by the Respondent from the lessees, towards reserves, on account of glazing & canopy works (£390,000) and fire stopping works (£86,000 for Moresby Tower and £44,665 for Hawkins Tower) in the service charge year 2020/21, are not reasonable or payable.

**(2) The Tribunal directs that the parties shall within 35 days from the date of this decision submit written representations to each other and to the Tribunal in regard to any claims for costs pursuant both to Section 20C of the 1985 Act, and Paragraph 5A of Schedule 11 of the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act"). The Tribunal shall make a determination on costs on the papers, unless either party shall object, as soon as practicable following receipt of such written representations.**

## Reasons

### INTRODUCTION

1. The application made by Mr Richardson and Mr Roath as lead applicants for a total of 84 lessees at Moresby Tower and Hawkins Tower, is for determination of on account charges demanded for the year 1 April 2020 to 31 March 2021. The challenge is in regard to advance service charges, being reserve fund contributions towards the anticipated costs of:-

   (1) Glazing & Canopy Works

   (2) Fire Stopping Works

   There is no dispute in regard to apportionment; all the leases are agreed to be in substantially similar form. The Applicants also sought orders in respect of the Respondent landlord`s costs under Section 20C of the 1985 Act, and under Paragraph 5A of Schedule 11 of the 2002 Act.

2. Directions were issued on 23 June 2020 and, following a case management hearing, again on 8 July 2020. The Applicants say that Moresby Tower and Hawkins Tower were constructed in or around 2014/15 by Mikella Limited, which became dissolved in 2018, although the main contractor was Bouygues, a company whose headquarters are in France. Moresby Tower and Hawkins Tower are described as being a mix of commercial and residential units; Moresby Tower, with 120 residential units, and is the tallest residential tower in Southampton; Hawkins Tower has 65 residential units. The facades of both towers are stated to be largely comprised of glass. In broad terms the Applicants submit that the costs of these works should be met either from an LABC warranty, or alternatively by the main contractor. RMG were appointed as managing agents for the Property on 1 September 2019.

3. The electronic bundle includes directions, position statement, statements of case, correspondence, photographs and other documents. A specimen copy lease was included in the bundle. Skeleton arguments were filed for each party, shortly

before the hearing date; similarly, each party filed a list of authorities including the following:-

Applicants` authorities:

*Quick v Taff Ely Borough Council [1985] 1 QB 809*

*Fluor Daniel Properties Limited v The Liposome Co Ltd & Others [1999] CH*

*Jacob Isbicki & Co Ltd v Goulding & Bird Ltd [1989] EGLR 236*

*Mullaney v Maybourne Grange (Croydon) Man Co Ltd [1986] 1 EGLR 70*

*Lloyds Bank plc v Bowker Orford & another [1992] 2 EGLR 44*

*Boldmark Ltd v Cohen and Cohen [1985] 19 HLR 135*

*Holding & Management Limited v Property Holding & Investment Trust plc [1989] 21 HLR 596*

*Parker & Beckett v Parham LRX/35/2002*

*Carey-Morgan & Money v Walden [2013] UKUT 0134 (LC)*

*Avon Ground Rents v Cowley [2019] 1 WLR 1337*

Respondent`s authorities:

*Avon Ground Rents v Cowley [2019] 1 WLR 1337*

*Carey-Morgan & Money v Walden [2013] UKUT 0134 (LC)*

*Knapper v Francis [2017] UKUT 3*

*Extracts from Dilapidations: The Modern Law & Practice*

## INSPECTION

4. Due to the Covid pandemic, no inspection of the Property took place.

## THE LAW

5. Section 19(2) Landlord and Tenant Act 1985 provides that:-

*19(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.*

6. Section 27A Landlord and Tenant Act 1985 provides that:-

*(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, the date at or by which it is payable, and*

*(d) The manner in which it is payable.*

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

*(3) 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)-(7)….*

Section 20C Landlord and Tenant Act 1985

*20(C) (1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before the … First-tier Tribunal …, 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) …*

*(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.*

Paragraph 5A Schedule 11 Commonhold and Leasehold Reform Act 2002:-

*5A(1) A tenant of a dwelling in England may apply to the relevant court or tribunal for an order reducing or extinguishing the tenant `s liability to pay a particular administration charge in respect of litigation costs.*

*(2)The relevant court or tribunal may make whatever order on the application it considers to be just and equitable.*

*(3)In this paragraph-*

*(a) "litigation costs" means costs incurred, or to be incurred, by the landlord in connection with proceedings of a kind mentioned in the table, and*

*(b) "the relevant court or tribunal" means the court or tribunal mentioned in the table in relation to those proceedings*

*.....*

**EXTRACTS FROM THE LEASES**

7. The leases contain at the Fifth Schedule, relevant provisions in regard to the landlord`s contractual obligation to carry out work; extracts of those provisions appear below:

   *"1(d) Repairing and remedying any inherent defects in so far as such works are not covered by the provider of any build warranty for the Development or construction or other warranties in favour of the landlord.*

   *15 To carry out all repairs to any other parts of the Estate for which the landlord may be liable and to provide such other services for the benefit of the Estate and to carry out such other repairs and such improvements works additions and to defray such other costs (including the modernisation or replacement of plant and machinery) as the Landlord shall consider necessary to maintain the Estate as an estate of good class residential and commercial Units or otherwise desirable in the general interest of the lessees of the Units on the Estate.*"

**REPRESENTATIONS**

8. The video hearing was attended by Ms Katie Gray, counsel of Tanfield Chambers for the Applicants and by Mr Richardson; the hearing was attended for the Respondent, by Mr Simon Allison, counsel of Landmark Chambers, together with Katie Edwards of J B Leitch and Leila Manzi. Also in attendance as an observer was Joel Semakula, Mr Allison`s pupil.

9. Judge Barber advised the parties at the outset that it would assist the Tribunal if certain aspects were clarified by counsel during the course of their submissions, including confirmation as to the subject of the on account demands for glazing works, the precise extent and nature of the proposed fire stopping works, the position regarding pending claims against the LABC warranty and/or against the main contractor and the timing of the intended works.

10. By way of a preliminary issue, Ms Gray said that she had received two further documents from Mr Allison at 5.00pm on the day before the hearing. Mr Allison explained that these documents relate to fire risk assessment and that he wished to refer to the 886 page bundle. A short adjournment occurred to enable the Tribunal and the parties to download the full bundle so as to enable cross referencing to it, to occur throughout the hearing. Following resumption of the hearing, Mr Allison referred to Page 418 of the bundle relating to fire risk, and also the action plan on Page 465 which was blank. Mr Allison said the issue had arisen following a conversation he had yesterday with the managing agents,

RMG, following which RMG checked their records and had only then produced the further documents. Mr Allison said the principal difference from the report already in the bundle was the addition of an action plan; he could not explain why it is missing from the bundle. Ms Gray objected to admission of this further evidence on the ground of lateness. After a short adjournment, the Tribunal indicated that it was not minded to allow the documents to be admitted, given that the request was made very late, that the directions had included clear timetables, that the Applicants would need time to consider and the undesirability of the hearing being further delayed in consequence, if admission was agreed.

Section 27A Application

11. Ms Gray opened by referring to the grounds at Page 31 onwards, of the bundle, adding that the glazing expert suggested there should be an expectation of some breakages, but none had occurred for nearly two years now, and that the works proposed, namely to apply a film covering to the glazing and to erect a canopy, were not repairs, but simply to stop glass fragments falling out, and to mitigate the risk should they do so. Ms Gray said there were only 5 incidents of glazing panels having broken, and that if there is a problem, it should be met by the LABC warranty, against which a claim was still pending, and that in any event the works are not urgent, according to the experts. Ms Gray said that the Heras fencing which has been in place for a year or more, prevents people from accessing areas in which any fragments might fall. Overall, Ms Gray said that a "wait and see" approach should be adopted by the Respondent rather than adding £390,000 to the service charge account in March 2020. In regard to the proposed fire stopping works, Ms Gray suggested there had been a default by the main contractor, and questioned why the Respondent is not pursuing that main contractor and as to why the Respondent claimed that any claim under the LABC warranty was unlikely to succeed. Ms Gray said the fire risk reports indicated that the risk is "tolerable". Ms Gray referred to the sample lease at Page 207 of the bundle, and the provisions for levying service charges in the Fifth Schedule. Ms Gray further mentioned the Respondent`s report from the glazing expert, Mr Colvin at Page 287 which she said referred to 5 cracked windows, only 2 of which she said were likely to have resulted from nickel-sulphide inclusion. Ms Gray said that Mr Colvin had identified solutions other than filming and the canopy, including a landscaping solution. Ms Gray referred to the fire risk assessments for Hawkins Tower at Pages 418-453, and for Moresby Tower at Page 472, each of which identified the fire risk as being "tolerable". Ms Gray called Mr Richardson who confirmed that the contents of his witness statement at Pages 665-668 are true; Mr Allison raised no questions of Mr Richardson in cross examination.

12. Mr Allison called Leila Manzi to give evidence; Ms Manzi joined via a telephone link, there being a problem with her video connection. Ms Manzi is the South Coast Regional Manager for the managing agent, RMG and she referred to her witness statement at Page 662 of the bundle. Ms Manzi referred to a planning application being necessary in respect of the proposed canopies; she added that a further glazing failure had occurred in June 2020 at the gym in Moresby Tower, which she said had been referred to insurers and, following forensic enquiry, the loss adjuster concluded that such failure had been due to nickel sulphide inclusion in the glass, although no report was included in the bundle to this

effect. Ms Gray conducted cross examination; Ms Manzi confirmed that LABC warranty claims had been submitted in respect of both the glazing failures and fire stopping work; she believed they were submitted at the same time. Ms Manzi did not know the state of progress of each claim, although had asked on many occasions. Ms Manzi said she did not know how long it may take to resolve the glazing claim, adding that RMG had only been appointed as managing agents from September 2019 onwards. In regard to the fire stopping claim, Ms Manzi again said she did not know of its progress and had not asked recently. Ms Manzi said the LABC may not accept either or both claims and that she had not been told definitively. Ms Manzi confirmed that of the 5 glass breakages, the first had been to a commercial unit at Hawkins Tower and the second two at Moresby Tower, all three of which the glazing expert Mr Colvin had attributed to inclusion of nickel sulphide in the glass manufacturing process. Ms Manzi accepted that no cause had been attributed to the other 2 breakages. Ms Gray referred to Mr Colvin`s recommendation at Page 305, that any glass fragments should be collected; Ms Manzi indicated difficulty in this regard, given that RMG had only been appointed in September 2019. Ms Manzi accepted that Mr Colvin suggested that the period of peak breakage rate for glazing with nickel sulphide included, was expected to be 5-7 years from the date of construction in 2015, and that half of all breakages should have occurred by then. Ms Gray pointed out that only 3 breakages have been positively attributed to inclusion of nickel sulphide; Ms Manzi said there could yet be more breakages to come. Ms Gray asked if more breakages should be expected now, given that the "peak" has been reached; Ms Manzi said she would not like to say. Ms Gray suggested that as we have now reached the "peak" without further breakages occurring, then maybe nickel sulphide inclusion is not the problem, and the issue is not as serious as once thought to be; Ms Manzi said it might be, but she disagreed as to seriousness, saying that any failure would be too many, if injury was likely. Ms Gray asked why the Respondent could not wait for a short period; Ms Manzi said they were following professional advice and cannot wait. Ms Gray asked why it was considered there may be insufficient evidence to make a successful warranty claim against LABC; Ms Manzi said that that was what the surveyor advised. Ms Gray asked Ms Manzi to explain why, if there is not sufficient evidence of a problem, mitigating action should be necessary; Ms Manzi said Mr Colvin referred to a risk. Ms Gray suggested that there is a need to wait and see if any more windows should break due to nickel sulphide inclusion; Ms Manzi said yes, and that they need to collect more evidence as they do not yet know. Ms Gray asked what the Respondent awaited; Ms Manzi said they await a decision by the LABC and also collection of evidence. Ms Gray asked why any work should be done now if it is unclear that there is a problem; Ms Manzi said there is a problem. Ms Gray questioned why, since Mr Colvin suggested only a further 2-4 failures, there was reason to instal canopies and glazing film at a cost to lessees of £390,000? Ms Manzi said other steps would be more costly.

13. Ms Gray referred to the existing Heras fencing around the base of each tower; Ms Manzi said it is not suitable for the long term and referred to a couple of incidents involving damage due to high winds, given the waterside location of both towers. Ms Manzi added that they had reports before Christmas, of jackets being snagged, which had to be replaced and that while the Heras fencing is secure, it is prone to blowing over in strong winds. Ms Manzi said that the Heras fencing has fallen over, but she did not know how often. Ms Gray pointed out

that there is a 24 hour concierge arrangement for the towers and that problems should be capable of being monitored; Ms Manzi accepted that any breakage could be monitored. Ms Gray asked why the landscaping option mentioned by Mr Colvin had not been explored instead of the filming and canopy solution; Ms Manzi said their surveyor said it was not viable for this site. Ms Gray said that landscaping would be more cost effective than the £390,000 proposed; Ms Manzi said she did not know. Ms Manzi accepted that the filming and canopy works would not actually fix any problem of glass breaking. Ms Gray referred to the Thomasons report at Page 337 of the bundle and suggested that if the currently proposed work is done, but more breakages occur in the next 2 years, then even more work at further cost, to replace the glass may have to follow. Ms Manzi said no, adding that the surveyor wants to avoid replacement.

14. Ms Gray referred to Mr Colvin`s report at Page 308 of the bundle, and the reference to a lower risk with "punched" windows than with other areas of "curtain" glass; Ms Gray asked why the same works are proposed for all windows; Ms Manzi said that lower risk is not no risk. Ms Gray referred to the reference by Mr Colvin at Page 310, to risk being acceptable if the remedy is excessively costly. Ms Manzi said the Respondent does not want any risk. Ms Gray suggested there were other ways to mitigate risk, such as the Heras fencing, daily monitoring and/or the landscaping option; Ms Manzi disagreed, saying commercial units had complained about landscaping deterring access to their premises, although she accepted there was nothing in her statement about this. Ms Gray suggested that these works are not urgent, and that the risk is inflated, referring to Table 1 on Page 306 of Mr Colvin`s report, indicating low to medium risk of injury, irrespective of height; Ms Manzi said she would not be happy with any injury. Ms Gray said that the Heras fencing addresses the risk; Ms Manzi said no, and referred to the snagging of jackets. Ms Gray suggested that the Heras fencing should not be regarded as permanent, but temporary until the LABC claim is resolved and that it could remain for a further two years; Ms Manzi disagreed saying that the fencing has fallen over and could cause injury. Ms Gray asked as to the position concerning the application for planning permission for the proposed works; Ms Manzi said that the surveyor has submitted the application, but she did not know on which date, and that the actual carrying out of works would depend upon the surveyor providing a specification, but it would most likely be next year. Ms Manzi added that no Notice of Estimates had yet been served on lessees pursuant to the Section 20 consultation process; she added that the second stage notice has yet to be done, hopefully soon, but no date is currently known.

15. In regard to the proposed fire stopping works, Ms Gray referred to the Respondent statement of case at Page 76, indicating that there has been no contact with Bouygues, the main contractor; Ms Manzi said that they have been in contact with Bouygues by email and phone, adding that in the last few days, Bouygues have accepted liability for some of the compartmenting or fire stopping works, although work had been previously partly done via the previous agent. Ms Manzi said they need time to review the findings and do not know exactly how much liability is accepted by Bouygues. Ms Gray suggested that as the LABC have also not yet rejected the warranty claim for the fire stopping works, they may yet accept the claim; Ms Manzi said it was unlikely because the other contractor had partly done some of the work. Ms Gray suggested that if the

lines of enquiry via Bouygues and the LABC are successful, then there should be no need for lessees to pay; Ms Manzi said she could not tell, and there may be some work still not covered. Ms Gray pointed out that all the Respondent`s reports say that the risk is tolerable, not high; Ms Manzi said there are fire stopping gaps and they do not wish to risk a disaster similar to the *Grenfell Tower* case. Ms Gray suggested that the Respondent`s own fire risk assessment indicated at Page 449, slight harm; Ms Manzi said they do not wish there to be any harm. Ms Gray referred to the fire stopping works carried out in June 2019 by Highfield Property Maintenance at Page 780, when all doors were said to have been serviced; Ms Manzi said she was not sure, but the bulk of that work, was the work for which Bouygues are now denying liability. Ms Gray asked if the 2019 work was poor or shoddy and Ms Manzi said yes, although some of it may be OK. Ms Manzi further accepted that the Respondent had used an unsuitable contractor who then did shoddy work, and that the fact it was done at all is now a problem regarding any full admission of liability by Bouygues. Ms Gray asked why lessees should have to pay for such work and Ms Manzi was unable to provide an answer. There was no re-examination.

16. Mr Allison opened by emphasising the basis for assessing what is a reasonable sum, and suggested that this depends partly on the contractual provisions in the lease, and partly on Section 19(2) Landlord and Tenant Act 1985. Mr Allison referred to his list of authorities which the Tribunal had lately received by email, but to which they did not have immediate access during the course of the video hearing. Mr Allison said that *Knapper v Francis* provided that the time at which reasonableness must be assessed, is at March/April 2020 being the time when the demands were formulated and served, adding that any recent admission by Bouygues as to liability, is not relevant. Mr Allison referred in some detail to the chronology in his skeleton argument, adding that it is not in dispute that all leases are in materially the same form. Mr Allison referred to the Fifth Schedule of the lease at Page 239 onwards, of the bundle; in particular he mentioned paragraphs 1(c), 1(d) and 15. Mr Allison submitted that the cost of remedying inherent fire defects is recoverable under paragraphs 1(c) and/or 1(d), and 2(a), or under paragraph 15, the latter of which he referred to in some detail, drawing attention to references not only to repairs, but also to improvements and additions. Mr Allison asked that the Tribunal should particularly read the 3 extracted pages in his list of authorities, from *Dilapidations: The Modern Law & Practice*. Mr Allison referred to key authorities, adding that every case turns on its own facts and every lease is different.

17. Mr Allison said it is well established in the Court of Appeal that “repair” and “condition” may differ, referring to the decision in *Credit Suisse,* and the question must be asked - is the property out of condition? Mr Allison submitted that the pattern of glass breakages shows that the towers are not in good condition. Mr Allison referred to Paragraph 15 in the Fifth Schedule of the leases and the reference to “improvements and additions” which he said is key; he said that in some types of lease, there are merely generalised “sweeper” provisions, but added that in the case of these leases, Paragraph 15 is a detailed provision, beyond a general catch-all. Mr Allison said that the canopy is clearly an “addition” under Paragraph 15, and added that Paragraph 15 would be purposeless unless it has an actual intention, in this case he said, being to maintain the towers as good class residential, otherwise desirable in the general

interest of the lessees. Mr Allison said the overall purpose was to keep people safe, and that the costs proposed were not out of proportion to that aim, which was a reasonably necessary one. Mr Allison referred to the Applicants` authorities, *Isbiski* and *Mullaney*, adding that the facts in those cases were distinguishable from the present case. Mr Allison also referred to the Applicants` authorities, *Lloyds Bank* and *Holding & Management*, saying that again, the facts were different and that the lease in this case needs to be construed in context of this particular development.

18. Mr Allison said that we do not know whether the glazing problem is an inherent defect. Mr Allison said in regard to Paragraph 1(d) of the Fifth Schedule, that currently the glazing works proposed, are not covered by the warranty, in the sense that neither party is currently able to prove they arise from inherent defects. In regard to the fire stopping or compartmentalising works, Mr Allison referred to the LABC policy document at Page 674, adding that it has to be shown that there has been major damage, before the policy will pay out and this he said, did not equate to the tweaking of fire doors.

19. In regard to reasonableness in the context of Section 19(2), Mr Allison said that these are budget sums only and that the Applicant lessees will have the chance to scrutinise exactly what has been done once the work is completed, and to challenge actual expenditure at that time. Mr Allison clarified the amounts demanded; he said that the £390,00 for glazing comprises £325,000 as suggested in the Thomasons report, together with 20% either for VAT or as a contingency; he added that whilst it is only an estimate, there is a sound basis for this figure, which would be spread over the two service charge years 2020/21 and 2021/22. Mr Allison referred to the specification at Page 342 of the bundle which, he said was a first attempt before tender, and prior to planning permission being available, adding that clearer pictures will become available, but that a broad-brush approach sufficed for the March 2020 budget. Mr Allison confirmed that planning permission is required both for the film covering and the canopy; he added that there were other more expensive options which could have been selected. In regard to the fire stopping works, Mr Allison said these are based on the survey as at Page 526 of the bundle; and he referred to the chronology of inspection, survey, budget setting and issuing of demands. Mr Allison said the Applicants are of the view that if the costs are met by the LABC, then no liability will arise for the lessees; he said that this is a fatally flawed submission, since there may be ancillary work which is necessary, but not covered by the warranty. Mr Allison submitted that the works proposed are reasonably required. Mr Allison referred to the Colvin report at Pages 302-4, and suggested that it is not the case that any glass breakages will occur evenly, and it may occur at random intervals, such that it is unsafe to make assumptions based on there being no recent breakages. Mr Allison invited the Tribunal to read in detail Pages 332-5 of the bundle in regard to the random nature of likely breakage. Mr Allison said that whilst the Applicants suggest “waiting”, it is unclear how long that should be; he added that fire stopping works could be argued to be a waste of time where fires do not occur, but that goes for any similar block, and is not a reason not to do it.

20. In regard to *Avon Ground Rents v Cowley*, Mr Allison said that the Tribunal must look at all the circumstances; in that case, he said, the LABC had accepted liability but the position is different here; there is he said, only a possibility that

some third party will pay, such that it is reasonable for the landlord to get on with action now. Mr Allison confirmed that the planning application for the glazing and canopy works was made in July 2020, although it is not known when it will be determined. The Section 20 consultation process is in course, he said, of being undertaken in relation to these works, and he accepted that Ms Manzi had said it was likely the works would not be done until after the end of the current service charge year, being after 31 March 2021. Mr Allison suggested that the tendering process should not take more than 3-4 months.

21. In regard to glazing, Mr Allison said that it was necessary to progress this, given that there are rights of way being impeded by the current Heras fencing, that the Heras fencing is unsightly and that the Heras fencing is not suited to the location, falling over in the wind. Mr Allison said that the Heras fencing can only be a short-term solution. Mr Allison said that in the longer term, it may be necessary to re-film the glass again in 10 years` time, but by then the position on breakages will be clearer and it may be that filming would by then have become a final solution, adding that it is reasonable to demand £390,000 over two years for the glazing and canopy work. In regard to fire stopping, Mr Allison said the landlord is under a statutory duty of care and must take steps to reduce fire risk; whilst the overall risk may be "tolerable", he said that does not mean that nothing should be done. Mr Allison said that the fire stopping works in 2018 were not good enough, but that is not part of this application, and for separate challenge if need be. Mr Allison repeated that according to the decision in *Knapper v Francis*, the fact that it is now known that Bouygues will pay for some of the work, is not relevant to the decision regarding budget setting which was taken before the Bouygues concession had occurred.

22. Ms Gray submitted in closing that the Respondent is desperate to avoid any risk liability to anybody at any cost; she said Ms Manzi had referred to avoiding risk to any person, even if it was low risk and high cost, and questioned the spending of huge amounts for a small risk. In regard to glazing, Ms Gray said that the Tribunal needs to be satisfied that there is a problem at all, and she said, there is no clear evidence of this, adding that of 5 breakages identified by Mr Colvin, only 2 had been identified positively as being due to nickel sulphide inclusion. Ms Gray pointed out that although the Respondent suggested that 9 breakages had occurred, this point had not been put to Mr Richardson in cross examination and he would have said that the other breakages were due to construction and in one case, the use of a catapult. Ms Gray said if the Respondent wished to prove more breakages, they should have produced evidence, adding that Ms Manzi had been unsure what evidence was needed by the LABC. Ms Gray said that at Page 69 of the bundle, the Respondent admitted the breakages were within industry standards and, she said, in order to be clear as to the problem, there is a need to "wait and see". Ms Gray said that on the basis of the Respondent`s own report by Mr Colvin, half of all breakages due to nickel sulphide inclusion, should have occurred by now, that we are not talking about hundreds of windows falling out, and with the report saying that generally the fragments stay in place, following a breakage. Ms Gray said the costs proposed were accordingly excessive, and that none of the £390,000 is reasonable in the light of other options, on which she said, Ms Manzi had been unable properly to assist. Ms Gray suggested that continuing as now, does not need to be for the long term, but only until 2022 or the acceptance by the LABC of liability. In regard to the Respondent`s objections

to the Heras fencing, Ms Gray said there had been no evidence provided of any dispute with commercial tenants, that any issues of unsightliness had not been raised in Ms Manzi`s written evidence, that Ms Manzi could not say how often the fencing had fallen over, and that any issue regarding snagged jackets could be addressed by levelling of any sharp edges. Ms Gray said in regard to the alternative landscaping solution, that Ms Manzi had been unable to say why it would be unacceptable, that it would be a perfectly good solution and that in any event there are canopies over the entrances already. Ms Gray said it was clear that the LABC claim is progressing and that the prospect of a third party paying, ought to be fully exhausted before looking to the lessees to meet the costs. Ms Gray accepted that in an urgent and high risk case, the position may be different, but that Mr Colvin had said the risk from glazing is small and that similar situations elsewhere had in his experience never resulted in serious injury, the risk being low or medium. Ms Gray said that when the demands were formulated, the Respondent had no planning permission or contractor, and that Ms Manzi had been unable to say when the Section 20 consultation will be completed.

23. Ms Gray said there is currently no evidence that the glass has a nickel sulphide problem and that in the context of the leases, it is not out of condition until it shatters. Ms Gray referred to *Fluor Daniel* which she said involved a wider sweeper clause than here, adding that *Fluor Daniel* did not allow work where the service was in proper working order, and that without disrepair, the tenants are not liable. Ms Gray said the Respondent accepted that it was unclear as to whether there was an inherent defect in the glazing and that the language of Paragraph 1(d) in the Fifth Schedule of the leases, suggests “wait and see”. Ms Gray said the Applicants do not accept that these works are needed to maintain the towers as good class residential, or in the tenants` interests, referring to *Isbicki v Golding & Bird* and *Mullaney*, adding that major works costs are not recoverable under a sweeper clause. Ms Gray also referred to *Lloyds Bank plc v Bowker*, and also *Holding & Management Ltd*, saying that words in a clause must be in context of a lease overall. Ms Gray added that it would be wrong in this case to interpret Paragraph 1(d) of the Fifth Schedule, so as to allow the Respondent to circumvent the warranty claim. In regard to reasonableness and Section 19(2), Ms Gray said that *Parker v Parum* distinguished advance costs, where the dates on which the landlord would incur them and the period in which they would be incurred, were uncertain. Ms Gray said that in this case there is no contract, no planning permission, no completed Section 20 consultation and Ms Manzi had said the costs would not be incurred in this year.Ms Gray said that in *Avon v Cowley*, the prospect of a payment by the NHBC was a matter to be taken into account, and she said, there was not such a rigid rule regarding knowledge at the time of the demands, as in *Knapper v Francis*. Ms Gray said the Tribunal has discretion to take account of all relevant matters and give them appropriate weight. In regard to fire stopping work, Ms Gray said that both the LABC and the Bouygues claims are outstanding and that they are not in reality, high urgency, the risk being stated as “tolerable”. Ms Gray said Ms Manzi had given no clear reason why the work had to be done in 2020/21 and now it is clear it will not be done in that period. Ms Gray referred to Pages 418 to 486 of the bundle and the fire report, in which she said that risk was lowered due to a sprinkler system in corridors, signed off by Hampshire Fire and Rescue Service. Ms Gray further said that in circumstances where Bouygues have accepted liability, other than for

an element of fire stopping works which Ms Manzi accepted as having been done shoddily due to the Respondent`s previous mistake, then why should the lessees have to pay.

24. Section 20C Costs and Para 5A Legal Costs

Ms Gray and Mr Allison each suggested to the Tribunal that it may be preferable for any representations concerning costs to be deferred until a future occasion, after the decision on the substantive Section 27A application is known. Accordingly, the Tribunal agreed that the costs issues may be dealt with at a later date.

## CONSIDERATION

25. The Tribunal, have taken into account all the case papers in the bundle and the oral evidence given at the hearing.

26. Ms Manzi, in giving her evidence, said that she was concerned at the prospect of any risk occurring; however, since the date when the demands were formulated in March 2020, the Respondent has progressed matters relatively slowly in regard to the works, and hardly in a manner consistent with those works being regarded as urgent and/or high risk. On the evidence provided, no application for the required planning permission was made until July 2020, and Ms Manzi was unclear as to when consent may be forthcoming. Similarly, Ms Manzi was unclear regarding the potentially lower cost of alternative solutions which might have been considered, such as landscaping. In addition, whilst a first stage notice of intention under Section 20 has been prepared and issued by the Respondent, no detailed specification has been prepared such as to enable tender documentation to be formulated and estimates of costs to be sought. In her evidence, Ms Manzi was unclear as to what other details or evidence in regard to the glazing defects were awaited or yet to be obtained. Accordingly, on the evidence provided it will be some time yet before any fully detailed specification is prepared, tenders sought and further stages of the Section 20 notices may be served, let alone any contract being let for carrying out the works. Mr Allison accepted that the works would not be carried out before the start of the next service charge year on 1 April 2021, notwithstanding the fact that the Applicants` challenge relates to sums demanded on account for payment in the present service charge year 1 April 2020 to 31 March 2021. The concerns expressed by Ms Manzi about the risk involved in these works, are inconsistent with the steps subsequently taken by the Respondent and in particular the speed at which those steps have been, and are being, taken.

27. The sums demanded on account in the service charge year 2020/21, are significant, being £390,000 for the glazing and canopy works and £86,000 and £44,665 respectively for the fire stopping works in Moresby Tower and Hawkins Tower. Ms Gray made the point that it may not be reasonable to demand large amounts on account where the proposed works are of low to medium or tolerable risk, in the view of the Respondent`s own expert. The Tribunal further notes that the Respondent has demanded on-account, the full costs of these various works without any allowance or reduction for possibly successful, or partly successful warranty claims or claims against the main contractor, or

attempted to adjust them in relation to any potentially cheaper alternative solutions.

28. It appears that the Respondent had applied for dispensation from consultation in or about 2019, but then withdrew its application; no further application for dispensation appears to have been made, notwithstanding the Respondent`s assertion as to the risk associated with these works. There is some inconsistency here if, as Ms Manzi suggested, the risk involved is of such a concern to the Respondent.

29. In March 2020 when the demands were formulated, the Respondent was clearly aware that claims in respect of the same works, had been made against each of the LABC and also the main contractor, Bouygues, but remained unresolved. Regardless of the terms of the repairing obligations contained in the leases, it would seem prudent for the Respondent to have awaited the outcome of those claims before demanding large sums on account from lessees, particularly in circumstances where the Respondent has acted relatively slowly after making the demands, in progressing towards a position where those works may actually be carried out, and where the Respondent accepts that the works will not be done until after 1 April 2021, not being in the current service charge year for which the demands were made, at all. The raising of demands for payment in 2020/21 appears somewhat premature.

30. The Tribunal notes that there may be other solutions potentially available to the Respondent as an alternative to the works proposed; however, in her evidence Ms Manzi did not know whether landscaping could be a cost effective alternative and whilst she objected to the continued installation of the Heras fencing, the grounds for such objection appeared to be based upon the fence having fallen over on occasions although she could not say exactly when and how often. Ms Manzi also referred to potential risk to passers-by, but this was apparently limited to incidents of snagged jackets, although no costs were referred to. Reference was also made to commercial tenants and rights of way being interfered with, although no clear evidence was presented to substantiate the position.

31. On the evidence actually provided, it appeared that 5 windows have failed in relation to Moresby Tower containing 120 residential units and Hawkins Tower with 65 residential units. Reference was made to any problems relating to nickel sulphide inclusion being likely to peak at 5-7 years from the date of construction, being in or about the period 2020-2022. Whilst Mr Allison said the breakages may occur randomly, it is nevertheless the case that very few windows as a proportion of the total appear to have broken and that for the most part, the fragments remain in place, rather than falling to the ground. The Colvin report of 13 November 2019 appears to indicate that it is generally the area on the ground under the façade where the general public has access, that presents risk requiring mitigation. The Respondent accepted that the 24/7 concierge at the towers would be in a position to monitor regularly the occurrence of any issues arising, not least of which in regard to any of the protective Heras fencing which may fall over, if it may not be capable of being more adequately secured to preclude public access.

32. In regard to fire stopping works, the Tribunal notes that the Respondent`s own fire assessment report refers to a risk of slight harm. Works were carried out in

2018/19, although the Respondent admits they were of a shoddy standard. A corridor sprinkler system appears to have been signed off by Hampshire Fire and Rescue as being sufficient. If the fire stopping works are considered by the Respondent to be urgent and involving significant risk, the Tribunal would have expected those works firstly to be the subject of a Section 20ZA application for dispensation, secondly to have been pursued more urgently by means of specification preparation and tendering, and thirdly not to be deferred by the Respondent until 2021/22.

33. Accordingly, and for the reasons given above, the Tribunal considers that the sums demanded by the Respondent from lessees on an on-account basis for these works in 2020/21, are not reasonable under Section 19(2). No issue was raised by either party regarding any suggestion that a proportionate part of the sums demanded might be considered reasonable, if the gross amounts were not so; accordingly, the Tribunal has not addressed that possibility. In the circumstances, it has not been necessary for the Tribunal to go on to consider in further or fuller detail the contractual issues relating to the landlord`s repairing covenants in the leases, or the case law relating thereto.

34. In reaching its decision the Tribunal makes it clear that it is not saying that the works, or any of them, should or should not be carried out from health and safety or any other risk assessment perspectives; the decision whether or not and when to carry out such works is a matter for the Respondent. The decision of the Tribunal is merely in regard to whether or not the sum demanded in respect of the service charge year 2020/21, towards reserves, is reasonable. Similarly, the lessees should not interpret this decision as meaning that no liability may ever arise for all or any of the costs envisaged; prudent leaseholders may wish to make some contingency provision or set aside savings of their own on a reserve basis.

35. We made our decisions accordingly.

Judge P J Barber

A member of the Tribunal
appointed by the Lord Chancellor

Appeals

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case.

2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.

3. If the person wishing to appeal does not comply with the 28-day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28-day time limit; the

Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.