FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case Reference	**:**	**MAN/00BN/LSC/2021/0066 & MAN/00BN/LSC/2022/0108**
Property	**:**	**30 & 32 Sorting Office, 7 Mirabel Street, Manchester, M3 1NJ**
Applicants	**:**	**1. Mrs Barbara Martin and Mr Paul Martin** **2. Mr Christopher Tan**
Representative	**:**	**In person**
Respondent	**:**	**Tempus Irwell Quays Management Company Limited**
Representative	**:**	**Mr Tom Morris (Counsel)**
Type of Application	**:**	**Landlord and Tenant Act 1985 – s27A** **Landlord and Tenant Act 1985 – s20C** **Commonhold and Leasehold Reform Act 2002 – Schedule 11 para 5A**
Tribunal Members	**:**	**Tribunal Judge L. F. McLean** **Tribunal Member Mr J.H. Elliott MRICS**
Date of hearing	**:**	**16th October 2023**
Date of decision	**:**	**10th November 2023**

DECISION

Decisions of the Tribunal

(1) The following sums are payable by the Applicants to the Respondent by way of service charge for the periods set out below:-

Period	1st Applicants	2nd Applicant
Jan-Mar 2021	£558.17	£558.72
23rd Apr 2021	£2,115.18	£2,117.25
Apr-Jun 2021	£558.17	£558.72
Jul-Sep 2021	£558.17	£558.72
Oct-Dec 2021	£558.17	£558.72
2021 balance	£547.45	£547.49
Jan-Mar 2022	£1,312.09	£1,313.37
Apr-Jun 2022	£1,312.09	£1,313.37
Jul-Sep 2022	£1,312.09	£1,313.37
Oct-Dec 2022	£1,312.09	£1,313.37
Jan-Mar 2023	£1,312.10	£1,313.38
Apr-Jun 2023	£1,312.10	£1,313.38
Jul-Sep 2023	£1,312.10	£1,313.38
Oct-Dec 2023	£1,312.10	£1,313.38

(2) The Tribunal refuses the Applicants' application under Section of the 20C Landlord and Tenant Act 1985.

(3) The Tribunal refuses the Second Applicant's application under the Commonhold and Leasehold Reform Act 2002, Schedule 11, Paragraph 5A.

The application

1. The Applicants have sought a determination pursuant to s.27A Landlord and Tenant Act 1985 as to whether they are required to pay to the Respondent certain sums by way of service charge.

2. Mr and Mrs Martin ("the First Applicants") initially made their application under s.27A dated 2nd July 2021. They later supplemented this with a separate application under s.20C dated 12th August 2023. In their original application they referred to the service charge financial year of 2021 and determination for what was then the future service charge financial year of 2022 "and beyond". In their Statement of Case dated 28th April 2023, the First Applicants also expressly sought the Tribunal's determination in respect of the service charges payable in the service charge year of 2023.

3. Mr Tan ("the Second Applicant") initially made his application under s.27A / s.20C and Paragraph 5A dated 5th September 2022. In his original application he referred to the service charge financial years of 2020, 2021 and 2022 and also sought a determination for what was then the future service charge financial year of 2023. He later clarified that he did not in fact dispute any service charges demanded prior to the insurance surcharge of 23rd April 2021.

4. The Applicants seek an order under Section 20C Landlord and Tenant Act 1985 that all or any of the costs incurred, or to be incurred, by the Respondent in connection with these 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 Applicant.

5. The Second Applicant seeks an order pursuant to Commonhold and Leasehold Reform Act 2002, Schedule 11, Paragraph 5A, reducing or extinguishing the Applicants' liability to pay administration charges in respect of litigation costs.

Background

6. The applications concern a development at Mirabel Street, Manchester, M3 1NJ under HM Land Registry title no. GM312969 ("the Estate").

7. Situated on the Estate is a group of residential apartment blocks known as Tempus Tower, the Sorting Office, the Bay Building and the Administration Building. Tempus Tower is a purpose-built block of flats with residential units. The Old Sorting Office is a Grade II listed building which was an old Royal Mail building converted into residential flats, as part of the same development in which Tempus Tower was constructed. In total, there are over 200 flats across the four buildings.

8. The premises which are the subject of this application are located in the block of flats known as the Sorting Office ("the Building").

9. The First Applicants are the tenants of 30 Sorting Office, which is a 2-bedroom flat within the Building, as the current registered proprietors of a lease granted on 14th February 2007 for a term of 125 years from 1st January 2005, which was originally made between (1) the Irwell Quays Limited Liability Partnership, (2) Syed Mohammed Zeesham Marood, and (3) the Respondent.

10. The Second Applicant is the tenant of 32 Sorting Office, which is also a 2-bedroom flat within the Building, as the current registered proprietor of a

lease granted on 3rd July 2007 for a term of 125 years from 1st January 2005, which was originally made between (1) the Irwell Quays Limited Liability Partnership, (2) RJF Properties Limited, (3) Pierre Valentin, and (4) the Respondent.

11. As the two leases described above are in materially identical terms, save as to the original parties and the particular premises demised, they shall be referred to collectively in this Decision as "the Leases".

12. The current landlord of the Estate is Lowry Investments (NW) Limited, which was originally a party to the proceedings but which was removed on the basis that any service charges under the Leases are payable to the Respondent and not to the landlord.

13. The Lease provides for the Respondent to provide certain services, set out at clause 6. The Lease also provides for the Applicant to pay a service charge in relation to the Respondent's costs so incurred, and the reasonableness of the Applicants' contributions to the costs of insurance in particular is the core issue in dispute in this matter.

14. The final hearing took place remotely on 16th October 2023 via the HMCTS Video Hearings Service. The Applicants all appeared in person. The Respondent was represented by Counsel.

15. The members of the Tribunal considered the parties' oral and written submissions and evidence and documents filed in accordance with the Tribunal's directions, which were comprised within an agreed hearing bundle of 1029 pages. A supplementary bundle was also lodged, although no specific reference was made to its contents during the hearing.

Grounds of the main applications

16. The First Applicants' grounds of their application were set out in their initial application form which was dated 2nd July 2021, their statement of case dated 28th April 2023 and their supplementary statement dated 25th May 2023. They raised two main grounds of dispute.

17. The Second Applicants disputed the apportionment of the element of the service charges relating to landlord's insurance for the years in question, because they asserted that it was not reasonable for the combined costs of insuring the Estate to be apportioned through their service charge according only to the relative floorspace of their flat. They relied on the definition of the "Tenant's Proportion" under Paragraph 1 of Part 1 of the Fifth Schedule to the Leases, which states that "*The Tenant's Proportion means a fair and reasonable proportion of the amount attributable to the matters mentioned in clause 6*" etc.

18. The First Applicants also contended in the alternative that it was not reasonable for them to contribute to the full costs of the insurance of the Estate in any event, because they alleged that the insurance costs had risen exponentially in large part due to the Respondent's alleged failure to comply

with its repairing and maintenance obligations in relation to the presence of high risk external wall cladding.

19. As such, the First Applicants disputed whether the costs had been "reasonably incurred" within the meaning of s.19(1)(a) of the Landlord and Tenant Act 1985.

20. The First Applicants also queried whether the provisions of the Building Safety Act 2022 would be of relevance regarding the reasonableness of the service charges demanded, but were unable to advance a positive case on this due to their unfamiliarity with this recent and developing area of law.

21. The Second Applicant's application was brought in broadly the same terms as regards apportionment of insurance costs, through his application dated 5th September 2022 and his statement of case dated 28th April 2023. Although the Second Applicant also briefly referred to certain other issues in his application form regarding maintenance costs which were specific to Tempus Tower, these were not pursued in his statement of case and by the time of the final hearing he had aligned his case with that of the First Applicants.

22. Accordingly, neither party substantially disputed the apportionment of service charges other than for insurance.

23. The Respondent submitted a statement of case in response dated 19th May 2023, to which the First Applicants submitted a short reply. The Respondent disputed that there had been any breach of the Leases on its part and asserted that this was not a relevant consideration in any event. The Respondent also asserted that it had calculated the Tenant's Proportion in a fair and reasonable manner because there was no other realistic means of apportioning the insurance costs between all of the leaseholders on the Estate as a consequence of the issues raised when the landlord had sought to place its insurance policies. Counsel for the Respondent also submitted a skeleton argument dated 13th October 2023.

Issues

24. The issues which the Tribunal had to decide were:-
    a. Did the Respondent comply with the provisions of the Lease, specifically in computing the Tenant's Proportion as it related to the costs of insurance, when demanding the service charges for the years in question?
    b. Was the Respondent in breach of its obligations under the Leases such that the service charge costs for the years in question were not reasonably incurred?
    c. Is it just and equitable to preclude the Respondent from recovering its legal costs of the application through the service charge?
    d. Should the Tribunal reduce or extinguish any administration charges sought from the Second Applicant by the Respondent?

Relevant Law

25. The relevant sections of the Landlord and Tenant Act 1985 read as follows:-

18 Meaning of "service charge" and "relevant costs"
(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.

19 Limitation of service charges: reasonableness
(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 provision of services or the carrying out of works, only if the services or works are of a reasonable standard;

and the amount payable shall be limited accordingly.

(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.

20C Limitation of service charges: costs of proceedings
(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 leasehold valuation tribunal or the First-tier 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 the county court;

(aa) in the case of proceedings before a residential property tribunal, to a leasehold valuation tribunal;

(b) in the case of proceedings before a leasehold valuation tribunal, to the tribunal before which the proceedings are taking place or, if the

application is made after the proceedings are concluded, to any leasehold valuation tribunal;
(ba) in the case of proceedings before the First-tier Tribunal, to the 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 the 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.

27A Liability to pay service charges: jurisdiction
(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.

26. Paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 provides as follows:-

Limitation of administration charges: costs of proceedings
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

Evidence

Agreed documents

27. Documents common to the parties included copies of service charge budgets, accounts and demands for payment, copies of the Leases, and correspondence regarding the issues in dispute.

Applicant Evidence

28. None of the Applicants produced separate witness statements, and instead relied on the contents of their written and oral submissions as their evidence in chief.

First Applicants – Oral Evidence / Submissions

29. The First Applicants said that when they purchased their lease in 2017, they had no issues with the service charge as it appeared reasonable. They only took issue from 2021 onwards. In 2021, the initial service charge demand was for £569. This was supplemented with an additional demand for payment in the sum of £2015, which appeared to be tied to the outcome of an EWS1 survey which had not long been completed for Tempus Tower. Payments from that date were expressly made under protest.

30. The First Applicants reiterated their case that the Respondent's approach to apportionment was neither fair nor reasonable. Their flat was in a different location from Tempus Tower and has no cladding. They considered that apportionment based on floor space was arbitrary, guided by administrative convenience and the path of least resistance rather than a clear assessment of the actual risk. Their view was that the right application of the RICS Code of Practice (Service charge residential management Code and additional advice to landlords, leaseholders and agents, 3rd Edition) was that individuals should bear the appropriate cost according to the benefit they receive.

31. The First Applicants' case in the alternative was that the Respondent was in breach of its obligation under clause 6.1 of the Leases to repair, renew and

keep the buildings in proper order. They said that this breach was the cause of the increased insurance premium and that it was not right that the Respondent could use its own contractual failure to impose additional costs. They disputed the Respondent's argument that there had been fire compartmentation problems across all parts of the Estate and said that there was little or no supporting evidence for this argument. They referred to their own preferred calculation method which was set out at paragraph 13 of their statement of case. They also questioned why the insurance policies only mention Tempus Tower and not the Sorting Office.

32. The First Applicants were questioned by Mr Morris.

33. In relation to the basis of the First Applicants' preferred apportionment formula, they explained that they had worked out their proportion of the contribution to the costs which excluded the £2015 surcharge, and then continued to apply that percentage across the whole cost in subsequent years. They initially admitted that this did not take into account any potential increase in those costs arising from general factors prevailing in the insurance market and assumed that the external wall cladding was the sole cause of the surcharge due to the contents of communications received at that time. They reiterated that they wanted the Tribunal to determine what was a fair and reasonable proportion.

34. The First Applicants also accepted that they had not produced any expert evidence to dispute the Respondent's assertions regarding the causes of the increase in insurance premiums, as they did not have access to detailed information regarding the insurance risk.

35. The First Applicants referred to a letter dated 23rd April 2021 from Scanlans on behalf of the Respondent as being a key example of their view that the increase in insurance premiums was entirely down to the cladding issue. In response, Mr Morris referred to a letter dated 16th March 2021 from Reich Group (the insurance broker) which cited five different general causes of increased premiums. The First Applicants considered that these factors would have already been influential before the £2015 surcharge and disagreed that there was any need to change their own preferred calculation methodology.

<u>Second Applicant – Oral Evidence / Submissions</u>

36. The Second Applicant did not wish to duplicate the First Applicants' evidential submissions but wished to reiterate his own views on the issues. He said that he was yet to receive an answer from the Respondent as to how the different elements of the service charge costs were broken down between different leaseholders. He also expressed a view that the flats in the Sorting Office typically had a larger floor area than those in Tempus Tower, so the Sorting Office leaseholders paid a consistently higher proportion of the costs (even if the Sorting Office did not represent a higher proportion of the risk). Overall, the Second Applicant felt that floorspace was not the appropriate means of identifying the leaseholders' respective cost contributions through service charge.

Respondent

37. The Respondent relied upon the witness statements of Peter Knight dated 5th September 2023 and that of Amanda Woods dated 29th August 2023. Each exhibit contained extensive exhibits, including correspondence, insurance documentation and detailed surveys and reports of the buildings. These stood as their evidence in chief.

38. Each witness was questioned by the Applicants.

39. The First Applicants questioned Mr Knight regarding a previous survey carried out by Tony Mancini of Scanlans which they had not seen. Mr Knight said that would be an internal non-invasive fire risk assessment of the common parts. The First Applicants asked whether that would have identified the compartmentation issues, to which Mr Knight said that it would not have done so in detail. Mr Knight could not say whether the compartmentation issues mentioned in the report of November 2019 would have been disclosed to insurance companies. He accepted that most of his evidence related to Tempus Tower.

40. When questioned about why the insurance documents only refer to Tempus Tower and fail to mention the Sorting Office or the wider development, Ms Woods could not offer an explanation but was certain that the insurance covered the whole Estate. Subsequently, an email trail was located among the exhibits in which the insurance liability for all of the buildings was discussed with the insurance brokers and in which it was clear that the policy covered the whole of the Estate.

41. The First Applicants referred Ms Woods to the fact that Scanlans had been clear that leaseholders in the Sorting Office would not have to pay towards cladding remediation itself, and she said that there was a complete difference between remediation works which could only affect Tempus Tower compared to an insurance policy for the whole development. When it was put to her that there was differential risk, she said that the brokers had stated they could not separate out the respective risks because of the proximity of the buildings to each other and because of the shared car park.

42. It was suggested to Ms Woods that the Respondent could have carried out its own apportionment. She said it was not possible in this case because there was no clear distinction and they did not have the information needed to break it down differently. The Applicants and the members of the Tribunal explored with her whether there was a mechanism within Scanlans' procedures for apportioning different percentages according to the circumstances and by category of service. She said that all services except cladding remediation were shared to a greater or lesser extent and so this had never been done. The crux of her position appeared to be that there was no other satisfactory alternative to their current methodology when it came to the insurance, because if they came up with a different approach which shifted the cost burden to the Tempus Tower leaseholders then it would still not be based on any actual apportionment of risk and so those leaseholders could challenge

it instead. She considered that the Respondent had followed the RICS Code of Practice.

Submissions and Discussion

Respondent

43. The Respondent's key submissions were set out in Mr Morris' skeleton argument dated 13th October 2023, upon which he expanded in his closing speech.

44. Mr Morris identified that the Supreme Court has held that s,27A(6) of the Landlord and Tenant Act 1985 does not annul any lease provisions regarding how the landlord/management company apportions service charge costs, and nor can the Tribunal simply impose its own preferred apportionment. The jurisdiction of the Tribunal is limited to assessing whether the landlord/management company has complied with or followed the lease provisions for calculating and apportioning the service charge. Where the provisions of the relevant lease include a requirement that the landlord/management company must act reasonably or that the apportionment must be reasonable, then the Tribunal can consider whether the apportionment was reasonably done but cannot just substitute its own decision afresh. All this flows from *Williams v Aviva Investors Ground Rent GP Ltd* [2023] A.C. 855.

45. Mr Morris referred to the authority of *Waaler v Hounslow LBC* [2017] EWCA Civ 45 as the leading authority on whether costs are "reasonably incurred" within the meaning of s.19 Landlord and Tenant Act 1985. He argued that the same principles ought to apply to the Tribunal's assessment of the reasonableness of the Respondent's actions, i.e. a consideration of whether the process was reasonable and whether the outcome was reasonable. He further suggested that unless the process or the outcome was unreasonable (in that no reasonable landlord would have adopted that process or reached that outcome) then there would be no basis for disturbing it. Although Mr Morris did not cite any authority for that proposition, it appears to be a sentiment borrowed from the arena of judicial review and the concept of irrationality or unreasonableness in decision-making (*Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, *per* Lord Greene MR at 229).

46. Mr Morris highlighted the Respondent's approach to apportionment, including the contractual considerations of the Fifth Schedule to the Leases, that there was one insurance policy where the premium is not attributable solely to Tempus Tower or to the Building, and that the policy is for the benefit of both buildings. In comparison, the costs of cladding remediation were was attributable solely to Tempus Tower and so were treated separately. He argues that apportioning according to the floorspace of each apartment applied the reasonableness requirements of the provisions of the Leases.

47. He also challenged the assumptions underlying the Applicants' cases, which he said were based on a misconception that the increase in insurance

premiums was entirely due to the cladding at Tempus Tower, whereas he said this was one of several factors including the general insurance market and other issues affecting the whole Estate.

48. Mr Morris referred particularly to the issue of fire compartmentation and asserted that the EWS1 process has generally increased premiums, and that it will identify compartmentation and fire break issues in such dwellings. He referred to correspondence with leaseholders which he said demonstrated this to be the case. He also asserted that for the Respondent's part, it had acted in good faith and done its best to negotiate on the leaseholders' behalf and to try to split the insurance costs out while also keeping costs to a minimum. Mr Morris highlighted that there was no alternative expert or professional evidence from the Applicants to propose a different basis of apportionment, and that had the Respondent adopted a different approach then it would have been vulnerable to challenge from the leaseholders in Tempus Tower.

49. Mr Morris then turned to the issue of alleged historic neglect (i.e. the failure to remediate the cladding on Tempus Tower sooner). This in turn was broken down into two key elements – (1) whether the Tribunal should reduce recoverable charges either because there was an identifiable equitable set-off or because a breach of lease rendered such charges as being not reasonably incurred, and (2) whether there was in fact any actionable breach in the first place.

50. He cited the two authorities of *Continental Property Ventures Inc v White* [2007] L&TR 4 and *Daejan Properties v Griffin* [2014] UKUT 206 (LC). He advanced the principle that the question of whether costs are reasonably incurred is unrelated to the whether they were incurred (or were incurred in a higher sum) due to the historic neglect of the party seeking to recover those costs. In the interests of balance, Mr Morris quite properly drew the attention of the Tribunal to a more recent decision in *Radcliffe Investment Properties Ltd v Meeson* [2023] UKUT 209 (LC), in which the Deputy President clarified that the principle set out in *Daejan Investments* was limited to its own facts. In *Radcliffe Investment Properties*, it was held that the landlord had not reasonably incurred certain costs of a waking watch which arose more or less directly from its own failure to comply with fire safety legislation.

51. Mr Morris therefore sought to distinguish the facts of this case from those of *Radcliffe Investment Properties*. He argued that there was no clear correlation between any alleged breach of the Leases and the need to insure the buildings, because the Respondent's choices were limited to either insuring the buildings at the rate in question, or not at all (which Mr Morris said was not a viable option). He therefore argued that if there is any entitlement of the Applicants to equitable set-off, then there is not enough information to identify the amount.

52. Mr Morris contended that there had not been any breach anyway. He referred to Clause 6.1 of the Leases which is the obligation to keep the various components of the Building "*in good and substantial repair and in clean and proper order and condition*". In analysing various case authorities which were described in an extract from chapter 8 of *Dilapidations: The Modern*

Law and Practice (7th Ed), Mr Morris suggested that these point to some extent in different directions as to how such lease terms are typically construed. His position was that cladding remediation has to fall outside the scope of merely keeping in repair, and that the ambit of Clause 6.1 of the Leases was for repairs only and nothing above or beyond. He said that any costs which the Respondent had sought to recover relating to cladding remediation was done under the power to recover costs of legal and regulatory compliance under Paragraph 10 of the Fifth Schedule and that such compliance measures were not contractually obligatory under the Lease (even if they were obligatory under statute). Mr Morris did not consider that the requirement to keep the components of the buildings in "proper order" imported a need for them to be suitable for their use, and argued that this was more directed towards their clean appearance.

53. In the event that the Tribunal was not persuaded by that reasoning, Mr Morris contended that there was no breach in any event. His argument was that it was not possible to say that the cladding was defective before the issues became apparent following the Grenfell Tower disaster, and that what rendered the cladding on Tempus Tower retrospectively inappropriate was a subsequent change in its legal status and the regulatory environment. He said that there should be an obvious proviso that when such legal status changes, the Respondent must have a reasonable time for remediating the position, and that no reasonable party to the Leases would assume that the Respondent would be suddenly in so serious a breach that it was instantly liable for millions of pounds. Mr Morris said that the Respondent had acted within a reasonable time to respond to the change in the regulatory environment, investigate the issues, identify solutions and apply for public funding to undertake the works. As it happened, he said, if the Respondent had acted as quickly as the First Applicants had wanted it to then the leaseholders would have had to pay for the works instead of them being grant funded.

<u>First Applicants</u>

54. The First Applicants focused on whether the Respondent's apportionment of service charge costs was reasonable. They contended that it was unreasonable even if it was difficult to identify the point at which it had become so. In their view, the Building would only represent around 25% of the compartmentation issues across the Estate, so around 25% of the increase in the insurance costs would be attributable to the Building.

55. In terms of the reasonableness of the Respondent's approach, the First Applicants said that there was a difference between how the insurance was placed by the landlord as against how the apportionment was done by the Respondent.

56. The First Respondents acknowledged that following the Grenfell Tower disaster there was a huge change in the insurance market. However, they argued that the Respondent did not react sufficiently at the time or since in terms of the apportionment of the associated costs. They considered that the potential disadvantage to other leaseholders was not relevant to their own case. They did not consider it appropriate for the insurance costs to be turned

into a "level playing field" and that doing so just felt unreasonable to them arising from a lack of due care and attention by the Respondent in apportioning costs.

57. In relation to the cladding remediation, the First Applicants disagreed with Mr Morris' submissions as to whether Clause 6.1 required remediation of the cladding under the "where necessary reinstate and renew" element of the clause. They highlighted that the leaseholder consultation on compartmentation remediation works was undertaken in November 2020, and questioned why this was not done until much later while the cladding remediation has only been done more recently under the auspices of the Building Safety Act 2022. They stated that they had always felt that they were being fobbed off and been met with obfuscation by the Respondent.

58. In relation to the issues arising under *Radcliffe Investment Properties*, the First Applicants considered that the costs were linked to the alleged breach. When pressed on when they felt that the breach of lease had occurred and why, they said that they felt it had occurred soon after the Grenfell Tower disaster because the Respondent should have surveyed the Estate in the aftermath of that event, to assess the problem and begin remediation promptly, whereas the EWS1 surveys were not completed until July 2021.

59. The First Applicants did not feel able to add anything to their written submissions regarding the application of the Building Safety Act 2022 to the dispute.

Second Applicant

60. The Second Applicant broadly agreed with the First Applicants' submissions. He added that he would like to revisit the apportionment generally because he believed that only the penthouse apartments in Tempus Tower were larger than the flats in the Building. He was not convinced that the apportionment was reasonable because of the different layouts of the buildings, and some had fast lifts and a disabled access lift. In relation to insurance, he accepted that it was difficult to apportion the costs after considering the evidence given by Amanda Woods.

Determination

Did the Respondent comply with the provisions of the Lease, specifically in computing the Tenant's Proportion as it related to the costs of insurance, when demanding the service charges for the years in question?

61. Following the authority in *Williams v Aviva Investors Ground Rent GP Ltd* [2023] A.C. 855, the role of the Tribunal in disputes over apportionment of service charge costs is to assess whether the party demanding payment has followed the provisions of the lease in question. The Tribunal cannot simply impose or substitute its own view of what a reasonable apportionment should be. If the Respondent has followed the provisions of the Leases, then (subject to any other grounds for dispute) the charges are payable, and if it has not then the charges may not be payable.

62. In relation to core of this issue, the question is whether the Respondent demanded a "fair and reasonable proportion" of its costs from the Applicants. The Tribunal does not think that the standard of fairness and/or reasonableness in this case is subject to a specific formulation akin to "Wednesbury unreasonableness" or that there should be any special meaning to those words. As they are words used in a lease, agreed contractually between private parties, they should be interpreted in accordance with their ordinary meaning and usage and in line with the usual principles of contractual interpretation – see *Arnold v Britton* [2015] UKSC 36. For the same reasons, the Tribunal does not consider that *Waaler* is of any application in reading across the s.19 concepts to the wording of a contractual document.

63. Even so, applying the ordinary concepts of fairness and reasonableness, the Tribunal does consider that the Respondent demanded a fair and reasonable proportion of its costs when submitting the disputed demands. In reaching this conclusion, the Tribunal found the following issues to be particularly relevant (in no specific order of priority):-

    a. The contractual obligation on the landlord of the Building was to insure all of the premises on the Estate, not just any one of them separately or individually.

    b. The Building is structurally connected to Tempus Tower, even if only at a subterranean level.

    c. The insurance risk in relation to the Building is heavily impacted by its proximity to Tempus Tower such that a fire in Tempus Tower poses a considerable chance of spreading to the Building.

    d. The above factors mean that insurers were not willing to provide a separate or building-specific risk breakdown in providing cover, even when this was requested by the Respondent.

    e. The scale of the insured sums meant that multi-layered cover had to be obtained through several underwriters, reducing the insurance options available.

    f. Part of the increase in the insurance premiums resulted from fire compartmentation issues, which affected the Building as well as Tempus Tower.

    g. Other factors also increased the insurance premiums, including the state of the insurance market in general.

    h. The above complex and interlinking factors could not reasonably be extricated from one another. The closest that the First Applicants could come to this was a broad extrapolation of the "before" and "after" costs without being able to weigh the various elements properly.

64. With the above in mind, the Tribunal agrees with the Respondent's position that – at least in relation to insurance – it could not feasibly attempt to apportion specific building-by-building weightings to the service charges without running a significant risk of legal challenge from other leaseholders on the Estate. As Amanda Woods put it, any other apportionment would still not be apportioned according to risk, because the relative impact of the various risks on the premium cannot be satisfactorily identified by either party. In the absence of any better alternative, the two usual methodologies for apportioning service charges are either (a) an equal share by number of units, or (b) a distributed proportionate share according to floor space, rateable value or some other objective measurement of the size/value of each dwelling compared to the others. Either approach is usually reasonable, depending on the particular circumstances, and the Respondent chose the latter. The Tribunal has considerable sympathy for the Applicants' position, but a detailed analysis of the evidence tends to support the Respondent.

65. Although the Tribunal has made its determination in relation to the service charge years in question on the basis that the other elements of the costs (i.e. those other than for insurance) are not formally disputed, this decision should not be seen as being determinative in relation to such other non-insurance costs in future years. The Tribunal has only explored the issues around insurance and makes no comment or findings regarding the fair and reasonable proportion of the other costs in future.

<u>Was the Respondent in breach of its obligations under the Leases such that the service charge costs for the years in question were not reasonably incurred?</u>

66. The Tribunal considers that the service charge costs for the years in question were reasonably incurred. It was a contractual requirement for the landlord to procure ongoing insurance as set out in the Lease, and this is not disputed. The evidence led by the Respondent indicates that it tested the market appropriately and availed itself of the services of a specialist insurance broker, which was a sensible course of action given the nature of the policy. As such, there is no suggestion that the premiums themselves were inherently excessive. The only issue is whether they are higher than they could have been if the Respondent had not allegedly breached its obligations under the Leases.

67. Irrespective of any detailed analysis, the Applicants' arguments must fail on this point. They were unable to provide any clear evidence of what the premiums actually would have been if the Respondent had remediated the issues at Tempus Tower sooner than it has done. This is not all that hypothetical a point – it might have been possible to obtain an expert opinion on the topic, although it could be questionable whether the costs of doing so would have been proportionate to the sums in dispute. The Applicants maintained that the increase in costs resulting from the unremediated cladding could be clearly identified, but the evidence of the Respondent (in particular the letter dated 16th March 2021 from Reich Group) was that the increase arose from a combination of several factors which could not be neatly separated from each other despite its efforts to do so. In the absence of any clear figure which can be attributed to any alleged breach of contract, the Tribunal is unable to quantify any alleged losses by the Applicants. This

applies with equal force irrespective of whether the Tribunal were to follow the approach in *Radcliffe Investment Properties* or the alternative approach of equitable set-off.

68. The Tribunal also considers that the Applicants did not lead sufficient evidence to demonstrate that there had been a breach of the Respondent's obligations under the Leases. Whatever the nature of the obligation, which is discussed below, the Respondent's evidence was that it had acted within a reasonable time in all the circumstances. The members of the Tribunal take judicial notice of the fact that cladding remediation has been a source of consternation ever since the Grenfell Tower disaster, including a period of time when building owners and leaseholders faced an unenviable choice between remediating cladding urgently but at a very high cost (which usually would ultimately be borne by the leaseholders), or waiting for the government to intervene and provide funding. Whilst delays in the meantime must certainly have been highly frustrating for the Applicants, they have not been able to show clearly how the Respondent should in practice have acted sooner.

69. The Tribunal does not strictly need to decide whether cladding remediation was or was not a contractual obligation of the Respondent under the particular wording of Clause 6.1 of the Leases, as to do so would be otiose in light of the above considerations. The issue may yet fall for determination in other proceedings either in this Tribunal or elsewhere. As such, the Tribunal prefers not to give a firm view on this occasion, albeit that the Tribunal did not feel entirely convinced by Mr Morris' submissions on the particular issue – even though they were valiantly made.

<u>Is it just and equitable to preclude the Respondent from recovering its legal costs of the application through the service charge?</u>

70. The First Applicants maintained that they had acted in good faith and that all bar one of their grounds for the application were permitted to proceed to a final hearing, following a CMC which the Respondent did not even attend.

71. For the Respondent, Mr Morris asserted that there were no issues of poor conduct on his client's behalf, and that the Respondent could not be criticised for the way it conducted the case or its dealings with the Applicants, or even for the reasons that the dispute arose.

72. Subject to any particular considerations of an individual case, the Tribunal will usually hold that it is just and equitable to grant a tenant's application under Section 20C Landlord and Tenant Act 1985 if the tenant is substantially successful in their main application.

73. Although there is no suggestion that the Applicants have conducted themselves inappropriately, and it is clear that the case was brought in good faith, neither is there any suggestion that the Respondent has acted badly or that there is any reason why it should cover its reasonable costs of responding to the application from its own resources. Although the Tribunal makes no finding regarding whether such costs are in fact recoverable under the provisions of the Leases, or whether such costs were reasonably incurred or

the services provided to a reasonable standard (for the purposes of s.19 Landlord and Tenant Act 1985), the Tribunal refuses the Applicants' application under s.20C.

Should the Tribunal reduce or extinguish any administration charges sought from the Second Applicant by the Respondent?

74. Likewise, subject to any particular considerations of an individual case, the Tribunal will usually hold that it is just and equitable to grant a tenant's application under Commonhold and Leasehold Reform Act 2002, Schedule 11, Paragraph 5A if the tenant is substantially successful in their main application.

75. Although it is unclear whether the Respondent has levied any administration charges for late payment, and the Tribunal makes no finding regarding whether such charges are in fact payable within the auspices of Schedule 11to the Commonhold and Leasehold Reform Act 2002, the Tribunal refuses the Second Applicant's application for the same reasons as set out above regarding s.20C of the Landlord and Tenant Act 1985.

Name: **Date: 10th November 2023**
Tribunal Judge L. F. McLean
Tribunal Member Mr J.H. Elliott
MRICS

Rights of appeal

1. 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.

2. 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.

3. 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.

4. 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.

5. 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.

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