FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**MAN/00BN/LSC/2020/0069 V**
Property	**:**	**Flat 22, Bracken House, 44-58 Charles Street, Manchester, M1 7BD**
Applicant	**:**	**Various See Annex A**
Applicants Representative:	**:**	**Gunnercooke LLP**
Respondents	**:**	**Grey GR Limited Partnership**
Respondents Representative	**:**	**Pinsent Masons LLP**
Type of Application	**:**	**Landlord and Tenant Act 1985 – s 27A** **Commonhold and Leasehold Reform Act 2002 –Sch 11 para 5A** **Landlord and Tenant Act 1985 – s 20C**
Tribunal Members	**:**	**Tribunal Judge M Simpson** **Mr P Mountain**
Date of Hearing	**:**	**26 April 2021**
Date of Decision	**:**	**3 May 2021**
Date of Determination	**:**	**18 May 2021**

DECISION

A. The Service Charges claimed for the provision of a Waking Watch service for 2019 (actual) and 2020 (budgeted) are payable.

B. The legal costs of £9220 claimed for 2019 are not payable or reasonably incurred.

C. There is to be no Order under Section 20C of Landlord and Tenant Act 1985.

Application.

1. By an application dated 4th September 2020 solicitors on behalf of Mr Rotti, and the leaseholders of 15 other flats, applied for a determination of both the payablity and reasonableness of two items in the service charge year ending 31 December 2019 and seven items based on budgeted costs for the year ending 31 December 2020.

2. The Tribunal gave Directions on 23rd November 2020 with which the parties (professionally represented) complied in a cooperative way, such that by the time of the hearing in April 2021, the only issues that remained were the Waking Watch ("WW") costs for both years and the claim for legal fees in respect of the invoices from J B LEITCH dated 01/02/2019 and15/05/2019 [at 845 &846 in bundle].

3. The WW cost for 2019 were £483,221 and the budgeted WW cost for 2020 are £528,000.

The Property and background events.

4. Bracken House was built as an office block in the 1960's. During 2015-17 it was converted into a development of 114 residential apartments on the top 8 floors, with a nursery on the ground floor.

5. The external cladding was unsatisfactory to some degree from the outset. The danger of it as a fire hazard has been thrown into sharp focus following the tragic Grenfell Tower disaster.

6. The reports from Greater Manchester Fire and Rescue Service ("GMFRS"); Manchester City Council ("MCC"); White Hindle; TECL; Jeremy Gardner and Associates and JJ Disney, leave no room for doubt that until the cladding is replaced, there is a need for a WW. Counsel for the applicants rightly concedes that, initially at least, the provision of a WW was a proper response to the reports as to fire risk. Indeed the GMFRS would have issued a Prohibition Notice, requiring the flats (or the vast majority of them) to be vacated forthwith.

7. The WW was originally for 2 persons 24/7. It was increased, primarily at the behest of GMFRS to 4 persons 24/7 on 8th March 2019.

8. The issues re WW is whether the Respondents have an entitlement under the lease to recover the costs from the Leaseholders.

9. Planning Consent for works, which extended beyond the combustibility of the cladding, was eventually obtained in October 2020.

10. In the meantime the Respondent has applied to HMG Building Safety Fund and, at the time of the hearing, had passed the first administrative requirements and the application is proceeding.

Leases.

11. All are in identical form so far as these issues are concerned. We have a copy of Mr Rotti's lease of 20th June 2017.

12. The leaseholder covenant to pay "the Service Charge," being a fair and proper proportion of "the Service Charge Expenditure", which includes the 'reasonable and proper costs fees and outgoings incurred in providing the Services…'

13. "the Services", which the landlord covenants to supply, are those set out in Schedule 6, which provides for the 'provision laying out replacement renewal repair maintenance and cleaning (as the case may be) of '… a list of 14 services.

14. The particularly relevant parts of which, for this application, are 1.6 and 1.10

15. 1.6 fire fighting equipment in the Common Parts (as required by law or as the insurers or the Landlord may deem reasonable).

16. 1.10 any other amenities that the Landlord deems reasonable or necessary for the benefit of the occupants of the Building.

17. There is what is commonly called a 'sweeper clause' at 7.5 "Variation of Services." The landlord acting reasonably may at its discretion withhold add to extend vary or make alterations to any of the Services from time to time if the landlord reasonably deems it desirable to do so for the more efficient management security and operation of the Flats or for the comfort of the majority of the tenants in the Flats.

18. So far as the issue of the legal fees is concerned the pertinent clause is 7.1.2. 'in supplying the Services the landlord may employ managing agents contractors or such other suitably qualified persons as the Landlord may from time to time think fit and whose reasonable and proper fees salaries charges and expense (including VAT) will form part of the Service Charge Expenditure'.

Hearing

19. This took place by Video Link at 10 .30 on Monday 26th April 2021. The Applicants were represented by Emily Duckworth of Counsel; the Respondent by Simon Allison of Counsel. There was no witness or parole evidence, save for a brief explanation from Sarah Parker, a manager of the respondent's management company, as to the up-to-date situation re the installation of Fire detecting alarms. This arose because of a preliminary matter raised by Ms. Duckworth. It had recently become apparent that the Respondent had obtained tenders on the 8th March 2021 for installation of Fire Alarms in all flats at a cost of £120,000 (with the probability of a grant of £80,000 towards the cost), despite the respondent's assertion in its statement of Case that such a course of action was not possible because the landlord had no power of entry to individual flats for that purpose.

20. The effect of such alarms on the need for WW was not clear. If it did have an impact, then there was an issue as to whether the continued use of WW was reasonable and whether the Fire Alarm issue should have been addressed much sooner.

21. The manager's evidence was that the landlord is attempting to get the consent of all occupants/owners (many flats are 'buy to let'). The alarms will be wi-fi. There is a contractors' lead time of 6 weeks. The grant may take longer but the landlord will front fund. It is uncertain as to the precise effect on the need or extent of WW, as 'compartmentation' is identified as a risk in addition to flammable cladding.

22. We were satisfied that even if Alarms had been considered sooner, it is unlikely to have been in time to effect the 2019 Service Charge so far as WW is concerned. That year's Service Charge is based on actual out turn, upon which our decision will be final. If, in due course it is established that there is a significant effect, which could have been sooner implemented, it is likely to affect the WW claim for 2020, which is based on budgeted figures. Our decision will be as to whether those budgeted figures are reasonable in the light of what was known when the budget was cast. It will not be a final decision, because the actual out turn can be challenged in due course, when issues as to reasonableness, in the light of the availability and timing of a fire alarm system, can be deployed.

23. In any event the Applicants' argument before us, is not that the charges are unreasonable in terms of S19, but that they are not payable under the terms of the Leases

24. On the basis that our determination, if it be so, as to 2020 budgeted service charge will not prejudice a S19 challenge to the actual 2020 figures, we decide to proceed rather than adjourn.

Applicants' Case.

25. This was fully set out, by counsel, in the Applicants' Statement of Case, Reply to Respondent's Statement of case and a very helpful skeleton argument, all of which the tribunal had the opportunity to consider prior to the hearing.

26. The Lease does not provide for recoupment by the landlord of the WW costs.

27. The landlord must comply with fire regulations (Cl 5.3), but there is no specific provision to enable recovery of these costs.

28. The provisions of paragraphs 1.6 and 1.10 in Schedule 6 are insufficient to enable the cost to be brought within the scope of Schedule 6.

29. Neither is Clause 7.5 sufficient to sweep the cost into a position of recoverability.

30. 1.6 is ineffective because the WW is not "equipment", but "personnel."

31. 1.10 is ineffective because the WW is not an "amenity". It does not fall within the description given to an amenity in, for example, *Re Ellis and Ruislip Northwood U.D.C [1920[1 K.B. 343 and Cartwright v Post Office [1968]2 Q.B. 439.* There is also an Obiter reference in another First Tier tribunal case *(Pemberton etc v Cypress Place etc. MAN/00BR/LSC/2018/ 0016)* as whether it is to strain the plain meaning of that Lease to regard WW as an amenity.

32. Clause 7.5 is ineffective because:-
a). WW does not contribute to efficient management and security (as opposed to safety) of the flats or "comfort" of the tenants.
b) The inclusion of the words "any of" contemplates only additions etc to the existing services as defined, and hence limited, by Schedule 6, rather than the provision of a wholly new service. *Jacob Isbicki & Co v Goulding & Bird Ltd [1989] 1 EGLR 236.*
c) 1.6 is very specific and should not be interpreted as a general measure to protect the flats from the risk of fire. WW is not designed to fight fires but to warn of them.

33. As to the invoices of JB Leitch, there is no specific provision in the Lease to include legal fees in the service charge. The only provision is clause 7.1.2 which allows the employment of others, but "in supplying the Services". Taking legal advice that is said to be about a possible dispensation application and the terms of the Lease relating to recoverability is not "in supplying the Services".

34. The respondent has provided little detail beyond the bald invoices, and could and should have provided much more without prejudicing legal privilege.

Respondent's case.

35. This was fully set out in the Respondents' statement of Case and the very helpful skeleton argument, which the Tribunal had the opportunity to consider prior to the hearing.

36. Relying, generally, on *Arnold v Britton [2015]UKSC 36* Mr. Allison highlights specific passages in his skeleton including:-
The Tribunal *'…is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language to mean"… And it does so by focusing on the meaning of the relevant words… in their documentary , factual and commercial context. That 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 (vi) disregarding subjective evidence of any party's intentions.':*

37. The parties would have answered 'yes' if asked at the time of entering into the Lease if they anticipated WW costs would be recoverable.

38. In any event the WW is an amenity which was reasonable and necessary. The applicants concede that it was a reasonable response by the landlord to the identified fire risk and do not challenge the reasonableness of the cost, for 2019 at least. They simply say it is not recoverable.

39. Further 7.5 is effective. Whatever doubts the Tribunal had in *Pemberton* it found that the WW cost were payable under a similar, though not identical, sweeper clauses.

40. As to the legal fees, further details cannot be provided because of the privileged nature of the advice. The first relates to a dispensation application which was not pursued. The second to construction of the Lease regarding recoverability.

Tribunal decision.

41. The provisions of the Lease and the mechanism for calculating and recovering the service Charge are well detailed above.

42. Quantum and S19 reasonableness in respect of the actual for 2019 and the budgeted for 2020 are not in issue.

43. The necessity of the WW, in the light of fire risk reports and especially in the face of a Prohibition Notice from GMFRS, is not in issue.

44. The leases are for 250 years at a ground rent. The general tenor of such Leases is that the landlord should carry out his obligations under Lease and the Lessees should pay a reasonable sum therefor.

45. It is conceded that the WW was a reasonable response to the reports from experts and the requirements of GMFRS. It is said, simply, that the cost is not recoverable under the terms of the Leases.

46. We do not find that the use of the words "any of the" in 7.5 is restrictive in the way contended for by the Applicants. The definition in the lease of 'the Services' is as 'set out in schedule 6'. To add to any of the Services is to add to the Schedule. To add WW, in the current circumstances, cannot be said to be other than for the comfort of the tenants.

47. *Isbicki* dealt with a similar, but not identical clause and a very different additional service. The desirability of external wall sand blasting is not in the same category as WW protection. Unlike 7.5 the *Isbicki* sweeper clause made no reference to security and the list of Services is not identical to Schedule 6 in these Leases.

48. In the context of this case we can find no significant distinction between 'safety' and 'security'. The latter is a protection or safeguard. A safeguard is anything that protects against danger. Safety is freedom from danger.

49. To 'add to' expressly contemplates additional services. If the power was restricted to only those services listed in schedule 6 then 'add' would be otiose and 'extend or vary or make alterations to' would suffice.

50. If we are in error in that view, we find, in the alternative, that an addition, extension, variation or alteration to 1.6 of Schedule 6, to include fire detection and warning, as opposed to mere fire fighting, would be permitted by 7.5, as would the reasonable employment of personnel as opposed to mere equipment.

51. 1.10 in Schedule 6 is widely worded. The WW is reasonable and necessary and for the benefit of the occupants (many of whom are not direct Lessees of the Respondent, but tenants of the Applicants).

52. The use of the word 'other' indicates that the listed services preceding 1.10 are themselves regarded as amenities. If so, they give an indication of the intended wide meaning of 'amenities' in these Leases.

53. *Ruislip and Cartwright* are both dealing with planning or similar legislation. We do not find that they inhibit our approach to the proper interpretation in these Leases of the clause referring to 'amenity.'

54. In *Ruislip,* Scrutton L.J. said the term 'amenity' was used very loosely in the legislation and he expressed a thought as to the meaning, rather than a definition. Eve J. Was not prepared to "hazard any opinion as to the proper construction of the word 'amenity'…"

55. In *Cartwright*, Willis J. was tentative on the issue, saying " ...(of the proposals re the land) ... nor will they result in any significant reduction in its amenity, if I rightly understand that word as referring to its visual appearance and the pleasure of its enjoyment" With respect, this does not appear to this Tribunal to be an attempt by the learned Judge to comprehensively define 'amenity'.

56. In *Pemberton* (which with all due respect is a first instance decision), the Tribunal did not, however, have to make a determinative decision as to whether the strain was critical , as they found for the landlord on the basis of other provisions in the lease.

57. As to the legal fees, we are satisfied that the Applicants have discharged the evidential burden of raising the issues as to payablity within the terms of the Leases and the reasonableness of the quantum within S19.

58. There is a paucity of evidence and explanation on the part of the Respondents. We accept that the actual advice given will be privileged, but the nature and extent of the advice sought, and how it ties in with the Lease provisions re Service Charges, is not. The simple production of invoices with extremely limited narrative , substantial disbursements (to 2 counsel, apparently on the same topic in the 15/05/2019 invoice), together with the brief explanation set out in the Respondent's Statement of Case, is not sufficient to enable us to say that the charges are within the Service Charge provisions and/or reasonably incurred.

59. To the extent that the advice may have been sought as a preliminary to Tribunal proceedings, such as a Dispensation application, we would expect to have enough information to consider how those costs may have been dealt with by the Tribunal on such an application, had it proceeded.

60. Beyond the provisions of Clause 7.1.2, the respondents do not point us to any specific provision in the Leases for the recovery of legal costs incurred in, or preparatory to, Tribunal or Court proceedings.

Costs.

61. We do not determine whether the Leases provide for recovery of litigation costs.

62. We do however decline to make a S20C order.

63. The issue before us is important to all Lessees and occupants, whether a party to these proceedings or not, and the amounts involved are substantial.

64. Whist not determinative of the cost issue our findings have been mostly in the Respondents' favour.

65. It would not be just and equitable to prevent the Respondents, if the Leases so provide, to regard the reasonable costs of these proceedings as relevant costs to be taken into account in determining the Service Charge.

66. Any costs incurred would not fall within the definition of an administration charge under Part I of Schedule 11 of Commonhold and Leasehold Reform Act 2002. No consideration of an Order under Clause 5 of that Part is required.

67. We have unilaterally considered if this is a case of making any Order in respect of the application fee. It is not, for the same reasons as given above re S20C.

Tribunal Judge Martin Simpson.
3rd May 2021.

Ms Michelle Buschl
Muin U F A Shariff & Mrs Jawairia Shariff
Mr Edalat G Abdi
Mr Ali Shakery
Mr Richard Rotti
Lodger Limited (formerly known as Kingsmaid Holdings Limited)
Mr David Stanbrook & Ms Karen A Fielke
Mr John Storey
De Bao HK Limited