**FIRST - TIER TRIBUNAL**
**PROPERTY CHAMBER**
**(RESIDENTIAL PROPERTY)**

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| **Case Reference** | **:** | **MAN/00CG/LDC/2018/0019**<br>**MAN/00CG/LSC/2018/0033** |
| **Property** | **:** | **Land at St Georges Close, Sheffield, S3 7AN** |
| **Applicant** | **:** | **Atlantic One Management Company Limited** |
| **Representative** | **:** | **PM Legal Services** |
| **Respondents** | **:** | **Various Leaseholders (see Annex)** |
| **Type of Application** | **:** | **Landlord and Tenant Act 1985 ("the 1985 Act") –**<br>**Sections 20ZA and 27A(3)** |
| **Tribunal Members** | **:** | **Judge C. Wood**<br>**Mrs. S Kendall** |
| **Date of Decision** | **:** | **8 March 2019** |

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**DECISION**

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## Decision

1. The Tribunal determines as follows:

1.1 that the costs of employment of fire wardens at the Property during the period from week ended 26 November 2017 to week ended 28 January 2018 totalling £10672.40 are reasonable, and the Respondents are liable to pay them as service charge;

1.2 that the costs in respect of the installation of the fire detection and alarm system at the Property of £75,704.40 are reasonable, and the Respondents are liable to pay them as service charge;

1.3 that the management costs of £9084 charged in respect of the fire safety works are not reasonable and are reduced to £7284, and the Respondents are liable to pay the reduced amount as service charge; and

1.4 that, in accordance with s20ZA of the 1985 Act, it is reasonable to grant dispensation from the consultation requirements under section 20 in respect of the works relating to the installation of the fire detection and alarm system at the Property.

## Background

2.1 The general background to this matter is the Government's introduction in July 2017, following the Grenfell Tower tragedy, of a compulsory testing regime for multi-storey and high-rise buildings in excess of 18 metres constructed with similar external cladding.

2.2 Where test results have shown that the cladding is category 3 ACM cladding of a type identical to that at Grenfell Tower, (where category 3 is defined as meaning that the material has "...no flame retardant properties"), it is necessary that the cladding is removed.

2.3 Landlords have been required to consider what action is required to ensure the safety of residents in such buildings pending the removal of the cladding.

2.4 It has been necessary for Landlords to review each building's current fire safety procedures to see if they remain appropriate in the light of these newly-identified risks to the safety of the residents.

2.5 In particular, it was common in such buildings to operate a "stay put" policy in the event of a fire. This policy recommended that residents in flats other than those in the immediate vicinity of a fire remain in their flats. This was predicated on the belief that the fire retardant properties/features of the building eg compartmentalisation of the individual flats within the building, fire breaks, half hour fire doors etc, would contain a fire allowing the fire service sufficient time to extinguish it without necessitating a full-scale evacuation of the building.

2.6 It is now apparent that in the circumstances like those which prevailed at Grenfell Tower, there is a real risk that the spread of the fire will be much more rapid and uncontrolled than anticipated. As a consequence, in many cases, the "stay put" policy has now been replaced by an evacuation policy.

2.7 To support this change in policy, it has also been necessary for Landlords to introduce other interim mitigating fire protection measures. One of these is the "Waking Watch". Essentially, this is the deployment of trained fire marshal(s) to patrol a building to aid in the detection of fire, to notify and liaise with the emergency services, to alert residents and to assist in their evacuation. Another possible measure may be the installation of a temporary communal fire alarm system.

2.8 In the present case, Category 3 ACM cladding was identified at each of the three blocks comprising the Property together with concerns regarding their compartmentalisation of the blocks. As a result, the Applicant determined that a change in the fire safety "stay put" policy was necessary, and the "waking watch" provision was introduced in July 2017. Initially, the costs of the "waking watch" were met by the Applicant but for the period from week ended 26 November 2017 to week ended 28 January 2018 the Applicant treated these costs as recoverable as service charge. Works commenced in or about November 2017 for the installation of an upgraded fire detection and alarm system as an interim measure pending the re-cladding and other necessary works. The works to install this new system were completed in January 2018, and on its commissioning in early February the "waking watch" ceased.

**The Application**

3.1 Separate applications were made by the Applicant for determinations by the Tribunal under sections 27A and 20ZA of the 1985 Act regarding:

3.1.1 the reasonableness of, and the liability of the Respondents to pay, as service charge, costs incurred in the provision of the "waking watch" from November 2017 – January 2018;

3.1.2 the reasonableness of, and the liability of the Respondents to pay, as service charge, costs incurred in the installation of the fire detection and alarm system;

3.1.3 the grant of dispensation to the Applicant from the section 20 consultation requirements under the 1985 Act in respect of the installation works.

3.2 The Respondents are together all of the leaseholders of the 190 flats within the three blocks which, together with the car park and external communal areas, comprise the Property.

3.3 Directions were issued on 19 August 2018 for the conduct of the proceedings, in response to which written submissions were received from the Applicant.

3.4 No submissions in response to the Directions were made by, or on behalf of, any of the Respondents.

3.5 A hearing of the Application was scheduled for 11:00 on Wednesday 27 February 2019, following an inspection of the Property at 10:00 on the same date.

## Inspection

4.1 The inspection was attended by Mr M Harrison and Mr J Ang, representatives of Omnia Estates, the Applicant's managing agents of the Property.

4.2 The Property comprises three blocks with a total of 190 flats as follows:
4.2.1 Block A (16, St. George's Close): 89 flats over 5 storeys;
4.2.2 Block B (2, Radford Street): 58 flats over 6 storeys; and,
4.2.3 Block C (St. George's Walk): 46 flats over 6 storeys.

4.3 The blocks are arranged around three sides of an external communal leisure/garden area accessible from the ground floor of each block. The car park runs below the entire area covered by the blocks and the external communal area.

4.4 The Tribunal made internal inspections of the ground floors of each of Blocks A, B and C and the car park in order to view the new detectors and control panels installed as part of the new fire detection and alarm system. It was explained that the control panel for Block A was sited in Block B. The property known as Allen Court, sited across a road from the Property, was pointed out to the Tribunal. Allen Court is the monitoring centre for the fire detection and alarm system and is manned 24 hours a day. In the event of an alarm being triggered on a control panel, the personnel required to make an initial investigation would come from Allen Court.

4.5 The Tribunal were also shown where remedial works had been carried out at the Property in respect of matters of concern raised in the Fire Risk Assessment carried out in February 2018, ("the FRA"), which had been included within the Applicant's written submissions.

## The Leases

5.1 A specimen lease was included in the Applicant's written submissions. Ms C Zanelli, the Applicant's solicitor, confirmed at the hearing that, as far as she were aware, all of the leases of flats at the Property were in substantially the same form and content.

5.2 At paragraphs 10 – 15 of the Applicant's Statement of Case reference is made to specific provisions of the lease which it is claimed establish both the Applicant's obligations to provide services and/or to carry out works of the kind which are the subject of this Application, its right to charge the costs of such services and works as service charge expenditure and the obligation of each Respondent to pay service charge. These include, in particular, the Fifth, Sixth and Ninth Schedules to the lease.

## Law

6.1 Section 18 of the 1985 Act provides:

(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.

6.2. Section 19 provides that –

(1) relevant costs shall be taken into account in determining the amount of a service charge payable for a period –

(a) only to the extent that they are reasonably incurred, and

(b) where they are incurred on the provision of services or the carrying out of works only if the services or works are of a reasonable standard;

6.3. Section 27A provides that:

(1) an application may be made to an 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 date at or by which it is payable, and

(d) the manner in which it is payable.

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

(3) .....

(4) No application under subsection (1)...may be made in respect of a matter which –

(a) has been agreed by the tenant......

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

6.4 In *Veena SA v Cheong* [2003] 1 EGLR 175, Mr. Peter Clarke comprehensively reviewed the authorities at page 182 letters E to L inclusive. He concluded that the word “reasonableness” should be read in its general sense and given a broad common sense meaning [letter K].

6.5 Section 20ZA (1) of the 1985 Act provides as follows:

(1) Where an application is made...for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works...the tribunal may make the determination if satisfied that it is reasonable to dispense with the requirements.”

**Hearing**

7. The hearing was attended by Ms C Zanelli of PM Legal Services for the Applicant, together with Messrs. Harrison and Ang, the representatives from Omnia Estates. None of the Respondents attended or were represented at the hearing.

8. As preliminary matters, it was confirmed that the costs the subject of the Application are:

8.1 the costs of the “waking watch” service of £10672.40 incurred during the period between November 2017 – January 2018;

8.2 the installation costs of the fire detection and alarm system of £75,704.40;

8.3 the management costs in relation to the installation of the fire detection and alarm system of £9084.00.

9. It was acknowledged by the Applicant that as these costs had been incurred the distinction made in the written submissions between sections 19(1) and 19(2) of the 1985 Act in relation to incurred costs and costs to be incurred was no longer relevant to the determination of the section 27A application.

10. With regard to the requirement to consult in respect of the installation works, Ms Zanelli commented that, as a result of the method of apportionment of the service charge by reference to respective square footage, there was a question as to whether it would have been necessary to consult all leaseholders as the resultant liability for some of the leaseholders may have been less than £250. It was accepted, however, that the section 20 consultation requirements were relevant in respect of some, if not all, leaseholders.

11. Ms Zanelli made the following oral submissions:

**Dispensation – section 20ZA**

11.1 The Property is a three block development, comprising 190 flats, of which c135 are used as student accommodation. Allen Court, a nearby block also owned by the Applicant, wholly comprises student accommodation;

11.2 until the Grenfell Tower tragedy, the fire emergency policy was a "stay put"/defend in place policy;

11.3 investigations required as a result of the Grenfell Tower tragedy revealed that there was category 3 ACM cladding on the exterior of the stairwells of each of the three blocks. In addition, those investigations revealed certain defects in compartmentalisation further affecting the safety of the blocks in the event of fire. As a result it was concluded that the "stay put" policy was no longer an appropriate policy and, as a result, the "waking watch" was put in place;

11.4 it was clear to the Applicant that further investigations were needed to address the issues of the cladding and the compartmentalisation;

11.5 an upgrade of the fire detection and alarm system was always regarded as an interim measure pending the re-cladding/compartmentalisation works. However, its installation would remove the need to continue with the "waking watch" with significant cost savings for leaseholders;

11.6 the installation works were started at the end of November 2017, and were completed in mid-January 2018. It was necessary to complete the works in all three blocks before the system could become operational. During the installation period, it was necessary to continue with the "waking watch";

11.7 reserve fund monies have been used to pay for the installation works and for the "waking watch". It was noted that the Applicant had paid for the "waking watch" for the period from July – November 2017;

11.8 consultation on the installation of the upgraded fire detection and alarm system was not undertaken as it would have taken months, and in the meantime the costs of the "waking watch" would continue to have been incurred;

11.9 Omnia Estates, as managing agent, had tried to engage with residents on a more informal basis: reference was made to the letters written to leaseholders dated 17 July 2017, 18 October 2017, 24 November 2017 and 22 December 2017, and to the residents' meeting held on 29 November 2017, at which none of the leaseholders attended. In the Applicant's view, it would be unfair to suggest that the managing agents had "gone off on a frolic" but, despite their efforts, there has been no engagement by the leaseholders;

11.10 both Ms Zanelli and Mr Harrison had received a number of telephone calls from leaseholders but the focus of these calls had not been on the need for/reasonableness of the works undertaken but on whether they would have to pay increased service charge to meet the costs;

11.11 with reference to the Daejan Investments' decision, it was submitted that none of the Respondents has argued or demonstrated that any prejudice had been suffered/caused by the failure to consult. In these circumstances it was submitted that it would be unreasonable not to grant dispensation for the full costs incurred.

12. In response to questions from the Tribunal, it was confirmed as follows:

12.1 the Applicant did not undertake any kind of tendering process for the installation works. The contractor (Nationwide) who undertook the works was the existing contractor responsible for the fire safety equipment at the Property and continuity was considered to be advantageous;

12.2 Mr Harrison confirmed that they had received advice was that they should have sought alternative quotations for the works. After the works had been completed, a second quotation was sought from a company called Photuris. Although not included in the Applicant's written submissions, Mr Harrison confirmed that it was for £69-70,000 plus VAT, which was more than had been paid to Nationwide. The Applicant's representatives accepted that there was little incentive for Photuris to submit a competitive quotation;

12.3 Ms Zanelli pointed out that it was not in any event necessary for a determination that costs were reasonable that they were the cheapest;

12.4 Mr Harrison explained that he had experience of similar works being carried out in similar developments to the Property and he considered that, in this context, the Nationwide costs had appeared reasonable to him;

12.5 it was acknowledged by the Applicant's representatives that obtaining alternative quotations prior to the works being awarded to a contractor was not, in itself, an overly onerous or lengthy task.

**Reasonableness and payability**

13. Reference was made to the following provisions of the specimen lease included within the Applicant's written submissions which it is submitted established the Applicant's rights to charge the costs of the "waking watch" and the installation costs, and the obligations of the leaseholder to pay these costs as service charge:

13.1 paragraphs 5.1 and 5.2 of the Sixth Schedule sets out the leaseholder's obligation to pay service charge, quarterly in advance, based on estimated charges for the year, with an adjustment made at the end of each year based on actual costs;

13.2 clause 7 of the lease sets out the Management Company's obligation to perform and observe the obligations set out in the Ninth Schedule;

13.3 paragraph 1 of the Ninth Schedule sets out the Management Company's covenant to "carry out the works and do the acts and things" set out in the Fifth Schedule;

13.4 the following provisions in the Fifth Schedule are relevant to the provision of the "waking watch" and the installation works:

13.4.1 paragraph 1: repair, maintenance, inspection and, as necessary, reinstatement and renewal of "Service Installations" (as defined);

13.4.2 paragraph 4: inspection, maintenance, rental, renewal, reinstatement, replacement and insurance of the fire fighting/protection appliances;

13.4.3 paragraph 7: general management and administration of the "Maintained Property" (as defined) and, in particular:

13.4.4 paragraph 7.8: provision, inspection, maintenance, repair, reinstatement and renewal of "any other equipment" and provision of "any other service or facility which in the opinion of the Management Company it is reasonable to provide";

13.4.5 paragraph 7.14: provision and operation within the Development (as defined) of "such fire prevention fire fighting and fire alarm and detection equipment and signs as may be required by any relevant authority or by the relevant insurers";

13.4.6 paragraph 7.15: referred to as the general "sweeper" clause;

13.4.7 paragraph 7.11: establishment of a reserve fund;

13.4.8 paragraph 7.10: reasonable and proper fees of any managing agent employed by the Management Company.

14. With regard to the question of reasonableness of the costs, Ms Zanelli referred the Tribunal to the relevant paragraphs in the Applicant's Statement of Case and, in particular, to the authorities cited in the Statement. On the basis of these submissions and authorities, Ms Zanelli concluded that the costs should be determined as reasonable by the Tribunal.

## Reasons

### Dispensation

15.1 Having regard to the chronology of events as set out in the Applicant's written submissions, the Tribunal was not wholly convinced that commencement of the works would have been significantly or at all delayed by undertaking a consultation.

15.2 The Tribunal accepted that the Applicant had attempted to engage with the Respondents by correspondence and in the residents' meeting on 29 November 2017. It also accepted that there had been little engagement by the Respondents prior to or during the period of the "waking watch" and/or the installation works or in connection with the Application.

15.3 In particular, the Tribunal noted that none of the Respondents had claimed or in any way demonstrated any prejudice which had resulted from, or been caused by, the Applicant's decision not to consult.

15.4 In the circumstances and, in particular, in the absence of any evidence before the Tribunal that the Applicant's failure to consult had caused any prejudice to the Respondents, the Tribunal determined that it was reasonable to grant dispensation from the section 20 consultation requirements in respect of the installation works.

### Reasonableness and payability

16.1 The Tribunal was satisfied that:

16.1.1 the costs incurred in respect of the "waking watch" service and the installation costs (including the management fees) for the fire detection and alarm system are properly payable as service charge costs under the terms of the lease, specifically under paragraphs 4, 7.8, 7.10 and 7.14 of the Fifth Schedule; and,

16.1.2 each of the Respondents as a leaseholder was obliged to pay such costs in accordance with the provisions of the Sixth Schedule.

16.2 The Tribunal was concerned by the Applicant's failure (acting through its managing agents) to obtain any alternative quotations for the installation works. However, having regard to Mr Harrison's knowledge and experience of the level of such costs in comparable buildings/developments, it accepted his evidence that the installation costs were reasonable. In making that determination, the Tribunal also took note that the retrospective quotation obtained by the managing agents was for a substantially similar amount.

16.3 The Tribunal determined that the failure of the Applicant's managing agents to benchmark the Nationwide quotation for the installation costs was a failure of good management practice. In this respect, the Tribunal noted the acceptance by all of the Applicants' representatives present at the hearing that to obtain alternative quotations was not an onerous or lengthy task. In view of this, the Tribunal considered that the management fees of £9084.00 were not reasonable and determined that a deduction of £1800, (c20%), was reasonable in the circumstances.

**Fire Risk Assessment**

17. The relevance of the FRA to the Application and the matters for determination by the Tribunal was not clear to the Tribunal although it noted Ms Zanelli's oral submission that it had been included in the interests of transparency. During the inspection Mr Harrison had pointed out to the Tribunal where various remedial works had been carried out to address concerns raised in the FRA. At the hearing the Tribunal invited the Applicant, if it thought appropriate to do so and for the sake of completeness only, to confirm in writing to the Tribunal the remedial works that had been carried out. The Tribunal wishes to make it clear that none of these matters has been taken into account in making the determinations set out in this Decision.

Annex A

Kan Bar Hosseinbor
Helen M Gard & David B Gard
Stuart Leepton & Denise Powell
Harriet Orkney
VeroGroup (Hermes) Limited
Sue Burke
Christopher Eastwood
Helen Wild
Andrew Kilner
Wei Luo
Yiran Zhang
James Coward
Ocean Asset Management Limited
Carlton Property Company (Sheffield) Ltd
Emma Broome
Kean Lee
An Du Thinh
Paul Keeton & Susan Keeton
Katie Spencer
Winston Campbell
Mrs Faiza Shaheer
Ausman Malik
Washbrooke Limited
Waheed Khan
Debra Lowndes
Vince Hayes, Julia Hayes & Lauren Hayes
Faran Malik
Jonathan Reynolds
Stephanie L Burns
Neil Hardy
Faisal Ghazi
Damien Eannetta
Alvin Pastore
Claire AM Yau
Andrew Perham
Kevin Holt
Malcolm Prince
James Jex
Gek Noi Wui
Emma C Daffern & Nathan AJ Powell
Lascelles Sewell
Rachel Daniel
Zan Johar
Mary A Bello
Mitesh Panchal
Steven Bossuyt & Jessy Bossuyt
Ian G Tooley
Moses Bello