FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**MAN/30UG/LSC/2021/0044**
Property	**:**	**Waterside Apartments, St James' Court, West Accrington BB5 1NA**
Applicants	**:**	**Adriatic Land 3 Limited (represented by J B Leitch Solicitors and Mr T Morris of Counsel)**
Respondents	**:**	**The long leaseholders of Waterside Apartments**
Type of Application	**:**	**Reasonableness of Service Charges Section 27A and 20C Landlord and Tenant Act 1985**
Tribunal Members	**:**	**Mr J R Rimmer** **Mr J Faulkner**
Date of order	**:**	**11th September 2023**
Order	**:**	**The waking watch charges for the service charge years in question are recoverable under the terms of the leases of the apartments in the amount claimed by the Applicants for the reasons set out herein.**

A. Application and background

1 The Applicant is the landlord of the apartment block known as Waterside Apartments, situated in St James Court West, Accrington. It has made this application against the respondent residential leaseholders of 55 flats within the building. They number 1-56, but there is no number 13. They occupy the 1st to 6th floors. The building itself is mixed use, there also being leases of 3 commercial premises, not relevant to these proceedings, situated on the ground floor.

2 There have been other matters raised between the parties arising out of the same circumstances as those now concerning this Tribunal that have been disposed of elsewhere. This Tribunal is now required to consider the reasonableness of certain service charges brought before the Tribunal by the Applicant.

3 The Applicant initially sought to establish that costs in relation to:

(1) remedial works to the automatic opening smoke vents ("AOV") within the building,

(2) fire marshal costs,

(3) the provision of a multi-facet, hard-wired alarm system sufficient to satisfy Lancashire Fire and Rescue Service ("LFRS") are recoverable under the terms of the leases held by the apartment owners and that they are costs reasonably incurred at reasonable cost.

4 The lease provided to the Tribunal as being the standard lease for all the residential flats within the building contains the following:

(1) The grant of the lease is made in consideration of the payment, among other things, of the service charge (Clause 2.3)

(2) The service charge is the tenant's proportion of the service costs (Cause 1 "interpretation"))

(3) The service costs are all of the costs reasonably and properly incurred or reasonably and properly estimated by the landlord to be incurred of

(i) Providing the Services and

(ii) Complying with all laws in respect of the retained parts (Clause 1). Retained parts includes the common parts of the building.

(4) The Services include, so far as is relevant to these proceedings:

Any other service or amenity that the landlord (acting in accordance with the principles of good estate management) provide for the benefit of the tenants or occupiers of the building (Specifically clause 1.Services.(i))

(5) The tenant covenants to observe the Tenant Covenants (Clause 5) including:-

(6) To pay the landlord the service charge demanded by the landlord under Paragraph 4 of Schedule 6 at the times and in the manner specified therein

(in effect to pay an interim service charge at the start of the year and any balance owing at the close of the year).

5 The parties disagreed as to whether the provision of the alarm and fire detection system, or the provision of the waking watch, fall within those service charge provisions: in particular whether items 3 and 4 in the preceding paragraph are sufficient to embrace those costs within the ambit of the charge.

6 Those costs were incurred, from the Applicant's perspective in complying with an enforcement notice served by LFRS, effectively as a response to the Grenfell Tower tragedy: the building being one that been fitted with exterior cladding. Inspection by LFRS also identified other hazards sufficient for it to serve the enforcement notice as the appropriate way to deal with those issues.

7 The matter of the costs in relation to the AOV and the direct costs of the alarm system are no longer in dispute between the parties and the Tribunal is now only concerned with the fire marshal costs to the extent that they were incurred over a much longer period than first anticipated by reason in delays in installing the alarm system to the point where it could be certified as operational. Only at that point could the waking watch be stood down.

8 The separate distinct matter of whether the lease encompasses the charges so as to allow them to be recovered from the tenants is, however still argued in relation to all three sets of costs.

9 The Applicant argues that in the circumstances extant at the relevant time the charges are reasonably incurred and at reasonable cost.

10 The timescale under consideration is as follows:

- 26.03.2019 LFRS inspect the building and identify it as being unsafe in the event of fire
- 13.05.2019 An enforcement notice is served identifying issues with cladding, compartmentation, fire detection, emergency procedures and smoke vents.
- xx.05.2019 Specialist consultants, Design Fire Consultants ("DFC") embark upon a report upon required works, based upon an inspection and initial report by the Thomasons construction consultancy.
- xx.06.2019 DFC produce a fire strategy for the building.
- 17.10.2019 DFC produce its definitive report (version 6) on the works required to comply with the enforcement notice, extensions to the timescales provide by LFRS being granted and there being no apparent suggestions of enforcement either directly in respect of the notice, or closing of the building.

- xx.11.19 work commences on the alarm and detection system, it having commenced in respect of the AOV approximately one month earlier.
- xx.11.2019 Work is paused, apparently for 2 reasons. Firstly there is a proposed change in managing agents from Urban Bubble to RMG Limited and there is also a shortage of service charge funds until the new service charge year in January
- 13.02.2020 work recommences. The Tribunal notes, however that this date is provided in the Applicant's statement of case as being the start date for the works
- 15.05.2020 the system installation is substantially complete but access is required to a number of individual flats to link internal heat detectors before the system can be tested and certified.
- xx.09.2020 testing and certification is complete. Waking watch can be stood down. The Applicant's statement of case is ambiguous on the point and could be read as suggesting, erroneously that it was stood down in May.

11 Given that there is an indication from the installers, First City Fire and Security Ltd ("FCF"), that the installation would take 3 months (page 227 of the agreed bundle) the argument of the Respondents is that it is unreasonable for the process to have lasted over some 16 months, thus extending quite considerably the period over which the waking watch was required.

12 The Respondents also expressed concerns that progress was unreasonably impacted by the change in managing agents from urban Bubble to RMG at the start of 2020 which also engendered a change in contractor providing the waking watch at a higher hourly rate.

Evidence and submissions

13 The Applicant provided a statement of case in respect of its position, together with two principal witness statements, from Stewart Prescott of Urban Bubble and Megan Gibson of RMG, and a further position statement. So far as the statement of Ms Gibson is concerned, this was adopted by Adam Smith as his own statement when he succeeded Ms Gibson as manager when she left RMG.

14 The statement of case is extensive and sets out at some length the history of the process undertaken to comply with the enforcement notice with particular reference to the alarm and detection system, provides copies of supporting documentation upon which the Applicant sought to rely in its decision making and the justification for choosing FCF to install a system complying with a tender for the installation of the option utilising 124 heat detector bases within the flats.

15 It also provided a comprehensive review of the service charge provisions of the lease to support the proposition that the alarm costs and the waking watch costs fell within those provisions and were recoverable as service charges.

16 The Respondent provides a statement of case challenging the validity of the view that the charges relating to the waking watch are recoverable under the terms of the lease, or, if they are recoverable, they are unreasonable.

17 It is argued that the charges are not within the definition of services within the lease. The point is made in this way:

- The only charges recoverable as service charges are those falling with items (3) and (4) in paragraph 4, above.
- Although a failure to comply with an enforcement notice would be a failure to comply with "all laws relating to the retained parts" the waking watch is not required by law and failure to provide one would not be a breach of any such law.
- Failure to comply with the requirement to fit a suitable alarm system might amount to such a failure but to the extent that the hard-wired detectors are fitted internally to flats, they do not relate to any failure in respect of the retained parts.
- If any other provision might be considered relevant it is that referred to above at paragraph 4(4), but the fitting of the alarm system amounts not to provision of a service or amenity. It is properly to be regarded as a fixture or fitting.

18 It is unfortunate that having engaged solicitors and they in turn having the statement of case settled by Counsel the Respondents have been unable to afford continued representation. It would have been helpful to have had assistance for the Respondents to have had help in putting these arguments at the hearing, but it could also have been clarified if the AOV system was also being regarded as a fitting.

19 In its reply the Applicant confirms its view that the alarm and waking watch charges, together with the AOV works are properly referrable to services needed in order to comply with all laws relating to the retained parts. The property is subject to the Regulatory Reform (Fire Safety) Order 2005 and the Applicant is the Responsible Person. It is subject to the duty to take such precautions as are required to make the property safe, prevent fire and the spread of fire. The costs are therefore recoverable.

20 The delay is not unreasonable, given the need to ensure that the alarm and AOV requirements comply with the guidelines of the National Fire Chiefs' Council, a consultation (albeit not one compliant with Section 20 Landlord and Tenant Act 1985) could be undertaken and the change of manager from 2019 to 2020.

21 Furthermore, the provision of the alarm and waking watch were services properly falling within the definition of services referred to at paragraph 4(4) as a service or amenity provided for the benefit of tenants or occupiers. The AOV works are directly referable to the retained parts and, without directly saying so, presumably referable to compliance with the Fire Safety Order.

22 The two substantive witness statements provide greater detail of the processes undertaken that lead to the decisions that were made and to the timescale of events. To the extent that they are challenged by the Respondents at the hearing they are considered more fully below.

The Law

23 It is useful to refer at this point to the law that that the Tribunal applies in considering the matter that is before it.

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

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

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

(1) An application may be made to a leasehold valuation tribunal for a determination whether a service charge is payable and, if it is, as to –

(a) the person by whom it is payable

(b) the person to whom it is payable

(c) the amount which is payable

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

(e) the manner in which it is payable

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

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

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

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

(2) The application shall be made…

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

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

26 There is also reference in the application to Paragraph 5A of Schedule 11 Commonhold and Leasehold Reform Act 2002 which provides that:

A tenant of a dwelling in England may apply to the relevant court or Tribunal for an order reducing or extinguishing the tenant's liability to pay a particular administration charge in respect of litigation costs. Essentially this is provision that mirrors Section 20C, but applies to costs that might be recovered as administration charges, rather than service charges.

Hearing

27 The hearing took place by videolink on Monday 11th September 2023 when the Applicants were represented by Mr Morris of Counsel. The Respondents were represented by several of their number. Particularly Mr Robert Dean and Mr David Smith. A skeleton Argument was provided by Mr Morris that provided a precis of the applicant's position.

28 The Tribunal were taken through the timescale of the matter from the inspection by LFRS up to the point where the alarm system could be certified and the waking watch stood down.

29 Mr Dean in cross-examining Mr Adam Smith, in respect of the statement he adopted from Ms Gibson, and Mr Prescott took the opportunity to highlight the delays that were experienced in the installation and commissioning process. The Tribunal took the unusual step of allowing simultaneous cross-examination of both witnesses as it felt this enabled Mr Dean a simple way of highlighting those matters he wished to raise.

30 In a lengthy examination of all the issues raised by the Respondents during the hearing the following particular matters were addressed:

(1) The stated position of FCF as to a 3-month timescale and the eventual completion after 16 months. Such clarification as was forthcoming suggested that version 6 of the DFC report, produced in October 2019, was a result of continuing review of guidance and policy that was being provided by fire services and government collectively, resulting in a need to ensure that whatever was eventually ordered was compliant. Thereafter there was a need to pause progress in November 2019 to raise commercial funding in the absence of any power to levy surcharges for service charges. Mr Prescott referred to the managing agents not being able simply to "crack on" with work in the absence of funding. When work re-commenced in February 2020 substantial works were completed by May but access to individual flats then proved difficult and prevented a test evacuation and final certification in September 2020.

(2) There were also delays to the finalisation of the DFC report caused by the local Authority (Hyndburn Borough Council) not being prepared to release the building control documentation for the building, It could apparently be viewed, but not copied or noted.

(3) The Tribunal noted above, at paragraph 10 that the Applicant's statement of case refers to work starting in February 2020 and the question as to whether work actually started in November 2019, or not, or was started, but was then paused, was not addressed,

(4) The view expressed by the managing agents that the developer of the site had ceased trading when it was suggested that they still traded, but had not been approached for contribution. It was accepted they remained the landlords in respect of the Commercial units and appeared to have been involved in negotiations in respect of those 3 units for the alarm installation, but not as developers responsible for the fire safety issues. Although matters of that nature were suggested to be the responsibility more senior persons within the managing agents' structures Mr Adam Smith suggested that the immediacy of a need to respond to the enforcement notice in May 2019 limited the scope for more complex enquiries.

(5) Neither witness considered that there was a hiatus in progress resulting from the change of managing agent at the end of 2019. Both were of the view that particular efforts had been made to facilitate a smooth handover, given the particular difficulties created by the enforcement notice. Neither witness was aware of the reason for the decision to change agents. Apparently, it did coincide with the year end for Urban Bubble and the service charge provision. Mr Adam Smith did indicate that in retrospect perhaps a better contingency could have been put in place to deal with the period from November 2019 to January 2020.

(6) One particular issue had been that the contractors providing the waking watch for Urban Bubble were not prepared to enter into a contract with RMG. Without any reason being given this appeared to be recognised as the cause of the need to engage a new provider at slightly higher cost.

31 Mr Morris on behalf of the Applicants did express concern that there now appeared to be a change of focus on the part of the respondents if they were now seeking to allege that the failure to engage the developer in pursuit of compliance with the enforcement notice. This was not something that had been raised in the Respondents' statement of case and it was not a matter upon which the Applicant had been given an opportunity to obtain evidence of its own. The Respondents' concerns had been about delay and that was what had been addressed.

Determination

32 The Tribunal has two questions to answer: Firstly, are the charges that are subject of these proceedings properly to be regarded as service charges and recoverable, in principle, under the terms of the lease, or do they fall outside those terms? Secondly, if that is decided in favour of the Applicant, are the charges that are indeed incurred, reasonably incurred at reasonable cost and work done to a reasonable standard? So far as that standard is concerned, there is no issue raised as to the quality of the AVO or alarm system and no suggestion raised that the waking watch was in any way substandard.

33 The Tribunal takes the view that the answer to the first question is straightforward. Recoverable charges are those relating to the Services (listed in the lease in Clause 1), or incurred in complying with all laws relating to the retained parts (again, Clause 1).

34 The waking watch falls within that second limb. The Regulatory Reform (Fire Safety) Order 2005 imposes a duty to take appropriate steps to protect occupiers and prevent fire or the spread of fire. The statement of case for the Respondents suggests that the Applicant did not need to impose the waking watch to comply with the law. In one sense that may be correct, but it had to do something. It had a choice. Compliance would involve either a waking watch or the closing of the building.

35 Furthermore, the Tribunal is satisfied that the waking watch falls within sub-clause (i) of the definition of services. It is clearly something that is a service or amenity provided by the landlord, in the interests of good estate management, for the benefit of tenants and occupiers of the building. The decision is not a capricious one. It has been carefully considered in the interests of good estate management as benefitting those tenants or occupiers. That is a reasonable decision when seen against the alternative and the inconvenience that would cause.

36 Insofar as the matters of the AOV and the alarm system are still to be considered within that same first question, it is the Tribunal's view that they too satisfy the test as to being services provided that benefit tenants and occupiers of the building by providing fire security in what would otherwise be an unsafe building. The fact that the Respondents' statement of case argues that they relate to improvements or to works other than the common parts is negated by the provision of these services as a comprehensive package to meet the obligations of the enforcement notice (where they are specified works in any event) and the Fire Safety Order.

37 Having answered that first question so as to determine the waking watch charges do constitute a service within the terms of the lease, are the charges for this reasonably incurred at reasonable cost?

38 Undoubtedly, to the Tribunal's mind the principle of the waking watch is reasonable, and the way in which the Applicant chose to set it up as an immediate response to the enforcement notice was a reasonable one. The costs are also reasonable from the perspective of working hours required and the hourly rate therefore, At some point then does something, or series of things, take the costs over the Rubicon to unreasonableness? What are the individual, or collective effect of:

- The apparent length of time needed to finalise the DFC report
- The "pausing" of work from November 2019 to February 2020
- The change-over in management from Urban Bubble to RMG
- The increase in charges after the change of waking watch contractor
- The 4-month delay from May to September 2020 to commission and certify a system that was almost completely installed?

39 On the strength of the evidence it heard the Tribunal is not at all convinced that work actually commenced and was then paused in November 2019. The Applicant's statement of case suggests work started in February 2020. This would coincide with the views that funding needed to be put in place and might also reflect the reality of the management change over, particularly when the email chain from Megan Gibson, to which the Tribunal was referred, ramps up in January 2020.

40 Looking at the time taken to finalise the DFC report, with version 6 appearing in October 2019, the explanation given is that time needed to be taken to consider changing guidelines and engage in some reduced consultation exercise (paragraph 20, above). The Tribunal has some sympathy with that position and there appears to be no doubt that 5 earlier versions of the report have existed. The Respondents are put in a difficult position. They can point to a delay, but they cannot clearly identify a cause sufficient to evidence unreasonableness, or suggest what would be a reasonable alternative.

41 In the light of the Tribunal's observations in paragraph 39, it assumes that possibly limited scoping work, and only that, may have taken place immediately after the report from DFC, but the issue of securing funding was no doubt a genuine one and to do that within the timescale of November to February is not unreasonable. The changeover in management is then a non-issue, particularly if the evidence the Tribunal heard as to co-operation between the agents is correct. Although questioned upon it, both witnesses were clear on that point and there is no evidence to suggest otherwise.

42 Conceivably, installation of the alarm between February and May 2020 matched or improved upon the view of DFC as to a 3-month timescale, but there is then the further period of 4 months to complete installation in individual flats, test the system, including a test emergency evacuation, and achieve certification.

43 The Tribunal notes an email from Ms Gibson to all leaseholders exhorting co-operation in enabling access to apartments and providing contact details to assist. The Applicant does what it can. It cannot secure access in the absence of speedy responses. Covid was mentioned in passing in the hearing. This is all happening at time of lockdown or the early escape from lockdown. Even in the absence of any further difficulties the pandemic might have provided, there is no evidence provided to suggest that the Applicants have brought the delay upon themselves at this point. No evidence is brought to the attention of the Tribunal that there has been unreasonable delay for which the Applicant is responsible.

44 Against that background the Tribunal is satisfied that the costs of the waking watch are reasonably incurred in principle when the decision is taken to impose it. Nothing that the Tribunal has seen suggests that those costs become unreasonable by virtue of what happens between June 2019 and September 2020 in the circumstances that are presented to it. Even the increase in costs caused by the change of contractor is explained by the fact that the first contractor does not work with RMG.

45 The Tribunal therefore determines that the costs in respect of the waking watch are reasonable and are reasonably incurred.

46 There remains outstanding the application under Section 20C Landlord and Tenant Act 1985. Within the definition of service costs in Clause 1 of the lease is paragraph (b):

> The reasonably and properly incurred costs fees and disbursements of any manging agent or other person retained by the landlord to act on the landlord's behalf in connection with the building or the provision of the services…

47 This would appear to encompass the managing agents', solicitor's and Counsel's costs in these proceedings being part of future service charge costs in respect of

which the Respondents are entitled to seek an order for the benefit of all those respondents that are party to the proceedings.

48 In relation to any administration charges that might be the subject of proceedings under Schedule 11, paragraph 5 Commonhold and Leasehold reform Act the Tribunal noted in the course of consideration of this matter that such charges might arise under Paragraph 7 of Schedule 4 to the lease, but that the charges mentioned do not encompass any arising within proceedings before this Tribunal.

49 The Tribunal therefore invites the Applicant to:

- provide any statement it wishes to provide opposing the Respondents application under section 20C Landlord and Tenant Act 1985 and serve the same upon the Respondents by 5pm Friday 20th October 2023, with a copy to the Tribunal, by electronic means.
- Identify within the statement any provision within the lease by which any administration charge may be payable by the Respondents within these proceedings, in the absence of which the Tribunal will make a protective order under Schedule 5, paragraph 11.

50 The Respondents may provide any statement in response that the wish to make and serve the same on the Applicant's solicitors, by 5pm 10th November 2023, with a copy to the Tribunal, by electronic means.

51 The Tribunal will then consider if any further direction is required, but then set down the matter down for consideration upon the papers: that being a suitable means which it considers appropriate for disposal of the matter.

52 If either party wishes to seek a hearing in respect of these applications, it must notify the Tribunal in writing by 5pm Friday 17th November 2023.

J R Rimmer (chairman)