FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**MAN/00BU/LSC/2021/0035**
Property	**:**	**Flat 72, Park Rise, Trafford Plaza, 73, Seymour Grove, Manchester M16 0UB**
Applicants	**:**	**Nigel Keith Meeson and Gayle Leigh Meeson (on behalf of the leaseholders appearing in the annex hereto)**
Respondents	**:**	**Radcliffe Investment Properties Limited**
Type of Application	**:**	**Reasonableness of Service Charges Section 27A and 20C Landlord and Tenant Act 1985 Paragraph 5A, Schedule 11 Commonhold and Leasehold Reform Act 2002**
Tribunal Members	**:**	**Mr J R Rimmer Ms S D Latham**
Date of order	**:**	**31st July 2022**

DECISION

Order : The waking watch charges for the service charge year in question are recoverable in the amount of £5,859.00 for the reasons set out in paragraph 50 ,herein.

A. Application and background

1 The Applicants are the long leaseholders of the two-bedroom flat situate at 72, Park Rise, Trafford Plaza, Stretford, Manchester. The Respondent is the current landlord of the Park Rise development. It was not the devel0per nor the original landlord.

2 In turn the Applicants represent the leaseholders of 78 other additional flats within the building.

3 The lease by which the Applicants hold the premises is made between Hazelloch Limited (1) and the Applicants (2) which is dated 12th February 2018 and is expressed to be for a period of 250 years from the Term Commencement Date (1st January 2017) to and including 31st December 2266.

4 The Leaseholders' obligation contained in Clause 1 of the lease is to pay a fair and reasonable proportion of the Service Costs listed in Part 2 of Schedule 7 to the lease. The leaseholders covenant in Clause 5 to observe the Tenants Covenants in Schedule 4. Paragraph 2 is the covenant in respect of the service charge.

5 The provision at Clause 1.1.14 of Part 2 of Schedule 7 would appear to be the payment obligation that would conceivably encompass the waking watch charge: Any other service or amenity that the landlord may in its reasonable discretion (acting in accordance with the principles of good estate management) provide for the benefit of the tenants and occupiers of the Building.

6 One matter has been referred to the Tribunal in the Application made by the Applicants. The 2019 service charge accounts contain a charge of £57,894 relating to the provision of a waking watch scheme for the development following investigation of fire safety issues by the Greater Manchester Fire and Rescue Service.

7 In the aftermath of the Grenfell Tower tragedy and subsequent extensive investigations by Greater Manchester Fire and Rescue Service (GMFRS) in relation to the development concerns were such that it concluded that the property would need to be evacuated if an immediate waking watch scheme was not put into effect. An enforcement notice to that effect was served dated 6th June 2019. A full copy of the notice is provided with the Applicants' statement of case. It requires a full fire risk assessment to be carried out with specific reference to a number of matters.

8 Matters were made more difficult by the non-operation of the fire alarm at the time and which was not in full working order for a further period of 7 days.

9 By reference to the full content of the notice it would appear that one concern may not have been a live issue as there was a misunderstanding as to the nature of external "cladding" to the building on the part of the inspecting fire officer, but there was a need for a full fire risk assessment to be carried out in view of the unsuitability of that which currently related to the building.

10 The cost of the waking watch provision was £57,894.00. that cost would fall to be paid equally by the leaseholders of 96 flats within the building if it forms a part of the service charge obligations of those parties. The Applicants contend that for the reasons set out in their application (and subsequently in a detailed skeleton argument produced for the benefit of the Tribunal) they are not liable for, any part of the costs, or, alternatively, if the fire alarm defect contributed to the need for the walking watch they were only responsible for the costs of those 7 days (£5,859.00) until the alarm was working and the waking watch reduced to a single person.

The Law

11 The law relating to jurisdiction in relation to service charges, falling within Section 18 Landlord and Tenant Act 1985, is found in Section 19 of the Act which provides:

910relevant 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 the are incurred on the provision of services or the carrying out of works, only if the services or works are of a reasonable standard.

12 Further section 27A landlord and Tenant Act 1985 provides:

(1) An application may be made to the appropiate 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

and the application may cover the costs incurred in providing the services etc and may be made irrespective of whether or not the Applicant has yet made any full or partial payment for those services (subsections 2 and 3)

Subsection 4 provides for certain situations in which an application may not be made but none of them apply to the situation in this case.

13 Section 20C landlord and tenant Act 1985 provides that:

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

(2) The application shall be made…

(ba) in the case of proceedings before the First-tier Tribunal, to the Tribunal

The…tribunal to which the application is made may make such an order on the application as it considers just in the circumstances

14 Paragraph 5A of Schedule 11 Commonhold and Leasehold Reform Act 2002 provides that:

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

Submissions

15 The submissions from the Applicants are quite straightforward. They are set out with commendable clarity in their skeleton argument. Essentially, they are as follows:

- The costs were incurred by the negligence or criminal conduct of the Respondent or their agents and/or
- The developer is liable and the Respondent should seek to recover the relevant costs from them.

16 The argument for the Respondent's liability is founded upon the principle that from the time of acquiring the freehold on 15th August 2018 they were the responsible person within the meaning of Article 3 Regulatory Reform(Fire Safety) Order 2005. They are required by Article 9(1) to carry out and by Article 9(3) to review the fire risk assessment for the building.

17 The last fire risk assessment had been carried out by the Developers, Mondale, in January 2018, prior to the completion of the building and no assessment had since been carried out, nor had a review taken place. The January 2018 assessment recommended a number of actions prior to the completion of the building and was considered by GMFRS to be unsuitable for residential accommodation.

18 Issues identified related to compartmentalisation of the building, appropriate fire procedures not in place and other matters identified as not yet being set up.

19 Further, the Respondent had not acted upon the government's revised guidance on non-aluminium composite material cladding and at the time of the imposition of the waking watch was unaware of the nature of the cladding used on the building.

20 Thereafter a series of events occurred that resulted in the imposition of the waking watch:

- On 29th May 2019 a water leak occurred which activated the fire alarm, which was recorded at the local fire station and a response was instigated.
- Thereafter the fire alarm was rendered inoperative as a result of the leak
- On 30th May 2019 Fire Officer Wildman attended and assessed there to be a number matters causing immediate concern and required a waking watch to be put in place immediately to prevent a closure of the building.

21 The fire officer referenced:

- The lack of a sufficient up to date fire risk assessment
- Compartmentation breaches
- Fire stopping issues in the lift shaft
- The unknown character of the external wall cladding
- The number of short term lets, colloquially "airBnBs"
- The defective fire alarm

22 The Applicants argue that the first two of those initial defects listed would have been apparent to the landlord or their agent had a full fire risk assessment been carried out and indeed the compartmentalisation work was subsequently carried out at the developer's expense. Further the landlord or their agent ought to have known about the composition of the wall cladding.

23 They also argue that fire stopping in the lift shaft would have been discovered and the short term lets ought to have been acted upon as being in breach of the terms of the leases of the flats. The Applicants contend that it would have been inconceivable that the defects would not have been apparent upon any reasonable fire risk assessment.

24 The nature of those defects and the combination of them reasonably point, to the satisfaction of the Applicants, that the relevant costs of the remedial works would be, and have in part been shown to be, the responsibility of the developer. The lack of a fire risk assessment and lack of knowledge concerning the cladding are the responsibility of the landlord and their agents. They ought not be payable by the leaseholders.

25 To the extent that the waking watch was imposed for the reason that there was also no working alarm for a period of 7 days and might therefore be the

responsibility of the leaseholders so far as payment is concerned, the Applicants accept this as a possibility, but they point out that no evidence is adduced to support the view that the alarm defect was critical in the making of the waking watch decision.

26 The Respondent in its statement of case, takes issue with the Applicant on a number of matters. Firstly, it outlines the efforts that it feels were made following the acquisition of the freehold to familiarise itself with the building and particularly following the Grenfell Tower tragedy found there to be a number of issues with the construction and design of the building that required remedial works to be undertaken, such an approach being reasonable in the circumstances.

27 Secondly, they rely upon the email from the fire officer of 3rd June 2019 which sets out,

> " the reason for the wakeful (sic) watch is that they are performing the function of the fire alarm system.
> Additionally, … there is a risk from the breaches in compartmentation, and a further risk from the non-compliant cladding system,
> I am very concerned with the level of Air B&B/Booking.com letting going on at the premises and have scheduled a meeting for later to discuss options."

28 In response to a further query from the landlord's agent he wrote again on 7th June 2019
"As you quite correctly summarise in your email… the requirement to retain at least one wakeful (sic) watch on a 24 hour basis, in addition to a fully functioning alarm system, is due to the numerous shortcomings in fire safety provision at the premises."

29 There then followed a letter accompanying the enforcement notice that the Fire Service issued in respect of the premises and setting out the need for a fire risk assessment and which set in motion correspondence interaction between the landlord and the developer as to responsibility for work and costs.

30 An assessment of that chain of events, as summarised, from the landlord's perspective, suggests that the waking watch and its resultant costs, arose not from any negligence or criminality on the part of the landlord, but from the assessment by GMFRS that a waking watch was required for the reasons set out in the email of 3rd June which did not reference any fire risk assessment issue.

31 In that light the costs of the waking watch are incurred within the ambit of the service charge provisions of the lease and properly recoverable from the lessees.

32 Further, the situation that the Respondent found itself in at the time of the fire officer's visit was such as to leave it with simple alternatives: to impose a waking watch, with associated costs, or the building being closed until sufficient remedial works had taken place.

33 The Respondent contrasts the position at Park Rise with that found in Avon ground Rents v Cowley [2019] EWCA Civ 1827 where there was a much clearer picture of funds being forthcoming in the near future from NHBC, hence it being inappropriate to raise charges against leaseholders. In this current case there may well have been a remedy against the developer, but immediately following the officer's visit lease the timescale would be extremely problematic

The hearing

34 The Tribunal was able to conduct a hearing in this matter on 11th July 2022. A previous hearing date had been set, but administrative difficulties in the tribunal office had made this impractical and some inconvenience had been caused to the parties at short notice.

35 The delay had seen the coming into force of elements of the Building Safety Act 2022 and significant other aspects of the Act would now come into force in the near future.

36 The Act will impact upon the situation which had occurred at Park Rise, to the extent that the landlord and tenant relationship governed by the terms of the lease and by the provisions of the Landlord and Tenant Act 1985 relating to the reasonableness and payability of service charges would be subject to building safety provisions that might pass what would otherwise be a leaseholder's liability to a developer, or landlord.

37 The Respondent therefore made an application to adjourn the hearing for full consideration to be given to the effect of the Building Safety Act. Given the lateness of the Application the tribunal Judge decided that it would be appropriate to consider the application as a preliminary matter at the hearing. In the circumstances in which the Act has come into force and its application to the situation in this case the Tribunal does not criticise the Respondent for making the Application.

38 Indeed, it has its merits. The waking watch costs are a service charge cost within the terms of the lease. If the Tribunal determines the case now in favour of the Respondent under its current jurisdiction the matter would not end there as the mechanisms provided by the Building Safety Act will inevitably provide a means for leaseholders to seek to have that obligation transferred to another party and avoid payment as part of the service charge.

39 That position was put very eloquently by Mr Whately on behalf of the Respondent and opposed equally eloquently by Mr Meeson. The Tribunal was of the view that it was well advanced in considering the position under the 1985 Act. It was going to be able to establish the reasonableness and payability of the relevant costs under the current law. It was going to be able to make a significant start along the road to a final determination in the event that further consideration would be

required in due course. It was also unclear to the Tribunal how long it would take for the situation to clarify to a point where any relevant further proceedings in relation to the Building Safety Act could be heard. The situation regarding how different leaseholders might be affected by the provisions of the Act were also unclear. The Tribunal was therefore of the view that it was appropriate to proceed to hear the present application at this time.

40 Having heard from Mr Meeson a further outline of his case based upon those matters addressed in his skeleton argument Mr Whatley, for the Respondent, reviewed with the Tribunal the basic premise that in principle the waking watch costs were recoverable under the provisions of Schedule 7 to the lease which lists the services in Part 1 and the nature of recoverable costs for those services in Part 2. The "sweeper clause" in paragraph 1.1.14 relating to

> " any other service or amenity that the landlord may in its reasonable discretion(acting in accordance with the principles of good estate management) provide for the benefit of the tenants and occupiers of the Building"

Whilst acknowledging that sweeper clauses must be viewed within the context of the other services provided, the preceding provisions of Part 1, with particular reference to fire safety provisions in paragraph 1.1.7 fixed the waking watch charges sufficiently within 1.1.14.

41 If such costs fell, as they clearly did from Mr Whatley's viewpoint, within the service charge provisions, there was also no suggestion from Mr Meeson that the costs were unreasonable for the service provided, nor that the watch was unnecessary, or unnecessarily lengthened. The issue was merely the factors that made the waking watch necessary at all

42 Those matters related to the shortcomings in fire safety identified by the fire officer and the need to incur the waking watch cost as a consequence of trying to remedy them, about which Mr Meeson and Mr Whatley disagreed.

43 Mr Meeson reiterated his arguments that the costs were incurred because the landlord had not conducted the appropriate fire risk assessment which would have revealed the defects found by the fire officer and which could have been remedied. It was unreasonable to impose those costs upon the leaseholders without pursuing the developer. Mandale.

44 The difficulty with that view from Mr Whatley's perspective was that the email from the fire officer om 3rd June clearly identified the reason for imposing the waking watch was the failure of the fire alarm system following the leak (see paragraph 23, above). It was not a situation at that time where any reliance could be placed upon any, or any speedy outcome from communication with the developer and it was reasonable for the costs to fall upon the leaseholders, but with the prospect that there might be some recredit to service charge accounts if pursuit of the developer was eventually successful.

45 Mr Meeson disagreed with the interpretation put on the chain of emails between the landlord's agent and the fire officer. He accepted the contents of the email of 3rd June, but expressed the view that it should be seen in the context of an immediate response to the situation and considered further in the light of the further email of 7th June pointing out that the waking watch should remain, notwithstanding the working alarm system following repair, because of the other numerous shortcomings in fire safety provision, those mentioned in the earlier email.

46 In essence his point was that a properly conducted fire risk assessment, carried out at some point between the completion of the building and the leak which occurred on 29th May 2019 ought reasonably to have identified those other issues relating to compartmentation and fire stopping in the lift shafts.

47 The further issue of the short-term lettings could be viewed from two different perspectives. Mr Meeson saw them in terms of black and white, breaches of the terms of the leases and requiring enforcement by the managing agents. The Respondents were aware of some such letting activity, but not to the extent discovered by the fire officer and were seeking to take appropriate action which would not necessarily be speedy and would incur significant cost. The Respondent considered a more nuanced action appropriate.

48 It does appear from emails appearing at pages 560 to 563 of the bundle of documents that some short-term letting had been taking place for some time prior to the 29th May and that this had been with the consent of Mandale, to that limited extent referred to above.

Determination

49 Having heard the above arguments on behalf of the parties the Tribunal retired to consider all that it had seen, heard and read in the extensive submissions to it.

50 A number of conclusions were reached based upon the evidence which had been received:

(1) The waking watch had been instigated following the leak on 29th May 2019 that had rendered the fire alarm system ineffective.

(2) The costs of that watch would ordinarily fall to be recovered under the service charge provisions of Schedule 7 to the lease.

(3) The costs themselves are not unreasonable for the time that the watch was necessarily in place.

(4) The decisions of the fire officer, Mr Wildman, must be considered in the context of all that was found to be of concern at the time of his inspection and his actions in respect of them must be seen as a fluid response to the situation as it developed from 29th May onwards.

(5) Although the email of 3rd June states that the waking watch was imposed as a consequence of the defective fire alarm this can only be regarded as the reason for the actions of the fire officer at that time

(6) It is clear that reading the emails as a whole the other defects identified influenced his decision as the Tribunal can see no other reason for the continuation of the watch, on a reduced basis, after the alarm was repaired.

(7) The fire risk assessment carried out by H.E.Woolley Ltd on 24th January 2018 had identified issues in relation to compartmentation of the building (page 14)

(8) That report also recommended a review of the assessment should take place by 24th January 2019 – by which time significant changes to the building by way of completion and occupation had occurred

(9) The developer and previous landlord had allowed short term lets to take place which were in breach of the terms of tenants' leases and an increase in their number had clearly gone unchecked

(10) The Tribunal agrees with Mr Meeson that a reasonable fire risk assessment carried out after the completion of the building and certainly by January 2019 would have discovered the defects and action could properly have been taken.

(11) Given the situation surrounding the completion of the building and the comments in the first fire risk assessment the Tribunal is satisfied that the landlord and/or its agents were remiss in not obtaining either a review or further assessment considering the manner in which the building was being occupied.

(12) On balance the Tribunal is satisfied that the waking watch costs, after the rectification of the fire alarm defect, are attributable to the acts and omissions of the landlord or its agents in relation to fire risk assessment. In the circumstances those acts and omissions render the costs of the waking watch unreasonable. They should not be paid by the leaseholders.

(13) In the absence of any clear evidence to the contrary indicating that a waking watch would not have been necessary had the only issue been the defective alarm, the Tribunal is not prepared to say that the first seven day costs have been unreasonably incurred.

Section 20C Application

51 The Applicants seek within their original application for an order under Section 20C Landlord and Tenant Act 1985 for an order that the landlord's costs in respect of these proceedings should not form part of any future service charge demands. A similar application is made under Schedule 11, paragraph 5A Commonhold and Leasehold Reform Act 2002 which provides broadly equivalent relief should the landlord treat those costs instead as administration charges. The Respondent has now indicated that it will not seek to recover those costs as

administration charges but does believe it can rely upon the lease in respect of those costs forming part of future service charges.

52 The Respondent provides a very detailed analysis of Section 20C in the latter part of its statement of case and the supplemental statement dated 20th October 2021. The Tribunal is satisfied that the Application under Section 20C clearly relates to the current Applicants and also those further Applicants joined in the proceedings and referred to in the email from the tribunal office dated 29th July 2021.

53 There have since been further Applicants that were not brought to the attention of the Tribunal at the hearing on 11th July 2022 who should have been joined in the proceedings but were not so joined. The Tribunal is satisfied that those parties have been sufficiently identified within he context of a tSection 20C application for them to be party to any decision the Tribunal makes.

54 The Tribunal proposes to make a decision on this element of the application on the basis of submissions already before it, but if any party wishes to make further representations in writing they may do so within 14 days of the publication of this decision, copying in the other party appropriately.

J R RIMMER
Tribunal Judge
31 July 2022

Annex A

Leaseholders who joined the Application

Graham Moore and Marketa Moore
Alexis Aranda and Coren Marra
Maxim and Elizabeth Gorbunov
Peter and Karen Whitham
Isaac and Eunice Mupotsa
Mingzhu Wei and Feng Li]
Wadzanayi Mushandikwa
Emad Armanious
Rajan and Margaret Fernandez
Phil Moore and Ling Li
Chin Pang Elvin Ching
James and Caroline Bourn
WE and QC Holdings
Graham Hutchinson and Gavin Peters
Paul Malpass & Rui Ma
Mr and Mrs Beecher
Robin and Sarah Queen
Lin Zhu & Zhen Cai
Gina Barkett and Mark Barkett
Peter and Seona Rowing
Ewa and Thomas Woollcombe-Adams
Chan Ying Lock and Wong Foke Leng
Stephen and Catherine Vickery
Adam Schmidlechner
Mark Norman & Paula Harris
Nina and Kari Pahlman
John and Amy Bailey
Debbie and Alex Morton
Jessica and Stuart Lennon
XH Diane Bakemme and Richard Ngu
Damien Mooney and Alexandra Cunningham
Shilla and Regis Bhunu
Christian Bernasconi
Jonathan and Lourenza Hargraves
MrHuawei Guo and Mrs Xinyang Guo
Anna Heystek
James Hind
Sami Haddad
Tam Wan Yee
Richard Ecob
Tejas Katre
Linda Hogg
A K Thakur
Vitalis Bunu
Sau Kong Lee
Adrian Bell
John Tyler
Ryan Luis
John Whetstone
Mikael Eriksson
Johannes Vorster
Richard Bligh
Paul Cure
Robert Wilcock
Francis Stebbing
Shirine Alzeine
Natalie Storey
Gregory Melikian
Karen Curle
Wiliam Gibson
Graham Lovett
Gaurav Aggarwal
David Pritchard
FoLo Ventures Ltd
James De-Machen
SFAAN Investments
B and I Capital AG
Ahmad Abdallah
Mr Mursaloglu