FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	**LON/00AH/LSC/2017/0435**
Property	:	**Flats 1–41, 25 Frith Road, Croydon CR0 1TH and Flats 1–54, 15 Drummond Road, Croydon CR0 1TW ("Citiscape")**
Applicant	:	**FirstPort Property Services Limited ("the manager")**
Representative	:	**Mr Azmon Rankohi, Legal Department**
Respondents	:	**The various long leaseholders of Citiscape ("the tenants")**
Representative	:	**In person**
Type of application	:	**Liability to pay service charges**
Tribunal member	:	**Angus Andrew** **Evelyn Flint DMS, FRICS, IRRV** **Jackie Hawkins BSc, LSC, MSc**
Date and Venue of hearing	:	**6 February 2018** **10 Alfred Place, London WC1E 7LR**
Date of decision	:	**9 March 2018**

DECISIONS

Decisions

a. The costs incurred in the provision of the waking watch to 19 December 2017 were reasonable.

b. A service charge is payable in respect of those costs.

c. There was insufficient evidence to enable us to determine the reasonableness of the costs incurred in the provision of the waking watch after 19 December 2017. Either party may apply for a determination of the reasonableness of those costs after the end of the current service charge year.

d. The estimated costs of £483,000 for the replacement of the cladding included in the 2017/18 budget was reasonable.

e. A service charge is payable in respect of those estimated costs.

The applications, directions, hearing and procedural issues

1. On 9 November 2017 the manager made two applications to the tribunal. The first application was made under section 20ZA of the Landlord and Tenant Act 1985 Act ("the 1985 Act"). The manager sought dispensation from some of the statutory consultation requirements in respect of its proposal to replace the Citiscape cladding. Judge Timothy Powell issued directions on 17 November 2017. The directions provided for the application to be determined on consideration of the documentations alone and without an oral hearing. The dispensation application was considered by a differently constituted tribunal that issued its decision on 20 December 2017. The tribunal granted dispensation subject to conditions.

2. The second application was made under section 27A of the 1985 Act. The manager applied for a determination of the tenants' liability to pay service charges in respect of fire watch and cladding replacement costs to be incurred in the 2017/18 service charge year.

3. Judge Timothy Powell issued directions on 17 November 2017. Those tenants who wished to take part in the application were required to send a statement in response by 20 December 2017, which date was subsequently extended to 8 January 2018. Compliant statements were received from five tenants including Srikant Reddy Alla, Richard Low-Foon and Miguel Jimenez–Carvajal, who all gave evidence at the hearing. A further 17 late statements, mostly in the form of e-mails, were also sent to the manager and with the agreement of Mr Bowker we had regard to those statements, which were included in a separate bundle handed in at the hearing.

4. Late in the day Mr Alla was successful in forming a residents association comprising approximately two thirds of the tenants and we were told that

the association will shortly be applying to the tribunal for recognition. At the hearing the manager was represented by Robert Bowker and those tenants who are members of the residents association were represented by Amanda Gourlay. Both Mr Bowker and Ms Gourlay are barristers. We assume that Ms Gourlay was instructed under the direct access scheme because no other legal representative is on record as acting for any of the tenants.

5. Thomas Smith, Paul Aitkinson and William Caldwell gave oral evidence on behalf of the manager. All three are employed by the manager. Thomas Smith is a safety advisor, Paul Atkinson is a regional director and William Caldwell is a senior property manager. We also heard oral evidence from the three tenants referred to above.

6. Mr Low-Foon and Terrance Ede made closing submissions on their on behalf, Mr Ede having submitted a late statement in response that was included in the supplementary bundle to which we have referred. There was insufficient time for Ms Gourlay and Mr Bowker to make full closing submissions. Although we offered to reconvene the hearing they elected to make their submissions in writing. We agreed to their request that they should make their written submissions sequentially and that Mr Bowker should go first. Subsequently and with Ms Gourlay's agreement we gave permission for Mr Bowker to make some short points in reply that were received on 19 February 2018. We reconvened on Friday 23 February 2018 when we made the decisions recorded above.

7. In this decision figures in [ ] are references to the page numbers in the hearing bundle.

Background

8. Citiscape was constructed in about 2001 by Barratt Homes Ltd and comprises two blocks of flats with a car park and other amenities. The larger block on Drummond Road is up to ten storeys in height whilst the smaller block on Frith Road is up to six stories in height. Both blocks are of relatively modern designed with external cladding on a metal frame system.

9. There are 41 flats in the Firth Road block and 54 in the Drummond Road block. After all the flats had been sold, Barratt sold the freehold reversionary interest that is now owned by Proxima GR Properties Ltd.

10. On 14 June 2017 a fire broke out in Grenfell Tower. The consequences of that tragedy continue to reverberate throughout this country and beyond. Sir Martin Moore-Bick is conducting a public enquiry into the Grenfell Tower fire although it seems likely that his final report will not be available for some considerable time.

11. In the days following the Grenfell Tower fire it was widely reported that the tower's external aluminium cladding may have contributed to the spread of the fire. It is not entirely clear when the manager first became aware that the cladding at Citiscape might represent a fire risk but certainly it was in a matter of days. Quantum Compliance conducted a survey on 22 June 2017 and provided a draft report, possibly on the same day [227]. Mr Caldwell told us that the manager had received verbal confirmation that the cladding had failed a fire test on 26 June 2017. There was a second survey on 27 June 2017 which resulted in a supplementary fire safety inspection report [247]. For the purpose of this decision it is only necessary to record the following comment in the executive summary of the first report; *"external cladding which is suspected to be Aluminium Composite Material (ACM) and will need to be subject to additional testing".*

12. The London Fire Brigade attended the property on the 25 June 2017 and we will say more about this and a subsequent visit later in this decision. We do not know whether the manager requested the visit or if the London Fire Brigade inspected of their own volition. On the following day the manager commissioned Property Management Recruitment Ltd to provide a fire marshal at a cost of £14.75 plus VAT per hour. In essence the job of the fire marshal is to patrol each block constantly and in the event of a fire to ensure the evacuation of the building. This service has become known as a "waking watch" and that is the term that we use for the remainder of this decision.

13. On 21 July 2017 Quantum Compliance conducted a third survey and produced a third report under the heading *"Visual Survey on Metal Faced Cladding System"* [268]. The report recommends *"a simultaneous evacuation policy"* but in terms of the fire risk from the external cladding it appears to add very little to the previous reports.

14. It has to be said that the information provided by the manager's witnesses, relating to the cladding, was not as comprehensive as we would have wished. The manager relies on a number of generic guidance documents issued by the Department of Communities and Local Government ("DCLG") to Local Authority and Housing Association Chief Executives between 18 June 2017 and 29 September 2017 [200 to 221] and also on an undated cladding screen test result apparently issued by the Building Research Establishment [283]. However it is not clear when these documents came into the manager's possession or if they informed the manager's decision making process. Rather there appears to have been an assumption (that was subsequently proved to be correct) that the cladding was a fire risk and would have to be replaced.

15. The service charge year runs from 1 September. The tenants make on account payments on 1 September and 1 March in each year. The on account payments are based on a budget prepared by the manager. Thus the manager had to prepare a budget by 1 September 2017 for the forthcoming year 2017/18. It wanted to include within that budget an

estimate of the cost of replacing the cladding because there is no provision in the leases that enable the manager to issue a supplemental service charge demand during the course of a service charge year.

16. The manager's internal surveyor estimated the cost of replacing the cladding at £483,000 [222] and this was included in the budget [224] that gave rise to the interim service charge demands that were issued on 4 September 2017.

17. Surprisingly the manager did not include in the 2017/18 budget an estimate of the waking watch costs. Mr Bowker agreed that under the terms of the leases the manager cannot recover any of those costs until the end of the current service charge year on 31 August 2018. In the meantime the manager is funding those costs out of its own pocket.

18. On 19 September 2017 the London Fire Brigade issued Fire Safety Guidance Note GN90 with the sub-heading: *"Waking Watch/ Common Fire Alarm. Guidance to support a temporary simultaneous evacuation strategy in a purpose built block of flats"* [326]. Again it is not clear exactly when the manager first became aware of this guidance. However on the following day the London Fire Brigade carried out a second inspection. Again it is not clear if the London Fire Brigade carried out the inspection on its own volition or if it was at the manager's request. In any event, following that inspection the manager instructed Property Management Recruitment Ltd to provide a second fire marshal when the estate supervisor was not on duty. We were told that the weekly cost of providing the waking watch is currently £4,216.59 plus VAT which equates to an approximate yearly cost of £263,000.

19. The manager commissioned a cladding replacement feasibility report from MDB Chartered Surveyors. The comprehensive report was issued on 6 December 2017 [291]. Paragraph 2.1.1 of the report records that the cladding is *"type 3 Aluminium Composite Material (ACM) which has recently failed combustibility test as carried out by the BRE"*. That is, it is the type of cladding in use at Grenfell Tower. In essence the report recommends replacement. Two options are given the first based on completing the work as a single continuous project; the second based on a phased approach with the cladding being removed and reinstated at a later date. The total cost of the first option including professional fees and VAT is estimated at £1,815,822.20 whilst the total cost of the second option is estimated at £2,530,877.50. In short there is nearly a fourfold increase in the estimate given by the manager's internal surveyor earlier in the year.

The leases

20. The leases are all for terms of 999 years and were all made between Barratt Homes Limited, Peverel OM Limited and an individual lessee. They are therefore tripartite leases. Peverel OM Limited was originally either a subsidiary or an associate company of Barratt. We were told that it

subsequently changed its name to FirstPort Property Services Limited and that it is not connected to the current freeholder.

21. Traditionally flat lessees were for terms of 99 years and were granted by a landlord to a tenant. The landlord maintains the building and recovers the costs through the service charge. The perceived advantage of such leases is that both parties have a capital interest in the building and therefore a common interest in ensuring that is was properly maintained.

22. As the market for leasehold flats developed landlords sought ways of divesting themselves of responsibility for maintaining the property. They did so by the use of tripartite lessees in which the maintenance responsibility is transferred to a third party. In the majority of cases the third party is a company controlled by the lessees who clearly have a capital interest in the property. However in a small number of cases, of which this is one, the third party is a professional manager that has no capital interest in the property. As Mr Bowker conceded the manager is in reality a managing agent.

23. As with other tripartite leases the freeholder's continuing obligations are minimal and consist of little more then a covenant for quiet enjoyment although it is required to step into the managers shoes if the manager goes into liquidation or *"fails to observe and perform"* its obligations, to which we now turn.

24. Under clause 6 of the leases the manager covenants to observe and perform the obligations set out in the Tenth Schedule. Paragraph 1 of that schedule commences with the following words:-

> *"Conditional on the Manager having first received payment of the Lessees Proportion then to carry out the works and do the acts and things set out in the Sixth Schedule as appropriate to each type of Dwelling".*

25. Thus in so far as concerns the issues before us the manager's obligations are defined by reference to the Sixth Schedule.

26. The tenants' obligations are set out in clause 4 of the leases. At sub-clause 4.2 the lessees covenant with the manager to observe and perform the obligations set out in parts 1 and 2 of the Eighth schedule. Paragraph 2 of part 1 of the Eighth schedule requires the lessees to pay to the manager a proportion of the Maintenance Expenses. For the purpose of this decision the proportion is not relevant. The Maintenance Expenses are defined in the following terms:

> *"Maintenance Expenses means the moneys actually expended or reserved for periodical expenditure by or on behalf of the Manager or*

the Lessor at all times during the Term in carrying out the obligations specified in the Sixth Schedule".

27. Thus the Sixth Schedule to the lease is pivotal to this case in determining both the extent of the manager's obligations and the nature of the expenses that can be recovered from the tenants under the service charge provisions of the leases.

28. We now recite the relevant provisions of the Sixth Schedule that were relied on by the parties and which are relevant in considering whether the cost of both the waking watch and the recladding can be recovered from the tenants through the service charge:

The Sixth Schedule

The Maintenance Expenses

Part "A"

Estate & Block Costs

5. Inspecting rebuilding re-pointing repairing cleaning renewing or otherwise treating as necessary and keeping the Maintained Property comprised in the Block and every part thereof in good and substantial repair order and condition and renewing and replacing all worn or damaged parts therefore.

Part "D"

(Costs applicable to any or all of the previous parts of this Schedule)

2. Providing and paying such persons as may be necessary in connection with the upkeep of the Maintained Property.

10. Complying with the requirements and directions of any competent authority and with the provisions of all statutes and all regulations orders and bye-laws made thereunder relating to the Development insofar as such compliance is not the responsibility of the lessee of any of the Dwellings.

11. Providing inspecting maintaining repairing reinstating and renewing any other equipment and providing any other service or facility which in the opinion of the Manager it is reasonable to provide.

15. All other reasonable and property expenses (if any) incurred by the Manager in and about the maintenance and proper and convenient

management and running of the Development including in particular but without prejudice to the generality of the foregoing any expenses incurred in rectifying or making good any inherent structural defect in the Building(s) or any other part of the Development (except in so far as the cost thereof is recoverable under any insurance policy for the time being in force or from a third party who is or who may be liable therefore) any interest paid on any money borrowed by the Manager to defray any expenses incurred by it and specified in this Schedule any costs imposed on the Manager in accordance with Paragraph 3 of the Seventh Schedule any legal or other costs reasonably and properly incurred by the Manager and otherwise not recovered in taking or defending proceedings (including any arbitration) arising out of any lease of any part of the Development or any claim by or against any lessees or tenant thereof or by any third party against the Manager as owner lessee or occupier of any part of the Development.

The statutory framework

29. The relevant sections of the 1985 Act are sections 18, 19 and 27A and they are set out below:

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.

Issues in dispute

30. The issues in dispute are encapsulated in the following four questions:

    a. Are the waking watch costs being reasonably incurred within the meaning of section 19(1)(a) of the 1985 Act?

    b. Is a service charge payable by the tenants in respect of the waking watch costs?

    c. Is the estimated cost of £483,000 for the recladding included in the 2017/18 budget reasonable within the meaning of section 19(2) of the 1985 Act?

    d. Is a service charge payable by the tenants in respect of that estimated cost?

Reasons for our decision

Are the waking watch costs being reasonably incurred within the meaning of section 19(1)(a) of the 1985 Act?

31. Nearly all of the tenants who responded to the application objected to the waking watch costs. Some were simply prepared to take the risk of dispensing with the waking watch. The majority however were critical of the managers decision making process and its perceived failure either to consider other alternatives such as the installation of a permanent fire alarm system or the use of directly employed fire marshals that they considered would be considerably cheaper then those employed by an external sub contractor. The tenants however had obtained no alternative estimates and could give no evidence as to what might be a reasonable cost. We do not criticise them for that because the residents association had only been formed shortly before the hearing.

32. The evidence presented on behalf of the manager was however equally unsatisfactorily. As we have already indicated we were left with the impression that the manager was unaware of the DCLG guidance notes and the BRE test results when decisions relating to the waking watch were made. If that impression is incorrect, the manager has only itself to blame. We make no criticism of the managers three witnesses who gave evidence before us. They gave their evidence in a straightforward manner and when they did not know the answer they said so. However they were repeatedly unable to answer Ms Gourlay's questions because the decisions had been made by the *"executive board"* and not being members of that board they were unable to explain the reasons behind the decision making process. Rather than field one of its own members to give evidence the board had delegated the task to subordinates who did not have the full picture. It seems inevitable that this issue will return to the tribunal and when it does we hope that a member of the executive board will attend to give evidence.

33. In giving their evidence the manager's witnesses relied principally upon the two inspections by the London Fire Brigade on 25 June and 20 September 2017. They said that on the first inspection the London Fire Brigade recommended the implementation of a waking watch and on the second inspection it recommended an increase in the number of fire marshals from one to two. We were told however that the London Fire Brigade did not commit this advice to writing. We find this surprising for two reasons. Firstly, because it is not consistent with our experience of the London Fire Brigade, in other cases. Secondly, because following the first inspection it issued a comprehensive *"Notification of Fire Safety Deficiencies"* under the Regulatory Reform Fire Safety Order 2005. It is difficult to understand why the implementation of a waking watch was not included either in their notification or in the covering letter.

34. Furthermore we were told that no one had made a contemporaneous note of the London Fire Brigade's advice. In their evidence the manager's witnesses were attempting to recall advice given at meetings some eight and five months previously.

35. In such circumstances we consider that it is reasonable to have regard to the London Fire Brigade's generic advice contained in the Fire Safety Guidance note issued on 19 September 2017, in the wake of the Grenfell Tower fire. At pages 10 and 11 three possible approaches are identified. The first is the installation of a common fire alarm system that is said to be the preferable approach where the cladding represents a significant hazard on buildings over 18 metres in height and cannot be replaced or removed in the short term. The second is reliance on the waking watch to detect the presence of fire and manually to initiate fire alarm sounders that would alert all residents of the need to evacuate. In this case, a limited number of fire marshals will be required to operate the alarm sounders within 10-15 minutes of operation of a smoke alarm within a flat. The third, *"the least reliable"* option, is the full waking watch deployed in this case.

36. It became apparent during the hearing and in answer to Ms Gourlay questions that the manager has obtained an estimate for installing a common fire alarm system. Mr Caldwell told us that an estimate was obtained in October 2017 (presumably in response to the Fire Brigade guidance note) and the estimated cost was £120,000 plus VAT although a copy had not been included in the documents bundle. He also told us that a lower estimate had been obtained for a temporary fire alarm but he could not recall the amount of the estimate. As far as we can ascertain the tenants had not been consulted about either option and the manager does not appear to have taken them forward.

37. In his closing submissions Mr Bowker said that we should ignore the estimated cost of a common fire alarm because the manager could not install a common fire alarm without the active consent of all the lessees which was unlikely to be forthcoming. That is because an alarm would have to be fitted in each flat. This observation however begs three questions. Firstly if the installation of a common fire alarm system was

impractical, why did the manager obtain an estimate at all? Secondly why did it not at least ask the tenants to give their consent? Thirdly why did it not consider as an alternative the second option of alarm sounders that might reduce the waking watch cost?

38. Despite these unanswered questions many of the tenants' criticisms are overstated and are made with the benefit of hindsight. In the aftermath of the Grenfell Tower fire it is impossible to criticise the manager for its initial decisions both to implement a waking watch and to increase the number of fire marshals from one to two. However following the publication of the fire safety guidance note on 19 September 2017 the manager should have given active consideration to the other approaches recommended by the London Fire Brigade not least because they are said to be preferable to a full waking watch. Three months would have been a reasonable time to consider those other approaches and to ask the tenants for their views.

39. Turning to the quantum of the cost it was reasonable for the manager, at least in the first instance, to commission the fire marshals from an independent subcontractor. The manager had neither the expertise nor the qualified staff to provide the service in-house and as Mr Caldwell pointed out an independent subcontractor has the resources to provide replacement marshals when the usual marshals are sick or on holiday.

40. Equally there was no cogent evidence to suggest that the hourly cost per marshal was unreasonable and certainly it does not strike us as excessive. Indeed Mr Caldwell's evidence was that as a check the manager had obtained an alternative quotation from another company that had come in at the slightly higher charging rate of £14.75 plus VAT per hour.

41. Some of the tenants said that they had on a small number of occasions found the marshals asleep. The manager had however responded to the complaint by the introduction of a barcode scanning system that required the marshals to check in during their rounds.

42. Consequently on the basis of the evidence before us we are satisfied that the costs incurred in the waking watch to 19 December 2017 were reasonably incurred. On the evidence before us we cannot at this time reach a conclusion as to the reasonableness of the costs incurred beyond that date.

43. That is not to say that the costs after 19 December 2017 were not reasonably incurred and the tenants should be aware that the test to be applied is one of reasonable cost and not lowest cost. We considered giving both parties the opportunity to submit further evidence before reconvening at a later date to consider this issue. However for the reasons stated above these costs are currently being funded by the manager and we consider that the better course of action is for one of the parties, at the end of this service charge year, to make a further application for a determination of the reasonableness of the waking watch costs incurred since 19 December 2017. That will give both parties ample opportunity to consider and fully

cost the other approaches recommended in the London Fire Brigade guidance.

Is a service charge payable by the tenants in respect of the waking watch costs?

44. Before turning to the arguments relied on by the parties we make an observation that appears to us self-evident although it was not made by either party. In the majority of leases the lessor's obligation to maintain and the lessees' obligation to contribute towards the lessor's expenses are contained in different clauses or schedules and are defined by different words. Thus it is often the case that a lessor cannot recover a cost that it is obliged to incur. However in these leases both the manager's obligation to maintain and the tenants' obligation to contribute are defined by the Sixth Schedule: that is identical wording defines both the manager's obligation to maintain and the tenants' obligation to contribute. It seems to us that the inevitable conclusion is that if the manager is obliged to do work or provide a service the tenants are obliged to contribute to the cost although they remain entitled to dispute the reasonableness of the cost. Or in the context of this case if, as Ms Gourlay asserts, the tenants are not obliged to contribute to the cost of either the waking watch or the recladding the manager cannot be obliged either to provide the service or undertake the work. It seems unlikely that such an outcome would find favour with a majority of the tenants who would be left living in a potentially dangerous building with no redress under the terms of their leases.

45. That apart the tenants' liability to contribute towards the waking watch cost was in issue between the parties. Mr Bowker relied on paragraphs 7.2, 10 and 15 of Part D of the 6th Schedule. Ms Gourlay relies on the words in parenthesis at the beginning of Part "D": *(Costs applicable to any or all of the previous parts of this Schedule).*

46. In short she argues that if we find that the cost of recladding is not recoverable under Part "A" then the cost of the waking watch is not recoverable either. Even if we are against her on that point she argues that the cost of the waking watch cannot be recovered under any of the paragraphs relied on by Mr Bowker.

47. As will be seen we do consider that the cost of the recladding is recoverable under Part "A" so that Ms Gourlay's primary argument falls away. Turning to the paragraphs in Part "D" relied on by Mr Bowker we are satisfied that the cost is recoverable under both paragraphs 10 and 15. There may be a valid argument about paragraph 7.2 but Mr Bowker only has to succeed under one paragraph.

48. The Fire Safety Guidance Note issued by the London fire Brigade on 19 September 2017 falls within the ambit of *"the requirements and directions of any competent authority"*. Equally the waking watch cost is a *"reasonable and proper expense ... incurred by the manager in and about the maintenance and proper and convenient management and running of the Development"*. Indeed had we been asked to decide the point we would

have been satisfied that the waking watch cost falls within paragraph 2 insofar as it is incurred in *"providing and paying such persons as may be necessary in connection with the upkeep of the property"*. We do not consider that the wording is obviated by payment for the fire marshals through an independent subcontractor.

49. Consequently and for each of the above reasons we find that a service charge is payable by the tenants in respect of the waking watch cost reasonably incurred.

Is the estimated cost of £483,000 for the recladding included in the 2017/18 budget reasonable within the meaning of section 19(2) of the 1985 Act?

50. We can take this issue in fairly short order. As put by Ms Gourlay the tenants' case was that the estimated cost of £483,000 cannot be reasonable because it is too low. It will be recalled that the report obtained by from MDB Chartered Surveyors estimated the cost at between £1,815,822.20 and £2,053,877.08. That is the estimate relied on in preparing the 2017/18 budget was roughly one-quarter of the currently estimated cost.

51. This is the first occasion that any of us can recall on which a lessee or group of lessees have come before us to object to an estimated or actual cost on the grounds that it is too low. That apart the criticism is again made with the benefit of hindsight and without regard to the context in which the estimate was both requested and given.

52. The Grenfell fire occurred on 14 June 2017. The new service charge commenced about 11 weeks later on 1 September 2017. As observed the manager was alive to the risk and commissioned a report from Quantum Compliance. The last of the three reports was received on 21 July 2017 by which date the manager was aware that recladding would almost certainly be required. It then had some 6 weeks left to obtain an estimate to include in the forthcoming year's budget. In such circumstances it was entirely reasonable to turn to the in-house surveyor. Equally there is nothing that leads us to conclude that the in-house surveyor acted unreasonably. The surveyor is unlikely to have been a cladding expert and it did the best that it could in the difficult and unprecedented circumstances that it found itself. There are criticisms that can be made of the manager and that are made elsewhere in this decision but this is not one of them.

53. Furthermore the tenants have not been prejudiced by the low estimate. We were told at the hearing that if the 2017/18 on-account payments are made there will be sufficient funds to remove the cladding and safeguard the underlying structure by covered scaffolding. This would enable the manger to safely terminate the waking watch and cap its cost. We did allow Ms Gourlay a short adjournment to consult her clients on the implications of this information but they did not change their position.

54. We have not dealt with the authorities upon which Ms Gourlay relies because we do not consider them of any assistance in the highly unusual

circumstances that arose in this and other similar cases following the Grenfell Tower fire.

55. Consequently and for each of the above reasons we find that the estimated recladding cost was reasonable.

Is a service charge payable by the tenants in respect of that estimated cost?

56. As far as Mr Bowker and Ms Gourlay were concerned the issue depended on the correct interpretation of paragraph 5 in Part "A" of the Sixth Schedule. Mr Bowker considers that it permits the recovery through the service charge of the estimated or actual recladding cost. Ms Gourlay disagrees largely relying on the argument that the cladding cannot be said to be in disrepair because it remains as designed and constructed. She also points to the definition of "maintenance expenses" and says that the recladding costs are not *"periodical expenditure"*.

57. Mr Bowker drew our attention to the judgement of Mr Justice Lindsay in Credit Suisse v Beegas Nominees Ltd [1994] 1 EGLR 76. That case related to commercial property and the covenant under consideration was in a very different form to paragraph 5. For that reason alone it would be unwise to place too much reliance on either that or similar judgements. Nevertheless in Credit Suisse the cladding had to be replaced (for wholly different reasons) and Mr Justice Lindsay found that the replacement fell within the landlord's covenant. In doing so he said at paragraph F:-

> *"I see the verbs "amend" and "renew" as going outside "repair", especially where as here the use of the phrase "defects or wants of repair" in the proviso to the principal covenant shows that some meaning beyond repair is contemplated. Moreover, and again having regard to that phrase in the proviso, I see the words "otherwise keep in keep in good and tenantable condition" as having a potential going beyond repairs strictly so-called".*

58. Applying similar reasoning we come to the same conclusion. The words *"renewing or otherwise treating as necessary"* go beyond simple repair. Equally the words *"in good and substantial repair order and condition"* indicate an obligation that goes well beyond simple repair: if it did not the words *"order and condition"* in the phrase would be superfluous. We do not see how the two blocks can be said to be *"in good and substantial repair order and condition"* whilst the cladding remains a fire risk. Finally, and subject to Mr Ede's point considered below, the reference to *"rectifying or making good any inherent structural defects"* in paragraph 15 appears to us to encompass the removal of the defective cladding and its replacement with fire resistant cladding and as we pointed out at paragraph 44 if the manager is obliged to do the work the tenants are obliged to contribute to the cost.

59. Equally we do not consider that the definition of Maintenance Expenses assists the tenants. The full phrase to which Ms Gourlay refers is: *"moneys actually expended or reserved for periodical expenditure"*. That is the

phrase draws a distinction between in-year expenditure and a reserve for future periodical expenditure such as external redecorating. Replacement of the re-cladding is an in-year cost. Under paragraph 6 of the Seventh Schedule the tenants must pay:

> *"In advance on the First day of September and the First day of March in every year throughout the Term one half of the Lessee's Proportion of the amount estimated from time to time by the Manager or its managing agents as the Maintenance Expenses for the year..."*

60. Thus the estimate or budget that gives rise to the on-account payments has two components: an estimate of in-year expenditure and an estimate of the reserve for future periodical expenditure. Both the waking watch and recladding costs are part of the first component.

61. Taking a broader view it is also appropriate to have regard to Lord Neuberger's judgement in Arnold v Britten [2015] UKSC 36) when he said that in interpreting a lease "*meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but disregarding subjective evidence of any party's intentions.*"

62. By granting 999 year leases the original freeholder was effectively relinquishing any capital interest in the flats. There is no prospect of the freeholder receiving other than nominal premiums either on enfranchisement or on individual lease renewals under the Leasehold Reform, Housing and Urban Development Act 1993. In such circumstances it is reasonable to conclude that the parties would have intended that all future costs associated with the blocks would be the responsibility of the tenants. That intention is reinforced by the use of identical words to define both the manager's obligation to undertake work and the tenant's obligation to pay for it.

63. Finally we return to Mr Ede. It will be recalled that Mr Ede made closing submissions of his own although we understand that he is a member of the residents association. Mr Ede is an engineer. He considered that the answer to the question lay not in paragraph 5 but in paragraph 15 in Part "D". It was implicit in Mr Ede's case that he considered that the existing cladding is an inherent structural defect. As an engineer he was better able than anyone else in the room to make that call.

64. Mr Ede's argument therefore was not that the tenants may not ultimately be liable for the cost but that, before they could be requested to pay the cost, the manager must first go knocking on other doors. He had in mind in particular Barratt Homes Limited and the current freeholder, Proxima GR Properties Ltd. Whilst there was the possibility of a third party claim the manager could not ask the tenants to pay the cost. In short he relied on the words in parenthesis in paragraph 15: *(except in so far as the cost*

thereof is recoverable under any insurance policy for the time being in force or from a third party who is or who may be liable therefore).

65. The difficulty with Mr Ede's argument is that paragraph 15 is of no assistance in determining how hard the manager must knock on other doors. Mr Bowker told us that the manager had indeed knocked on the doors of both Barratt Homes Limited and Proxima GR Properties Ltd but it had been firmly rebuffed. The tenants' MP has knocked on the Government's but so far to no effect.

66. It is foreseeable that the tenants may have claims against a number of parties: against the manufacturer of the cladding in particular if any warranties were given as to its suitability: against Barratt Homes if they were negligent as to the selection and installation of the cladding: against the Local Authority if there were errors in the certification process: against the DCLG if, as been suggested elsewhere, the relevant building regulations were not fit for purpose.

67. The difficulty with all these potential claims is that they are entirely speculative with uncertain outcomes. No claim could realistically commence until Sir Martin Moore-Bick has reported. The potential cost of maintaining any of these claims would be prohibitive and if taken up by the manager it would doubtless seek to recover that cost through the service charge that would doubtless generate further litigation. The tenants would find themselves mired in litigation for many years during which time their flats would be effectively unsalable. The most vulnerable tenants would be those most at risk: those who need to sell their flats because of old age, infirmity, family breakdown and the like.

68. It seems to us that the original parties to the leases would not have had such an eventuality in mind. Reverting to the test applied by Lord Neuberger this cannot have been the intention of the original parties to the lease not least because it defies commercial common sense.

69. Furthermore the use of the words *"is recoverable"* and the prior reference to recoverability under an insurance policy indicates that the parties to the lease had in mind not speculative litigation but recoverability with a degree of certainty such as a claim under a warranty or under a compensation scheme such as that previously introduced under Part XVI of the 1985 Housing Act. That scheme provided for 90% grants towards the cost of repairing designated defects in houses purchased from public authorities. Whether such a scheme should be introduced for the replacement of defective cladding and extended to the private sector is of course a matter of political rather than judicial judgement.

70. Consequently and for each of the above reasons we find that a service charge is payable by the tenants in respect of the estimated recladding cost.

Name: Angus Andrew **Date: 9 March 2018**