FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00AL/LSC/2020/0184**
Properties	**:**	**Blocks A-B Norman Road, Blocks C-G Tarves Way and the Old Pearson Block (Eight blocks forming part of the development known as New Haddo, Greenwich, London SE10 9JP**
Applicant	**:**	**(1) RMB 102 Limited** **(2) E&J GR Properties Limited**
Representative	**:**	**Mr. S. Alison of counsel instructed by J B Leitch Solicitors**
Respondents	**:**	**The several leaseholders listed in the application ("the tenants") Newell**
Representatives	**:**	**Mr. S. Chaudhry and Mr. A. Smith - In person**
Type of application	**:**	**For the determination of the reasonableness of and the liability to pay service charges**
Tribunal members	**:**	**(1) Judge S.J. Walker** **(2) Tribunal Member Ms. A. Flynn MA MRICS** **(3) Tribunal Member Mr. O. Miller**
Date and venue of Hearing	**:**	**16 November 2020 – video hearing**
Date of Decision	**:**	**18 December 2020**

DECISION

This has been a remote video hearing which has been consented to by the parties. The form of remote hearing was V: Video Remote. A face-to-face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. The Tribunal's determination is set out below. The parties said that they were generally happy with the process.

Decisions of the Tribunal

(1) The cost of providing a waking watch at the properties is recoverable in principle under the terms of the leases held by the Respondents. For all leaseholders other than in the Old Pearson Block the cost is a Sector 2 Part 2 cost, for the Old Pearson Block it is a Sector 4 cost.

(2) The cost of the waking watch for the period from its commencement on 11 April 2020 until 30 August 2020 – a total of £162,700.20 - was reasonably incurred and will be payable by the Respondents if properly included in the year end final accounts and properly determined.

(3) The Applicants have properly consulted on the works to install a fire alarm system in accordance with section 20 of the Landlord and Tenant Act 1985.

(4) The cost of installing a new fire alarm system is recoverable in principle under the terms of the leases held by the Respondents. For all leaseholders other than in the Old Pearson Block the cost is a Sector 2 Part 2 cost, for the Old Pearson Block it is a Sector 2 cost.

(5) It would be reasonable for the Applicants to incur the cost of installing a new fire alarm system at an estimated cost of £279,076.01, the Applicants could properly include that cost in the budget for the 2021 service charge year, and a service charge would be payable by the Respondents in respect of that cost.

(6) It is reasonable for the costs of both the waking watch and the fire alarm to be apportioned on the basis that they are split between each of the blocks on a per unit basis and then calculated within each block on a square footage basis as provided for in the leases.

(7) The application for an order under section 20C of the Landlord and Tenant Act 1985 so that none of the Applicants' costs of the Tribunal proceedings may be passed to the Respondents through any service charge is refused.

(8) The application for an order under paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002, so that none of the landlord's litigation costs can be recovered as an administration fee is refused.

Reasons

The Application

1. The Applicants seek a determination pursuant to s.27A of the Landlord and Tenant Act 1985 ("the Act") as to the amount of service charges

payable by the Respondents in respect of the service charge years 2020 and 2021.

2. The application was made on 9 June 2020. The issues identified in it concerned charges in respect of the provision of trained fire marshals at the properties (a "waking watch") and the installation of a fire alarm system to replace the waking watch pending the replacement of the external façade of the properties. The application invited the Tribunal to conclude that these costs were both payable under the terms of the relevant leases and that they were reasonable.

3. Directions were issued on 28 August 2020 and required the parties to provide a hearing bundle. These directions were complied with and an electronic hearing bundle of 697 pages was produced. All page references in what follows are to the printed page numbers which appear in the top right-hand side of that electronic bundle unless otherwise stated.

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

The Hearing

5. The Applicants were represented by Mr. S. Alison of counsel instructed by J.B. Leitch Solicitors. Two of the Respondents took an active part in person at the hearing, Mr. S. Chaudhry and Mr. A. Smith. Other Respondents observed the hearing but took no part in it.

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

Application to Amend the Application

7. The application as originally made was only in respect of seven blocks in Norman Road and Tarves Way. On 25 September 2020 the Applicants applied to add an eighth block, the Old Pearson Block ("OP"), to the application (see pages 526 to 529). OP is subject to two residential leases, both owned by London & Quadrant Housing Trust ("L&Q") and it was said by the Applicants that it formed part of the same development as the other blocks and was also in need of similar cladding works. The application was made before the Respondents had been served with documentation relating to the application.

8. It became clear to the Tribunal that this application had not been determined by the Tribunal prior to the hearing date. The Tribunal was concerned to ensure that L&Q were aware of both the application to add OP to the application and that this hearing was taking place.

9. The Tribunal accepted the assurances of Mr. Alison on behalf of the Applicants that L&Q had been served with a copy of the application to

add OP to the application. Although the Tribunal file did not contain any express correspondence which showed that L&Q had been notified of the hearing date, the Tribunal accepted that they were in fact leaseholders in respect of a number of flats in the original seven blocks and so they had been notified of the hearing date by virtue of the directions issued on 28 August 2020.

10. L&Q made no response to the application as originally made, nor to the application to add OP to that application.

11. In the circumstances the Tribunal considered that it was fair and appropriate to make the amendment proposed and to include OP within the scope of the application. The application was, therefore, granted.

Application to Submit Further Evidence After the Hearing

12. On 19 November 2020, after the hearing had concluded but before the Tribunal's decision had been issued, the Applicants made an urgent application to the Tribunal under rule 6(d) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ("the Rules") for permission to adduce further evidence in support of its application.

13. The substance of the application was that the Applicants wished to adduce eight separate reports from Tri Fire Ltd. dealing with the fire risk present at the properties.

14. It was asserted in the application that the evidence contained in those reports was central to the Applicants' case and that it strongly supported that case.

15. It was also asserted that this evidence was not received by the Applicants until 18 November 2020 and so it was impossible for it to have been placed before the Tribunal in advance of or at the hearing.

16. Notice of this application was given to the Respondents, and the Tribunal directed that any response to it should be received by 5.00pm on 24 November 2020. By that time 3 responses had been received from the Respondents.

17. The Tribunal had regard to the overriding objective contained in rule 3 of the Rules. This required it to deal with cases fairly and justly. This includes dealing with cases in ways which are proportionate to the importance of the case and the complexity of the issues, avoiding unnecessary formality and seeking flexibility in the proceedings, whilst also avoiding delay so far as this is compatible with proper consideration of the issues.

18. The Tribunal took account of the fact that time is an important factor in this case, as the passage of time is likely to lead to an increase in costs, and it was reluctant to take any step which was likely to lead to delay.

19. However, it also bore in mind the importance of the decisions it was being invited to make in this case and the importance of making decisions on the basis of the available evidence and which are supported by that evidence.

20. It was clear to the Tribunal that the new evidence was directly relevant to the central issues in the case and the Tribunal had no reason to doubt the Applicants' assertion that this evidence could not have been placed before the Tribunal earlier.

21. The Tribunal considered that in all the circumstances fairness required it to take account of the evidence which the Applicants sought to adduce. The importance of making a properly informed decision in this case outweighed the relatively short delay that would be brought about.

22. As a result, the Tribunal issued further directions on 25 November 2020 requiring the Applicants to file and serve the further evidence relied on and allowing the Respondents to submit further evidence and submissions in response.

23. The Tribunal received a further electronic 168 pages from the Applicants which included a further statement in support of their case.

24. In response the Tribunal received a further 3 pages of submissions from Mr. Smith, a further 3 pages from Mr. Chaudhry, and an e-mail from Mr. Scott-Brown and three attachments.

The Background

25. The properties which are the subject of this application are a number of purpose-built blocks comprising both commercial units and residential flats.

26. The first Applicant is the freehold owner of all the blocks other than Block A in Norman Road, which is owned by the second Applicant.

27. The Respondents are the leaseholders of the residential flats.

28. The Applicants' case as set out in the application is that they have been made aware that the materials installed in the façade in several areas across the properties do not qualify as being "of limited combustibility or better" and so are not compliant with the guidance set out in the Ministry of Housing Communities and Local Government Advice ("the Advice Notes"). It has been recommended that the complete system including cavity barriers across several areas of the properties should be replaced with a system containing materials of limited combustibility or better.

The Leases

29. The flats in all the blocks apart from OP are subject to long residential leases in similar terms. An example is at pages 121 to 171. This is referred

to in what follows as "the lease". OP is subject to two residential leases in similar terms, one of which is at pages 174 to 217. This is referred to as "the OP lease".

The Lease

30. By paragraph 7 of Schedule 8 of the lease the Respondents are to pay to the Applicants the "Tenant's Proportion" (page 156). [The lease provides that payment shall be made to the manager unless they have been replaced by the landlord in accordance with paragraph 5 of Schedule 9 of the lease. There was no dispute that that provision applied – the Tribunal was informed that the management company no longer existed, having been struck off in 2015 - and there was no contention that payment should not be made to the Applicants rather than anybody else].

31. By clause 2.1 the Tenant's Proportion is defined as the proportion of the maintenance expenses payable in accordance with Schedule 7 (page 133). These expenses are themselves defined as the expenses incurred in carrying out the obligations in Schedule 6 of the lease (page 130). Those obligations are divided into a number of different "Sectors". Sector 1 sets out obligations relating to the total development, Sector 2 sets out obligations which apply to individual blocks, Sector 3 deals with car parking, Sector 4 applies only to commercial units, and Sector 5 supplements the other four sectors. Sector 2 is further divided into external block obligations (Part 1 of Sector 2) and internal block obligations (Part 2 of Sector 2).

32. Paragraph 1 of Schedule 7 provides that residential leaseholders are to pay the Sector 1 and the Sector 2 proportions. These are also defined in clause 2.1. For Sector 1 costs the proportion is calculated on the basis of the square footage of the flat as a proportion of the total square footage of the entire development including commercial units whereas the Sector 2 costs are calculated on the basis of the square footage of the flat as a proportion of the total square footage of the residential units in the block in question (page 132). In addition by paragraph 3 of Schedule 7 the leaseholders are to pay any amounts falling within the "All Sectors" heading in Schedule 6 (ie Sector 5 costs) which are attributable to their unit.

33. In Schedule 6 the lease provides that the Sector 1 costs relate;

> "*to the maintenance and upkeep of the Total Development but excluding the Blocks*" (page 143)

whereas Sector 2 costs relate to the maintenance and upkeep of the blocks (pages 145 and 147). Clause 2.1 defines the blocks to mean the buildings comprising more than one unit and all structural parts thereof, all external parts of them and all service installations not used solely for the purpose of an individual unit (page 127).

34. The obligations contained in Part 2 of Sector 2 include (page 148);

"*Inspecting maintaining repairing and renewing all mechanical plant electrical installations and fire safety systems including renewing the fixed and portable fire protection systems within the blocks*" (para 5)

"Maintaining inspecting and renewing the fixed and portable fire protection systems within the Blocks" (para 11);

"*Providing inspecting repairing maintaining and cleaning and any other associated cost in providing any additional facilities and services which in the opinion of the manager may be necessary or desirable from time to time for the efficient management and running of the Block"* (para 12); and

"*Employing such staff (including but not limited to any associated costs) as the Manager shall at its absolute discretion deem necessary from time to time for the purpose of carrying out its obligations hereunder or for any other purpose as may be decided from time to time by the Manager to be in the interests of good estate management*" (para 8).

Para 13 of Part2 of Sector 2 also provides for the payment of sums towards a reserve fund or for items of future expenditure expected to be incurred in connection with the Block.

The OP Lease

35. The OP lease is very similar to the lease. The only relevant difference is in the content of the various Sector obligations. Sector 2 is not subdivided between external and internal block costs. The obligations contained in Sector 2 are worded differently. They include (pages 193 to 194);

"*Maintaining repairing and renewing all mechanical plant electrical installations and fire safety systems*" (para 1.9); and

"*Maintaining inspecting and renewing the fixed and portable fire protection systems within the Blocks*" (para 1.10)

In the OP lease there is no provision in Sector 2 for the employment of staff or the provision of additional services. However, Sector 4 includes the following obligations, the costs of which are also payable on a square footage basis (pages 196 and 197);

"*Providing and paying proper and reasonable sums to such persons as may be necessary in connection with the upkeep of the Maintained Property"* (para 2);

"*Providing inspecting maintaining repairing re-instating and renewing any other equipment and providing any other service or facility which in the reasonable opinion of the Manager it is reasonable to provide.*" (para 12); and

"*All other proper and reasonable expenses (f any) incurred by the Manager in and about the maintenance and proper and convenient management and running of the Total Development* …. " (para 15)

Sectors 2 and 4 also provide for the recovery of sums in respect of items of future expenditure expected to be incurred in connection with the Block Common Parts or the Maintained Property (paras 1.16 and 16 respectively).

The Applicants' Case

36. The Applicants' case arises out of the far-reaching consequences of the Grenfell Tower disaster. Following the events at Grenfell and the changing regulatory framework the Applicants undertook a survey of the external façades of the properties. Reports prepared by Façade Remedial Consultants Ltd ("FRC") disclosed that the materials installed in several areas across the properties did not meet the requirement to be of limited combustibility or better as required by the Advice Notes. These reports are at pages 219 to 442.

37. With the exception of OP, the blocks are all over 18 metres high (page 236). OP is 4 storeys high and was estimated by FRC to be 12m high (page 417).

38. The Applicants argued that the failings in the façades identified in the FRC reports are such that there is a health and safety risk to the residents in the event of fire. In reliance on guidance produced by the National Fire Chiefs Council "Guidance to support a temporary change to a simultaneous evacuation strategy in purpose-built blocks of flats" ("the NFCC Guidance") (pages 29 to 46) they argued that it was necessary to move from a policy which advised occupants to stay put in their flats in the case of a fire elsewhere in a block ("a stay-put policy") to a policy of simultaneous evacuation. This change of policy was, they said, required until the failings in the façade had been rectified.

39. The Applicants' case was that in order to implement this change of policy it was necessary to employ a waking watch to patrol the properties on a 24-hour basis until such time as an appropriate fire alarm system could be installed. The Applicants instructed a waking watch on 8 April 2020 which came into effect that day and which consists of 3 people patrolling all 8 blocks 24 hours a day 7 days a week. This is provided by Ace Security and Services Ltd ("Ace") at a cost of £13 per person per hour plus VAT. Invoices for this service are at pages 490 to 492, with a summary of costs paid or invoices waiting to be received at page 494. The Applicants sought a determination that the costs incurred in respect of the waking watch for the period up until 30 August 2020 – a total of £162,700.20 - were reasonably incurred and will be payable by the Respondents as a Sector 2 Part 2 cost (or as a Sector 2 cost for OP) if properly included in the year end final accounts and properly determined.

40. The Applicants' case was that four companies were approached to provide the waking watch. Two of these provided an immediate response and prices and that of Ace was chosen because, whilst not the lowest in price, they were known by the Applicants' manager to provide good service.

41. The Applicants further argued that once they have installed a fire detection system the waking watch can be removed. They have obtained a specification from Ream Partnership LLP ("Ream") which sets out the minimum requirements for a fire detection system (pages 467 to 481). Following a meeting with the London Fire Brigade ("LFB") they were advised that an alarm system which relied on wireless connection would not be appropriate (page 498). Ream sought to tender the specification and produced a tender report which produced three qualifying quotations – the fourth, Ramtech, only provided wireless systems. The lowest tender was from M&G Fire Protection with a bid of £257,043.20 plus VAT – a total of £279,076.01 (pages 501 to 516).

42. The Applicants accepted that the installation of a fire alarm engages the consultation requirements under section 20 of the Act ("section 20"). Their case was that stage 1, notice of intention, and stage 2 notice of estimates, have been complied with.

43. The Applicants sought a determination that the costs of installing a fire alarm system are recoverable in principle as a Sector 2 Part 2 cost (Sector 2 for OP), that they have properly consulted as required by section 20, that the total estimated cost of £279,076.01 is reasonable and that a service charge would be payable by the Respondents and could properly be included as a cost in the budget for 2021.

The Respondents' Case and the Tribunal's Conclusions

44. In addition to the oral arguments put forward by Mr. Smith and Mr. Chaudhry the Tribunal had regard to the representations made by Mr. Scott Brown (pages 531 to 534), the detailed submissions presented by the 45 Norman Road Residents Association – of which Mr. Smith is the Chairman, the 25 Tarves Way Residents Association, the 1 Tarves Way Cladding Action Group, the 5 Tarves Way Group, the 15 Tarves Way Residents Association, the 47 Norman Road Residents Association and the leaseholders named at page 558 (pages 535 to 636), and the written submissions of Mr. and Mrs. Chaudhry (pages 637 to 645).

45. The issues raised in these submissions, insofar as they are matters which fall within the jurisdiction of this Tribunal, are set out below together with the Tribunal's conclusions in respect of the arguments put forward.

1. Recoverability Under the terms of the Lease

46. The first issue, which was raised by Mr. Chaudhry, but not by Mr. Smith, was whether or not the costs of the waking watch and/or the fire alarm could be recovered under the terms of the lease in principle. In his statement of case Mr. Chaudhry argued that the relevant provision in the lease was paragraph 16 of the Sector 5 costs in Schedule 6 (page 640). This states as follows;

> "*All other expenses (if any) incurred by the Manager in and about the maintenance and proper and convenient management and running of the Total Development but including in particular but without prejudice to the generality of the*

foregoing any expenses incurred in rectifying or making good any inherent structural defects in the Blocks incorporated in the Total Development (except in so far as the costs thereof is recoverable under any insurance policy for the time being in force or from a third party who is or may be liable therefor)....." (page 153).

47. Mr. Chaudhry argued, both in his submission and orally at the hearing, that responsibility for the defective façade rested with a third party, Bellway Homes, who constructed the properties. He argued that the costs of the waking watch and the fire alarm flowed from the dangerous construction and were recoverable from the third party, or that they could be recovered under an insurance policy. He argued that the Applicants should pursue any remedy they had against Bellway Homes. He further argued that because of this and the clause set out above, the Applicants were prevented from seeking recovery of the costs in issue from the Respondents.

48. The Tribunal rejected this argument. It agreed with Mr. Alison who argued, firstly, that paragraph 16 of Sector 5 is just one of many different provisions which allow for the recovery of costs and that, if these costs fall within any of the other provisions, then it does not matter whether they fall within the scope of paragraph 16 or not. Secondly, he argued that the costs in question, whilst indirectly caused by structural defects, were not costs incurred for either rectifying or making good those defects and so did not fall within the express limitation in that part of the lease.

49. The Tribunal was satisfied that the waking watch and alarm costs did not fall within the express limitation in paragraph 16. In any event, there was nothing in the lease which suggested that the wording of paragraph 16 in any way modified or limited the provisions elsewhere in the lease and so if the costs fell within any other charging provision, they were payable in principle under the lease.

50. No other arguments were put forward by the Respondents in respect of the terms of the lease save that it was argued that the costs were not recoverable because they were neither necessary nor reasonable. This argument will be dealt with below.

51. The Tribunal was satisfied that the costs of the waking watch fell within the scope of paragraph 8 of Sector 2 of Part 2 of the lease (as set out above) and that the costs of the fire alarm fell within the scope of each of paragraphs 5, 11 and 12 of that Part. It was also satisfied that paragraph 16 allowed for the recovery of costs in anticipation of future expenditure and so, at least in theory, covered the future costs of the alarm system.

52. With regard to the OP lease, there were no representations by any Respondent. The Tribunal accepted that the terms of the OP lease allowed for the recovery of both the waking watch and the fire alarm

costs. It accepted that the fire alarm costs were recoverable as a Sector 2 cost as they fell within the scope of paragraphs 1.9 and/or 1.10 set out in above, and that they could be recovered in advance by virtue of paragraph 1.16 of Sector 2. However, it did not accept that the costs of the waking watch were recoverable under Sector 2 because of the absence of any express provision which covered this and the absence of any provision for the employment of staff or the provision of additional services. Nevertheless, these costs are in principle recoverable as Sector 4 costs under the terms of the OP lease as they fall within the scope of paragraphs 2, 12 and 15 of Sector 4 (as set above).

2. The section 20 Consultation

53. It was argued on behalf of the Respondents that there had been inadequate consultation in respect of the fire alarm system. (There was no section 20 issue in respect of the waking watch as this was a service provided under a contract with less than a year's duration).

54. It was accepted that a notice had been sent under section 20A of the Act on 11 March 2020. This, with two letters sent at the same time, is at pages 584 to 587.

55. The Respondents' argument was that the consultation was inadequate as it provided no details of the work that the Applicants were intending to undertake. It was argued that the Respondents had no idea what works might be required.

56. In reply to this the Applicants relied on the wording of the notice and the letters sent at the same time, the fact that one nominated contractor was put forward by a leaseholder (although they were eliminated as they only dealt with wireless systems) and the fact that the notice gave the Respondents 35 days in which to contact the Applicants to seek further information.

57. The Tribunal bore in mind what is required by the Service Charges (Consultation Requirements) (England) Regulations 2003 and, in particular, Part 2 of Schedule 4 of those Regulations. Paragraphs 8(2)(a) and (b) require an initial notice to;

> "*(a) describe, in general terms, the works proposed to be carried out, or to specify the place and hours at which a description of the proposed works may be inspected;*
> *(b) state the landlord's reasons for considering it necessary to carry out the proposed works*"

It is clear from these requirements that a description in general terms of the proposed works is all that is required.

58. In this case the works to be carried out were described as "*to install appropriate fire defences as prescribed by the governing fire authority*" and the reason given for the works was stated to be *"A full survey of all façade coverings at New Haddo has highlighted concerns regarding certain aspects of the wall coverings and construction*" (page 587). The first letter of 11 March 2020 also states that the identified issues when

the properties were surveyed included the presence of elements which are not of limited combustibility and that fire defence specialists are being consulted. It also states that works may be necessary to help mitigate risks to residents by supporting a simultaneous evacuation policy and that possible options will be investigated (pages 584 to 585).

59. The Tribunal also bore in mind that the Act allows for consultation requirements to be dispensed with where it is reasonable to do so. It had regard to the decision of the Supreme Court in Daejan Investments Ltd -v- Benson [2013] UKSC 14. This decision makes it clear that the purpose of the consultation requirements is to protect tenants from paying for inappropriate works and from paying more than would be appropriate for such works. It follows that the issue when considering dispensation is the extent to which the tenants are prejudiced as regards these two protections. This, rather than the gravity or otherwise of any breach, is what is determinative.

60. The Tribunal was not satisfied that there had been a failure to comply with the consultation requirements. It was clear from what was stated in the notice of intent that what was proposed was the provision of appropriate fire defences. This was a description in general terms of the work to be carried out and, in the view of the Tribunal, was self-explanatory. The Tribunal considered that this was a sufficient description to enable the Applicants to make representations about whether or not fire defences should be provided or about what those should be.

61. The Tribunal accepted that the Applicants may have wished to have more detailed technical information about what was proposed but, at this stage, the consultation process only requires a description in general terms of what is proposed, and that had been provided.

62. Whilst the initial notice may well have been capable of being improved upon, the Tribunal was satisfied that it met the necessary minimum requirements and so there had not been a failure to consult properly. There was no criticism of any other part of the consultation process.

63. Even if the Tribunal was wrong to reach this conclusion, it was satisfied that the failures identified did not give rise to any real prejudice to the Applicants. The relevant protection here is the protection from being asked to pay for inappropriate works. The notice that was given was sufficient to enable the Applicants to put forward representations to the effect that the provision of fire defences was not appropriate in principal or to make representations about what an appropriate provision would be – indeed one leaseholder put forward a contractor. The protection against being required to pay for inappropriate work remained intact.

64. The Tribunal therefore concluded that if an application had been made for dispensation from the consultation requirements in this case it would have been granted without condition.

3. Was it Reasonable to Provide a Waking Watch at All

65. Although Mr. Chaudhry, who informed the Tribunal that he is a chartered engineer, made some submissions to the effect that some parts of the external façade were not in fact flammable and that there were problems caused by the absence of firebreaks, there was no expert report prepared by the Respondents. Mr. Smith stated expressly that he did not challenge the conclusions in the FRC reports.

66. The Tribunal accepted the findings in those reports which had been made by specialists following extensive intrusive inspections of the properties. The conclusions in respect of the properties other than OP are at page 398. FRC concluded that each of the blocks contained materials in their façade which did not qualify as being of limited combustibility or better and so were not compliant with the Advice Notes. The conclusions in respect of OP are at page 439. FRC concluded that the block's façade construction was unlikely to pass a BS8414-2 test and was unlikely to meet the requirement of clause B4(1) of the Building Regulations and so remedial works including the provision of cavity barriers was required.

67. The principal argument put forward by the Respondents was that, despite the failings of the façades of the properties, there was not a sufficient risk to the residents to justify a change from a stay-put policy to a simultaneous evacuation policy. That being the case, they argued, it was neither necessary nor reasonable to implement a waking watch or to install a fire alarm system. The decision to implement a waking watch was, they argued, simply arbitrary.

68. In support of their decision to change the evacuation policy, the Applicants had placed reliance on the NFCC Guidance. Paragraph 1.6 of this states that the guidance is principally intended for buildings over 18m in height in which the means for satisfying the Building Regulations in relation to external fire spread have not been satisfied, for instance because of the use of insulation or cladding materials which are not of limited combustibility (page 31). Paragraph 1.11 states as follows;

> "*Where there is significant failing in the general fire precautions and/or other issues such as combustible external façades, a competent fire safety specialist may consider that these failings could contribute to uncontrolled and, potentially, unrestricted fire spread in the building, and therefore the building can no longer support a stay put strategy*" (page 32).

Further, paragraph 1.2 states that where issues such as a combustible external façade are present "*a temporary change to a simultaneous evacuation strategy is likely to be necessary until the failings have been rectified*".

69. In response to the Applicants' case the Respondents replied as follows;

70. Firstly, they referred to a fire risk assessment which was produced on 30 December 2019. This is at pages 560 to 582. The Respondents argued that this report concluded that the risk to life from fire at the properties was "tolerable" (page 567) and that no issues had been identified with regard to fire detection or escape other than a problem with some unsecured fire doors.

71. Secondly, they argued that there was nothing in the FRC reports which concluded that it was necessary for any interim measures to be put in place at the properties.

72. The Respondents also argued that the Applicants had not followed the NFCC Guidance. They referred to paragraphs 3.1 and 3.2 which state as follows;

> "*The complexity of the interactions between people, buildings and fire is such that no single set of criteria can be applied to all types of buildings in all circumstances. Therefore an assessment – specific to the building in question – will need to be conducted that considers any potential fire spread in conjunction with the evacuation strategy and any modifications to that strategy (ie a change from a stay put to a simultaneous evacuation strategy*"
>
> "*The advice used to inform this assessment must be provided by a competent person, as this is critical for ensuring that an appropriate level of safety is achieved. In some cases, the risk assessment may be straight forward, in which case a competent fire risk assessor may be used… In others, the assessment will be more complex and require advice from a qualified engineer with relevant experience in fire safety, including the fire testing of building products and systems, such as a Chartered Engineer registered with the UK Engineering Council by the Institution of Fire Engineers*"

It was argued that there had not been a specific assessment of the properties by a competent person and so there was an insufficient basis for concluding that a change in the evacuation policy was necessary. The Respondents argued that at the time the waking watch was implemented the only risk assessment that had been carried out was one which did not suggest a change in policy.

73. The Respondents further relied on a second fire risk assessment produced on 18 June 2020. This is at pages 602 to 625. It described the risk posed by the construction as zero (page 611).

74. The Respondents made a freedom of information request of the LFB who responded on 24 July 2020 stating that they had been unable to locate any record of the LFB having prescribed any mandatory fire safety requirements for the properties (page 629). On 23 September 2020 Mr. Smith met with Mr. M. Ryan, the technical manager for the Applicants

to discuss fire safety matters. The Respondents relied on notes of this meeting which Mr. Ryan confirmed were accurate. They are at pages 633 to 634. They stated that the Applicants had not undertaken a risk analysis of the non-compliances disclosed in the FRC reports and that the management company's default position was to install a waking watch in all cases where external facades are found to be combustible. Mr. Ryan also stated that he was not aware whether the LFB had mandated a waking watch or not (page 634).

75. The Respondents also argued that the delay between the preparation of the FRC reports in January 2020 and the implementation of the waking watch in March 2020 showed that the waking watch was not really necessary.

76. In summary, the Respondents' central argument was that there was insufficient evidence to show that there was a fire risk at the properties.

77. It was clear to the Tribunal that the key question for it to decide was whether or not the properties posed a sufficient fire-risk to justify a change of evacuation policy. If they did, then, it follows that it would be reasonable to implement a waking watch at least initially as recommended by the HFCC Guidance. It bore in mind that this was an issue of fact pertaining to the properties themselves which should be determined on the basis of the evidence available to the Tribunal and also that the burden was on the Applicants to establish that there was a risk on the balance of probabilities.

78. The Respondents have criticised some of the reasoning behind the decision to implement a waking watch – especially the evidence of Mr. Ryan who accepted that he himself did not make the decision and who in his witness statement made reference to a spate of fires in other properties and also suggested that a change was needed in the summer because the weather was getting hotter. However, what concerns the Tribunal is less why the decision was made and more whether, as a matter of fact, the decision was justified on the basis of the actual state of the properties.

79. In reaching its conclusions the Tribunal bore in mind two initial factors. Firstly, there were the clear findings in the FRC reports that the façades contained materials which were not of limited combustibility. Secondly, there is the clear wording of paragraph 1.2 of the HFCC Guidance which states that in cases where vthere are problems with combustible façades, it is likely that a change in evacuation policy will be required. In other words, if the façade is combustible it is more likely than not that a change in policy will be needed.

80. The Tribunal concluded that little weight could be attached to the Respondents' arguments in respect of the first fire safety assessment. Whilst the report identified that there was a stay put evacuation strategy – which is described as giving rise to a zero risk (page 573) - and whilst it identified that the building had external cladding (page 569) and

balconies with timber floors (page 582), there is no indication that the writers of the report were aware that the cladding was flammable. On the contrary, it is clear that the writers of the report were aware only of the possibility that the cladding on the properties may be flammable. As a result of this they strongly recommended that a full investigation should be undertaken as a matter of high priority (page 582). The recommendations also go on to observe that depending on the findings of such an investigation there may be a need to implement mitigation measures pending remediation of the cladding. Although the Respondents are right to say that this report does not itself suggest interim measures, it clearly draws attention to the possibility that these may be needed.

81. The Tribunal had regard to the EWS1 certificate dated 13 March 2020 by FRC which clearly stated that an adequate standard of safety was not achieved at the properties (page 589).

82. The Tribunal also considered that little weight could be attached to the Respondents' arguments in respect of the second fire assessment. Whilst this does indeed conclude that the hazard from fire at the properties is medium – which means that fire hazards are subject to adequate controls – and that the risk to life is tolerable – which means that no major additional fire precautions are required (pages 609 to 610), these conclusions are clearly based on the ongoing presence of the waking watch. This is made clear at page 611 where reference is made to the cladding report, a change in the evacuation policy, and the presence of a temporary waking watch. Indeed, even with this change of policy the report still concludes that the consequences for life safety in the event of fire would be moderate harm, which means that an outbreak of fire could foreseeably result in injury (including serious injury) of one or more occupants though multiple fatalities are unlikely. In the view of the Tribunal this report is very far from a confirmation that there is no significant fire risk at the properties as argued by the Respondents.

83. The Tribunal also attached little weight to the absence of evidence of a direct instruction by the LFB to the Applicants to install a waking watch. Whilst the existence of such an instruction would indeed be a clear indication of a fire risk, its absence does not show the contrary. There was no evidence before the Tribunal that the LFB had ever conducted their own assessment of the fire risk at the properties.

84. The Tribunal did not consider that the delay between the receipt of the FRC reports and the implementation of the waking watch did necessarily showed that a change in the evacuation policy was not required. In any event, the delay was not substantial and, as already explained, the key question was whether there was in fact a risk or not.

85. In addition to all these conclusions, the Tribunal also took account of the additional evidence submitted by the Applicants after the hearing. References in this paragraph are to the page numbers of the electronic bundle of 168 pages submitted by the Applicants. The additional

evidence consisted of eight separate reports produced by Tri Fire Ltd. ("Tri Fire"). The Tribunal noted that the reports were produced and authorised by Mr. A. Kiziak whose qualifications include being a Master of Science in Fire Protection Engineering and being a Member of the Institution of Fire Engineers, and a Member of the Institute of Fire Safety Managers (page 11). The reports were based on the findings in the FRC reports and took account of the Advice Notes and the NFCC Guidance. In the first seven reports, which, in the order they appear in the additional evidence, relate to blocks A, B, D, F, C (that part which is at 1, Tarves Way), G and E respectively, the reports concluded that;

> "*Due to the presence of a significant amount of combustible materials on the external façades, we strongly recommend that the waking watch is continued. The risk presented by the external façade is sufficient to require this, as a fire breaking out of a flat and involving the façade material has the potential to spread rapidly across all floor levels, thus rendering the 'stay put' evacuation policy unsuitable. Furthermore, there is only a single stairway available for means of escape and the stairway and corridors have windows which open on to the external façades.*" (pages 12, 32, 52, 72, 90, 110 and 130)

The eighth report deals with 49, Norman Road, which forms part of block C (see the addresses set out in the application at page 14 of the original bundle). This states as follows;

> "*Whilst the risk presented by the external façades at 49 Norman Road is considerably lower than the other blocks on the estate, we recommend that as the waking watch is in place for other blocks and 49 Norman Road is included within the scope of the waking watch. Due to the proximity to other blocks on the estate with combustible facades, the risk presented by the external façade is sufficient to require this, as a fire breaking out of a flat and involving the façade material has the potential to spread rapidly across all floor levels, thus rendering the 'stay put' evacuation policy unsuitable. Furthermore, there is only a single stairway available for means of escape and the stairway and corridors have windows which open on to the external façades.*"

Nothing in the additional submissions received from the Respondents challenged the substance of the findings set out in the Tri Fire Reports.

86. There is no mention of OP in the additional evidence.

87. Taking the evidence as a whole, the Tribunal was satisfied that it was reasonable for the Applicants to change the evacuation policy at the properties to a simultaneous evacuation policy. It was satisfied that there was a sufficient fire risk to justify this. In view of the NFCC Guidance, if such a change is reasonable it also follows that it was reasonable to implement a waking watch as that is necessary in order to implement such an evacuation policy, at least initially.

88. The Tribunal bore in mind that the position of OP is somewhat different, as it is not over 18 metres high and there is less evidence of a fire risk there as there is no Tri Fire report. Nevertheless, the FRC reports show

that it has similar problems with its façade. Whilst the NFCC guidance was developed specifically for high rise premises and is stated to apply to buildings over 18 metres in height, paragraph 1.6 makes it clear that that figure is somewhat arbitrary and that minor variations in the limit need not necessarily have any significant effect (page 31). In addition, the leaseholders of OP have not opposed the Applicants' application. The Tribunal therefore concluded that it was reasonable for the Applicants to implement a waking watch at OP also.

4. Was the Cost of the Waking Watch Reasonable

89. The Applicants sought a determination that the costs of the waking watch for the period from its implementation until 30 August 2020 were reasonably incurred and so are recoverable. That is the period considered by the Tribunal.

90. The costs of the waking watch depend on three factors, the number of people engaged, the period over which they are engaged, and the hourly rate.

91. The Applicants' case was that the watch consisted of 3 people patrolling the 8 blocks on a 24/7 basis. This was, they argued, a relatively minimal watch and that in other places there may be two people per block or even a person per floor. It was not argued by the Respondents that the actual provision was excessive. In any event, the Tribunal was satisfied that this was, indeed, a low-level watch and, given its earlier findings, it concluded that the extent of the watch was reasonable.

92. In his written submissions Mr. Scott-Brown challenged the fact that the Applicants only obtained 2 quotes for the waking watch (page 533). The Applicants' case, as explained at para 24 of their statement in response (page 653) was that they approached Ace – who quoted an hourly rate of £13 - and an alternative provider, Sentra Solutions Ltd. who stated that their starting price was £12.50 but this could vary depending on the requirements and size of contract (page 670). The Applicants stated that they decided to instruct Ace as they were known to them and they provided a good service. No alternative quotes were provided by the Respondents.

93. The Tribunal was satisfied that the hourly rate charged by Ace was reasonable. The Respondents had not put forward any alternative and the figure charged, £13 per hour plus VAT was, in the view of the Tribunal, reasonable. In reaching this conclusion it bore in mind the contents of the Ministry of Housing, Communities and Local Government guidance on waking watch costs (pages 672 to 677). This stated that the median hourly rate per person undertaking waking watch duties was £13.99 (page 674).

94. The Respondents' remaining challenge to the waking watch costs concerned the period during which the waking watch was in action. Their argument was that it had continued for too long and that if, as the

Tribunal has found, the waking watch costs are recoverable they should only be recovered for the period until 20 July 2020. This, they argued, was a period of 6 months from the production of the FRC reports during which time the Applicants should have installed a fire alarm system (see paras 62 and 66 of the written submissions at pages 553 and 554). This is an argument which they repeated in their additional submissions.

95. There is no doubt that the NFCC Guidance makes it clear that waking watches should only be temporary and should only remain in place until a temporary fire alarm and detection system is implemented and that where a simultaneous evacuation policy is likely to be needed for the medium to long term, a temporary fire alarm system should be installed (see paras 4.4. and 4.14 at pages 36 and 37).

96. In reply to the Respondents the Applicants argued that they intend to instruct the contractor to commence work to install the fire alarm system once this Tribunal has issued its determination. The expenditure involved is significant and it was reasonable for the Applicants to seek the assurance of a Tribunal determination before proceeding. The necessary section 20 consultation process takes time to complete and, during that time they have progressed matters by obtaining a specification, liaising with the LFB about the contents of that specification, and obtaining tenders. In addition, their case was that there was currently insufficient money in the reserve fund to pay for the fire alarm (paragraphs 57 to 62 at pages 659 to 660).

97. The Tribunal bore in mind that the determination sought was only for the period until the end of August 2020. Whilst it accepted that there may come a time when it is no longer reasonable to be continuing with a waking watch as a fire alarm system should have been installed, that moment has not yet been reached. It accepted that the Applicants were proceeding reasonably and at a reasonable speed and, therefore, concluded that the costs of the waking watch for the period up until 30 August 2020 – a total sum of £162,700.20 – were reasonably incurred and will be payable by the Respondents in accordance with the service charge provisions in the leases if properly included in the year end final accounts and properly determined.

5. Will it be Reasonable to Install a Fire Alarm System and Are the Projected Costs of that System Reasonable

98. The Respondents' arguments in respect of the fire alarm system were largely the same as those advanced in respect of the waking watch, namely that there was no need to change the evacuation policy and so there was no need for a fire alarm.

99. For the reasons explained above, the Tribunal was satisfied that it was reasonable to change the evacuation policy from stay put to simultaneous evacuation.

100. There is no doubt that remediation of the façades of the properties will take a considerable time and that the installation of a fire alarm will be a

considerably cheaper way of managing the new evacuation policy in the long run when compared with the costs of a waking watch. It is also likely to be more reliable. This is something which is expressly acknowledged in the NFCC Guidance (see para 4.14 at page 37). Indeed, the preference of a fire alarm system to a waking watch is implicitly recognised in the Respondents' case where they criticise the Applicants for not installing the fire alarm sooner.

101. The Tribunal was, therefore, satisfied that in principle it would be reasonable to install a fire alarm system to facilitate a simultaneous evacuation policy.

102. No issues were taken by the Respondents in respect of the specification of the proposed fire alarm system. The contractor that one of the Respondents put forward was not suitable because they only dealt with wireless systems, which were not approved by the LFB (see para 1.5.3 at page 498). Tenders have been sought and obtained and the Applicants propose to instruct M&G Fire Protection who put forward the lowest tender.

103. On that basis the Tribunal was satisfied that it would be reasonable for the Applicants to incur the cost of installing the fire alarm systems (at an *estimated* total cost of £279,076.01) that a service charge would be payable by the Respondents in respect of that cost, and that the Applicants could properly include such a cost in the budget for the 2021 service charge year.

Apportionment

104. One further issue remains in respect of the substance of the application, and that is the question of how the costs of the waking watch and the fire alarm are to be apportioned among the Respondents.

105. As explained above, the Tribunal was satisfied that the costs of the waking watch and the fire alarm system are recoverable under the terms of the lease as Sector 2 costs – save that some of the OP costs are Sector 4 costs. In all cases, the leases provides that such costs are to be apportioned on a square footage basis.

106. However, the leases only contemplate Sector 2 costs as being costs in respect of one block, whereas the costs of the waking watch and the fire alarm system have been spread over all 8 blocks. The question, therefore, arises as how to apportion the costs of the waking watch and the fire alarm system between blocks.

107. The leases do not help a great deal here, as whilst they make provision for what are described as total development costs, these are expressly defined as to exclude the maintenance and upkeep of the Blocks themselves (see page 143) or, in the case of the OP lease, the maintenance and upkeep of the Communal Areas and Facilities (page 191) which, in turn, are defined in such a way that the blocks are not themselves

included (clause 2.1.10 at page 179). Also, there is no provision for the splitting of costs between the residents of OP and the others.

108. However, the lease permits the Applicants to recalculate the proportion to be paid by the Respondents or to change the mode of calculation of that proportion where it becomes necessary or equitable to do so and provided that any change is itself equitable (see paragraph 5 of Schedule 7 of the lease – page 154). Similarly, clause 4 of Schedule 7 of the OP lease allows the Applicants to recalculate the proportion payable on an equitable basis (page 198).

109. The solution proposed by the Applicants was that the costs should be apportioned between the blocks on the basis of the number of units in each block.

110. The Tribunal considered this to be a fair and reasonable approach. It concluded that this was preferable to a calculation based on the total square footage of each of the units in each block as there was no clear relationship between the amount of time spent by the waking watch in any part of the development and the size of the unit in question, nor was there such a relationship between the extent of the fire alarm system and the floor area of the units.

Applications under s.20C of the 1985 Act and Para 5A of the Commonhold and Leasehold Reform Act 2002 and Fees

111. The Respondents applied for orders under section 20C of the 1985 Act and under para 5A of the Commonhold and Leasehold Reform Act 2002 so that none of the Applicants' costs of the Tribunal proceedings may be passed to the Respondents through any service charge or management fee.

112. On behalf of the Respondents Mr. Smith argued that the application to the Tribunal had not been necessary and that, if the Applicants were confident of their case they could have proceeded without an application being made. In addition, he argued that the Applicants could have sought a dispensation from the need to consult under section 20ZA of the Act, thereby saving time.

113. Further submissions were made by the Respondents in their additional submissions. In particular, they argued that the costs of the Tri Fire reports should not be passed on to leaseholders. Such costs may well be costs incurred by the Applicants as part of the management of the properties. They may or may not be recoverable under the terms of the leases as such. However, the Applicants have not sought a finding in respect of them and their recoverability is not a matter for this Tribunal.

114. Insofar as those costs are not management costs but are costs "incurred … in connection with proceedings" before the Tribunal, or are litigation costs then section 20C and paragraph 5A are engaged.

115. The Respondents argued that the Tri Fire costs should not be recoverable as they were incurred too late and/or were unnecessary.

116. On behalf of the Applicants Mr. Alison drew attention to the substantial sums involved in both providing the waking watch and installing the fire alarm system. He argued that it would have been imprudent for the Applicants to have simply commissioned the works at great expense in the hope that no successful challenge was later made at the Tribunal. This was, he argued, an important case involving many Respondents and that it was reasonable for the Applicants to seek the security of a Tribunal determination.

117. The test for whether orders should be made under section 20C and paragraph 5A is whether or not the making of such an order is just and equitable. The Tribunal considered that in this case it was not just and equitable to make such an order. It bore in mind that the Applicants had succeeded in all aspects of their application and it accepted their argument that it was reasonable for them to have applied to the Tribunal to seek the determinations they have now obtained.

118. With regard to the costs of the Tri Fire reports, to the extent that these could be regarded as costs falling within the scope of either section 20C or paragraph 5A the Tribunal concluded that it was not just and equitable to make an order in respect of them. Their importance in this case is obvious and is also highlighted by the very parts of the HFCC Guidance which the Respondents relied on in order to criticise the Applicants' decision-making – namely the need to perform a property-specific assessment when deciding whether or not to move to a simultaneous evacuation policy.

Name: Tribunal Judge S.J. Walker **Date:** 13 December 2020

ANNEX - RIGHTS OF APPEAL

- The Tribunal is required to set out rights of appeal against its decisions by virtue of the rule 36 (2)(c) of the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013 and these are set out below.

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

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

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

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

Appendix of relevant legislation

Landlord and Tenant Act 1985 (as amended)

Section 18

(1) In the following provisions of this Act "service charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent -
  (a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord's costs of management, and
  (b) the whole or part of which varies or may vary according to the relevant costs.

(2) The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable.

(3) For this purpose -
  (a) "costs" includes overheads, and
  (b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

Section 19

(1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period -
  (a) only to the extent that they are reasonably incurred, and
  (b) where they are incurred on the provisions of services or the carrying out of works, only if the services or works are of a reasonable standard;

and the amount payable shall be limited accordingly.

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

Section 27A

(1) An application may be made to the appropriate Tribunal for a determination whether a service charge is payable and, if it is, as to -

(a) the person by whom it is payable,
(b) the person to whom it is payable,
(c) the amount which is payable,
(d) the date at or by which it is payable, and
(e) the manner in which it is payable.

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

(3) An application may also be made to the appropriate Tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to -

(a) the person by whom it would be payable,
(b) the person to whom it would be payable,
(c) the amount which would be payable,
(d) the date at or by which it would be payable, and
(e) the manner in which it would be payable.

(4) No application under subsection (1) or (3) may be made in respect of a matter which -

(a) has been agreed or admitted by the tenant,
(b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
(c) has been the subject of determination by a court, or
(d) has been the subject of determination by an arbitral Tribunal pursuant to a post-dispute arbitration agreement.

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

Section 20

(1) Where this section applies to any qualifying works or qualifying long term agreement, the relevant contributions of tenants are limited in accordance with subsection (6) or (7) (or both) unless the consultation requirements have been either—
  (a) complied with in relation to the works or agreement, or
  (b) dispensed with in relation to the works or agreement by (or on appeal from) the appropriate Tribunal .

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

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

(4) The Secretary of State may by regulations provide that this section applies to a qualifying long term agreement—
  (a) if relevant costs incurred under the agreement exceed an appropriate amount, or
  (b) if relevant costs incurred under the agreement during a period prescribed by the regulations exceed an appropriate amount.

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

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

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

Section 20B

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

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

Section 20C

(1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court, residential property Tribunal or the Upper Tribunal, or in connection with arbitration proceedings, are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.

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

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

Commonhold and Leasehold Reform Act 2002

Schedule 11, paragraph 1

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

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

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

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

Schedule 11, paragraph 2

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

Schedule 11, paragraph 5

(1) An application may be made to the appropriate Tribunal for a determination whether an administration charge is payable and, if it is, as to—
  (a) the person by whom it is payable,
  (b) the person to whom it is payable,
  (c) the amount which is payable,
  (d) the date at or by which it is payable, and
  (e) the manner in which it is payable.

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

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

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

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

(6) An agreement by the tenant of a dwelling (other than a post-dispute arbitration agreement) is void in so far as it purports to provide for a determination—
(a) in a particular manner, or
(b) on particular evidence,
of any question which may be the subject matter of an application under sub-paragraph (1).

Schedule 11, paragraph 5A

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.

Background

119. A full hearing of this application took place on 16 November 2020. The Tribunal's decision has not yet been issued.

120. On 19 November 2020 the Applicants submitted an application to the Tribunal under rule 6(d) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ("the Rules") for permission to adduce further evidence in support of its application.

121. The substance of the application was that the Applicants wished to adduce eight separate reports from Tri Fire Ltd. dealing with the fire risk present at the premises.

122. It is asserted in the application that the evidence contained in these reports is central to the Applicants' case and that it strongly supports that case.

123. It is also asserted that this evidence was not received by the Applicants until 18 November 2020 and so it was impossible for it to have been placed before the Tribunal in advance of or at the hearing.

124. Notice of this application was given to the Respondents, and the Tribunal directed that any response to it should be received by 5.00pm on 24 November 2020. By that time 3 responses had been received from the Respondents.

The Tribunal's Decision

125. The Tribunal has regard to the overriding objective contained in rule 3 of the Rules. This requires it to deal with cases fairly and justly. This includes dealing with cases in ways which are proportionate to the importance of the case and the complexity of the issues, avoiding unnecessary formality and seeking flexibility in the proceedings, whilst also avoiding delay so far as this is compatible with proper consideration of the issues.

126. The Tribunal takes account of the fact that time is an important factor in this case, as the passage of time is likely to lead to an increase in costs, and it is reluctant to take any step which is likely to lead to delay.

127. However, it must also bear in mind the importance of the decisions it is being invited to make in this case and the importance of making decisions on the basis of the available evidence and which are supported by that evidence.

128. It is clear to the Tribunal that the central issue in this application is whether or not the fire risk at the premises was sufficiently great to justify the Applicant in making a change to its evacuation policy. The new evidence is directly relevant to that issue.

129. The application asserts that this evidence could not have been placed before the Tribunal earlier, and the Tribunal has no reason to doubt that.

130. Whilst the timing is unfortunate, the Tribunal considers that in all the circumstances fairness requires it to take account of the evidence which the Applicant seeks to adduce. The importance of making a properly informed decision in this case outweighs the relatively short delay that will be brought about.

131. The Tribunal therefore directs as follows;

DIRECTIONS

1. The Applicants are to serve the Respondents with the further evidence on which they seek to rely (if this has not already been done) by 5.00pm on 2 December 2020 together with any additional statement relied on.

2. The Applicants are to file a copy of that evidence and any statement with the Tribunal by the same time.

3. The Respondents are to serve on the Applicants and send to the Tribunal any further evidence and submissions on which they seek to rely by 5.00pm on 9 December 2020.

Name: Judge S.J. Walker **Date:** 25 November 2020

NOTES

(a) Whenever you send a letter or email to the tribunal you must also send a copy to the other parties and note this on the letter or email.

(b) If the applicant fails to comply with these directions the tribunal may strike out all or part of their case pursuant to rule 9(3)(a) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ("the 2013 Rules").

(c) If the respondent fails to comply with these directions the tribunal may bar them from taking any further part in all or part of these proceedings and may determine all issues against it pursuant to rules 9(7) and (8) of the 2013 Rules.