FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00AU/LSC/2021/0255**
Property	**:**	**Flats at 156-176 St John Street, Brewhouse Yard, London EC1V 4DG**
Applicant	**:**	**St John Street Property Services Limited**
Representative	**:**	**Mr Robert Bowker of counsel**
Respondent	**:**	**Riverside Group Limited (formerly One Housing Group Limited)**
Representative	**:**	**Mr Stephen Evans of counsel**
Type of application	**:**	**Determination of liability and reasonableness of service charges- Section 27A Landlord and Tenant Act 1985**
Tribunal members	**:**	**Judge Timothy Powell** **Ms Sarah Phillips MRICS**
Date of determination and venue	**:**	**15 & 16 June 2023 at** **10 Alfred Place, London WC1E 7LR**
Date of decision	**:**	**25 July 2023**

DECISION

Numbers in [ ] in this Decision refer to page numbers in the pdf hearing bundle.

Summary of the Tribunal's decisions

(1) The interim and final service charge costs of and associated with the cladding remediation works are recoverable under the lease, and are reasonable and payable by One Housing/Riverside, as follows:

- The full cladding remediation costs, less deductions for the Price Bailey invoice of 31 May 2021 [693] and the re-apportioned sums of £30,801.53 and £8,400.42 (totalling £39,201.95), which should be credited back to One Housing/Riverside;

- The waking watch costs in full;

- The managing agents' fees in full; and

- Legal costs in the sum of £32,962.80.

(2) Unless the parties are able to reach agreement regarding the costs incurred in the proceedings and the relevant charging provisions in the lease, they may make submissions on the issue of any order under section 20C of the Landlord and Tenant Act 1985 in accordance with the directions appearing at the end of this decision.

Background

1. This was an application brought by the applicant freehold company, St John Street Property Services Limited (referred to in this decision as "St John" or the "landlord"), under section 27A of the Landlord and Tenant Act 1985 (the "1985 Act"). The landlord sought a determination of the payability and reasonableness of "on account" service charges for the year 25 March 2021 to 24 March 2022, specified in the landlord's budget.

2. The costs related to fire safety and cladding remediation works to the development at 156-176 St John St, Brewhouse Yard, London EC1V 4DG (the "Development"), which had already started and for which payment was required in the then current service charge year. The following total costs were specified in the landlord's budget: (1) £1,457,505 for major works; (2) £143,286 for fees relating to the major works; (3) £54,750 for the costs of a waking watch; (4) £60,000 legal costs; and (5) the remainder for normal annual expenditure on the Development [15 & 107].

3. The Development is mixed-use, with five head leases having been granted out of the freehold title in respect of: (1) residential Flats 1-15 Block B; (2) residential Flats 1-6 Block D; (3) commercial unit Block C; (4) residential Flats 1-48 Block D; and (5) commercial unit Block D.

4. The respondent was originally One Housing Group Limited ("One Housing"), a registered provider of social housing and a non-profit Registered Society registered with the Financial Conduct Authority. One Housing was transferred to and became part of The Riverside Group Limited on 31 March 2023. In this decision, the respondent will mostly be referred to as "One Housing" although references will be made to "Riverside" or to "One Housing/Riverside" where the context requires.

5. One Housing held two of the five head leases, in respect of two parts of the Development: Flats 1-15 Block B and Flats 1-6 Block D. The amounts claimed from One Housing by way of on account service charges (i.e. its share of the total) were: for Flats 1-15 Block B £200,839 [595-597] and for Flats 1-6 Block D, £59,915. [591-593].

6. The head leaseholders of the other blocks are: Hampshire County Council (commercial unit Block C), Brewhouse Yard Investment Limited (residential Flats 1-48 Block D) and PZR Property Limited and PZR Limited (commercial unit Block D). The occupational tenants of commercial unit Block C and commercial unit Block D were Superunion Limited (a pension fund) and Waitrose Limited (a supermarket).

7. The Landlord's application was dated 16 July 2021 and was received on 19 July 2021. The application initially named all five head lessees as respondents. Directions were issued on 8 September 2021, originally providing for a hearing on 9 and 10 February 2022. Thereafter, a case management hearing took place on the 13 January 2022, when further directions were given, which stayed the proceedings for three months to allow ongoing negotiations with the parties to conclude. As a result of those negotiations, the proceedings were withdrawn against four of the five head lessees. Following a further case management hearing on 13 December 2022, further directions were given in respect of the remaining proceedings against One Housing/ Riverside, which still disputed its liability under the leases, setting down the matter for a hearing on the 15 and 16 June 2023 at the Tribunal hearing centre at 10 Alfred Place, London, WC1E 7LR.

8. The Applicant also made a protective application under section 20ZA of the 1985 Act in the case any tenants raised technical defects in the consultation process. As none have, a determination under section 20ZA is not needed.

The hearing

9. The hearing in this matter took place on 15 and 16 June 2023. The applicant was represented by Mr Robert Bowker of counsel and the respondent by Mr Stephen Evans of counsel.

10. Mr Evans had only recently been appointed to represent One Housing/ Riverside, having received instructions the previous week.

11. The Tribunal had the benefit of an agreed hearing bundle containing some 1,080 pages, detailed and helpful skeleton arguments from both counsel and, from the landlord's side, a list of proposed questions for its two live witnesses, a chronology and a schedule of invoices.

12. The applicant relied upon the witness evidence of four witnesses, Mr Stuart Swycher, sole director of the landlord company, Mr Michael Burbage, director of Tideway Investment Management Limited ("Tideway"), the landlord's managing agents, Mr James Townsend,

chartered surveyor of Harris Associates Limited, and Mr Hristo Radev, senior façade technician, also from Harris Associates. The statements of Mr Townsend and Mr Radev were agreed by One Housing; but not the statements of Mr Swycher and Mr Burbage, both of whom were called to be cross-examined.

13. One Housing/ Riverside called no witness evidence of its own.

14. On the second day of the hearing, the Tribunal was provided with a copy of a letter of claim dated 7 June 2023 sent by the respondent's solicitors to the applicant's solicitors seeking reimbursement of the total sum of £286,210.26 incurred in respect of service charge payments made for the fire safety works, legal fees and counsel's fees.

Preliminary matters

Applications made at the start of the hearing

15. Two applications were made at the start of the hearing: Mr Bowker for the applicant sought the Tribunal's permission to ask its witnesses some questions in chief and Mr Evans for the respondent applied for the Tribunal to consider its late application under section 20C of the 1985 Act at the end of the hearing. Each counsel opposed the other's application.

16. The applicant's proposed questions were set out in a document which accompanied the skeleton argument. Mr Bowker said that the questions were intended to clarify some of the documents and written evidence, they were reasonably routine and it would be consistent with the overriding objective to allow them. Mr Evans disputed that the questions were reasonably routine and said they were, in effect, new evidence. He was not taking an issue with the late service of Mr Swycher's second witness statement, but the proposed new questions only arrived the previous day and they should have been included in that second statement. Without an instructing solicitor or client present, the applicant would be prejudiced.

17. After a short interlude, the Tribunal gave its oral decision that the proposed questions in chief would be allowed, for the following reasons. The questions appeared to be limited in scope, they were questions that the Tribunal members had in mind themselves and may well have asked. It was in line with the overriding objective to take a flexible approach and for the Tribunal to have the fullest evidence before it. The asking of the questions was proportionate, and any prejudice could be addressed by Mr Evans having time to take instructions on the replies to those questions, if need be.

18. The Tribunal also decided to hear the section 20C application at the end of the hearing but, in the event, this had to be postponed until after the Tribunal issued this decision.

Other matters

19. Before clarifying the issues that the Tribunal had to consider, Mr Bowker dealt with two further preliminary matters touching upon the proceedings.

20. First, as One Housing did not raise any issue regarding the statutory consultation procedure carried out before the cladding remediation works, Mr Bowker confirmed that the Tribunal did not need to deal with the landlord's protective dispensation application under section 20ZA of the 1985 Act.

21. Secondly, as had been trailed in paragraph 14 of the landlord's first statement of case [72], the landlord intended, and did, ask the Tribunal to make determinations that the cost of the remediation works will be payable both as an interim bill in accordance with section 19(2) of the 1985 Act and as a final bill in accordance with section 19(1). In practical terms, this would entail the Tribunal considering the interim charges payable on the four quarter days in 2021 totalling £59,915 for Block D [591-593] and £200,839 for Block B [595-597] and the final balancing charges of £10,018.27 (Block D) and £51,570.81 (Block B) [594 & 598], payable on 1 December 2022.

22. Mr Evans was unhappy with this approach saying that he had not yet been able to get instructions from his client. However, he pointed out that section 19(1) of the 1985 Act also involved any works having been carried out to a reasonable standard. That had no application to the interim charges, but it would apply to any final bill. If the Tribunal proceeded now to deal with both interim and final bills, the respondent would have to reserve its ability to challenge that final bill if it transpired that the cladding remediation works had not been carried out to a reasonable standard.

23. The Tribunal was satisfied that the landlord's intention to also seek determination of the final costs had been flagged up in its statement of case dated 22 December 2022, repeated in the landlord's supplementary statement of case dated 21 March 2023, and that disclosure, leading to the agreed hearing bundle, included invoices relating to actual expenditure. In those circumstances, it was clearly reasonable, cost-effective and proportionate for the Tribunal to deal with both interim and final charges at this hearing. The remediation works had been completed on 1 February 2023 (Mr Townsend's statement, paragraph 18) [112] and there had been enough time, both before that date and between then and now, for One Housing to assess the quality of the works undertaken and to raise any issues at the hearing.

24. Mr Evans said that he would try to take instructions and the Tribunal indicated that if he were able to do so and he wanted to raise this issue again, the Tribunal would hear him before the end of the hearing.

However, the matter was not raised again and so the Tribunal proceeded to deal with both interim and final bills, without any reservation of the reasonable standard issue to the respondent.

The issues

25. The Tribunal having dealt with the preliminary matters, Mr Bowker proceeded to clarify the issues that the Tribunal had to consider at the hearing and determine, which are listed immediately below.

26. Issue 1: whether the lease permits recovery of the cost of cladding remediation, waking watch and associated costs and/or whether recovery is consistent with the principles in *Waaler v Hounslow* (the "Lease Issue").

27. Issue 2: whether the applicant has failed to evidence that it has taken steps to establish whether third-party funding was available to pay for the cost of cladding remediation, waking watch and associated costs (i.e. whether such costs were therefore "reasonably incurred" under section 19 of the 1985 Act) (the "Funding Issue");

28. Issue 3: the payability and reasonableness of the apportionment of additional charges to the respondent (the "Apportionment Issue");

29. Issue 4: whether and to what extent the potential for a successful claim under the Building Safety Act 2002 affects the payability of the service charge costs (the "BSA issue");

30. Issue 5: whether the respondent's payment of the service charges affects the Tribunal's decision (the "Payment Issue"); and

31. Issue 6: whether the Tribunal should make an order under section 20C of the 1985 Act.

The facts

32. In 2009 and 2010, substantial construction work to the Development was carried out by the previous landlord, St John Street Limited, a company incorporated in Jersey, acting by receivers appointed under the Law of Property Act 1925. The main contractor was Ardmore Limited ("Ardmore"), with Rolfe Judd Limited providing architectural services and Avison Young Project Management Limited managing the contract. The original Design and Build Contract in the sum of £8,429,138.76 was dated 10 December 2009 [347]. Building contractor's warranties and collateral warranties were issued in May and July 2011. The certificate of practical completion for the work was said to be dated 26 July 2012.

33. At some point, St John Street Limited went into administration. The company acting by its administrators granted One Housing two head leases of residential accommodation in respect of Flats 1-15 Block B and Flats 1-6 Block D. Both leases were dated 16 September 2011 and each

was for a term of 125 years from that date. The premiums paid by One Housing were: £2,729,950 and £820,050, respectively. Copies of both leases were provided in the hearing bundle though, for convenience, reference is made solely to the lease for Block B.

34. In 2019, the freehold was transferred by the administrators of St John Street Limited to the current freeholder company, St John Street Property Services Limited ("St John") for a nominal £1. The sole director of the applicant company is Mr Swycher, who is also sole director of Brewhouse Yard Ltd, head leaseholder of residential Flats 1-48 Block D.

35. The transfer of the freehold came after the Grenfell Tower fire on 14 June 2017. As a result of that fire, concerns were raised across the country about the fire safety of buildings arising from the nature of cladding used and the quality of building work behind it. At the Development, insurers raised concerns in 2020 resulting in investigations being carried out by the landlord's managing agents, Tideway, and reports being obtained from FR Consultants Limited on 11 October 2020 [124-193] and Harris Associates on 5 December 2020 [194-199]. The reports revealed that Ardmore had installed flammable ACM cladding (the same as was used on Grenfell Tower) on the exterior of the building and behind that the building work appeared to be defective by reason of a lack of cavity fire breaks and fire stopping. These matters constituted a significant fire hazard for the occupants and users of the Development. Expert recommendations were to remove and replace the cladding and remedy the defective work behind it. It was common ground that the blocks in the Development were not high enough to attract funding from the Building Safety Fund to meet the cost of the remediation works.

36. In about March 2021, insurers required an immediate waking watch to be instigated pending remediation works. They later increased the insurance premium for the Development from £50,000 to £400,000 per annum.

37. In 2021, the new landlord consulted the head leaseholders about proposed works to remediate the problems and obtained more expert reports. One Housing did not respond to the consultation.

38. In order to procure funds to pay for the remediation works, the applicant levied interim service charges on the leaseholders, including the respondent. When the interim service charge demands were issued, they met stiff resistance from the commercial head leaseholders, Hampshire County Council and Pfizer. They refused to pay unless and until a claim had been brought against Ardmore and they appointed an independent surveyor to monitor and question the works, which Mr Swycher said in his statement "the surveyor did in excruciating detail" [104]. Pfizer eventually paid in full. After negotiations with Hampshire and their sub-lessees, Hogarth, part of WPP plc (upon which, apparently, liability for the remediation costs would ultimately fall), an

agreement was reached that Hogarth would pay £500,000 towards the cost of works and Hampshire's liability for its service charge costs would be capped at that £500,000.

39. That left the landlord with a shortfall in recovery of some £182,009.02, which it then apportioned between the remaining four head leaseholders. The additional sums demanded from One Housing were, in respect of block B, £30,801.53 and in respect of block D £8,400.42. This meant that One Housing has been charged more than its usual service charge percentage of approximately 11% for Block B and approximately 3% for Block D. As a result of re-apportioning the shortfall in recovery from Hampshire, the charge to One Housing increased to approximately 17% and 5%, respectively.

40. On 26 May 2021, a contract was signed with Façade Consultants Limited to carry out remediation works at the Development [763], with work commencing on 7 June 2021. On 9 June 2021, invoices for on account charges for the works were issued to One Housing. In about July 2021, the waking watch was stood down. The date of practical completion of the remediation works was 1 February 2023.

41. Meanwhile, on 16 July 2021, the applicant made an application to the Tribunal under section 27A of the 1985 Act relating to the remediation works and associated costs, which totalled £1,776,463 and comprised five elements [15]. The applicant also made a protective application under section 20ZA of the 1985 Act, which as mentioned above does not require a Tribunal determination.

The lease provisions

42. The leases to Flats 1-6 Block B and Flats 1-5 Block D were said to be in near-identical terms and no differences between them were drawn to the Tribunal's attention. The following paragraphs set out the provisions taken from the Block B lease, so far as they are material to this decision. Other provisions of the lease will be referred to and set out later in the decision, as the need arises.

The service charge mechanism

43. The service charge mechanism in the leases is relatively straightforward. The Demise in clause 2 includes the tenant's obligation:

> "…paying throughout the Term without any deduction whatsoever:
>
> (a) the Rent (if demanded);
>
> (b) by way of further rent:
>
> (i) the Premises Service Charge in the manner and on the dates set out and as provided in schedule 4…."

44. Clause 1.1 contains the following definitions:

> "**Premises Service Charge** means the charge attributable to the Demised Premises for provision of the Property Services being:
>
> (a) the Block B Percentage of that part of the Property Total Expenditure that in the opinion of the Landlord's Surveyor (acting reasonably) is solely attributable to Block B; and
>
> (b) the Property Percentage of that part of the Property Total Expenditure that in the opinion of the Landlord's Surveyor (acting reasonably) is attributable to the Property as a whole, not being solely attributable to either:
>
> (i) Block B; or
>
> (ii) any of the Remaining Blocks"
>
> "**Property Services** means the services and amenities and/or facilities referred to in schedule 3 (Property Services) to be provided or made available or procured by the Landlord for the use or intended use by the Tenant and the tenants of the Property or for any category or class will section thereof"
>
> "**Property Total Expenditure** means the costs and expenses reasonably and properly incurred by the Landlord in connection with the Property Services the sum shall be determined by the Landlord's Surveyor acting reasonably from time to time to represent the costs and expenses reasonably and properly incurred by the Landlord in connection with the Property Services"

45. Clause 3.1 of the lease is the tenant's covenant "to pay the rents reserved by this Lease at the times and in the manner set out in this Lease without any deduction whatsoever."

46. Clause 4.3 ("Property Services") contains the following covenants and conditions:

> "(a) At all times during the Term the Landlord shall use its reasonable endeavours to provide the Property Services.
>
> (b) The Landlord may from time to time withhold or vary the Property Services or any of them if in the reasonable opinion of the Landlord it is necessary for the more efficient management of the Property as the case may be. […]
>
> (e) No objection shall be made to any cost incurred by the Landlord included in the calculation of the Property Total Expenditure upon any ground whatever save that the work or expense is not in respect of the Property Services and in

particular no objection shall be made by reason that the material work or service in question might have been provided or performed at a lower cost or to a lower quality standard or specification.

(f) If any of the Property Services shall be performed, works carried out or expenditure incurred which relate partly to the provision of Property Services and partly to services works or expenditure which are not properly part of Property Services the Landlord's Surveyor shall make such apportionment of the same as shall appear to him to be fair and reasonable in all the circumstances."

47. Schedule 4 deals with the calculation and payment of the Premises Service Charge, which includes an obligation in paragraph 5 that:

> "Pending the ascertainment of the Premises Services Charge for each Accounting Period the Tenant shall pay to the Landlord without deduction by equal quarterly payments in advance on the Payment Dates in every year of the Term (and proportionately for any part of a year) a provisional sum on account of the Premises Service Charge which shall be at the annual rate which the Landlord shall consider to be fair and reasonable…"

48. In paragraph 7 of Schedule 4:

> "It is hereby agreed and declared that:
>
> (a) the Landlord shall be entitled to change the Accounting Period… [which has been done in this case from the year to 31 December to the year to 24 March in each year]
>
> (c) "The Landlord shall be entitled to change or vary the extent and nature of the Property Services and may change or vary the method of calculating the Property Percentage in order to achieve a more equitable division of the Property Total Expenditure from time to time and in either event shall make such adjustments resulting therefrom as shall be necessary."

The landlord's obligation to repair

49. In clause 1.1 of the lease, the term "repair" has a discrete and extended definition [271]:

> "**repair** includes occasional making good replacement and rebuilding whether or not in consequence of an inherent or latent defect"

50. The landlord's obligation to repair is set out in paragraph 4.4, as follows [280]:

> "At all times during the Term the Landlord shall keep in good and substantial repair and condition:
>
> (a) the roof, foundations, exterior and main structure of the Property including the structural parts of any roof terrace and balconies and any outside areas and any railings or boundary fences;
>
> (b) the Conducting Media and installations serving the Common Parts of the [...]
>
> (d) all such parts of the Property the repair and maintenance of which is not the liability of any tenant or occupier for the time being of it or any part of it."

51. Common Parts are defined in clause 1.1 as follows:

> "**Common Parts of the Property** means those parts of the Property not comprised within this demise which are capable of being enjoyed by the Tenant in common with the tenants of the Other Units including the roof, foundations and main structure of the Property the access ways, the Conducting Media, plant, equipment, machinery and apparatus for the supply of any services to the Property or the tenants or occupiers thereof party and perimeter walls, balconies and balcony areas, entrance halls, corridors, fire escapes, lifts, ramps and all other facilities or available for common or general use (excluding the Demised Premises)"

52. Schedule 3 [288] defines Property Services in greater detail in seven paragraphs of which paragraph 1 (Maintenance), 4 (Staff and Security) and 6 (General) are most relevant, bearing in mind that by clause 1.2 [272]: "(i) the headings in this Lease shall not affect its construction..."

53. The relevant parts of Schedule 3 (Property Services) are set out below:

> "**1 Maintenance**
>
> The inspection, maintenance, repair, repainting, decoration, servicing, cleaning and where appropriate for the purposes of repair, the resurfacing, rebuilding and replacement as often as the Landlord may consider reasonably necessary of:
>
> (a) any building or structure necessary for the housing of plant or machinery or any other equipment used for the purposes of the Landlord discharging the Property services; and
>
> (b) all party walls, boundary walls and fences not the subject or intended to be the subject of repairing obligations on the part of the Tenant or the tenants of the Other Units; and

(c) all Conducting Media in common use and serving the Demised Premises and all or part of the remainder of the Property to the point of connection with the public system; and

(d) all other parts of the Property not the subject of or intended to be the subject of repairing obligations by the Tenant or any of the tenants of the Other Units; and

(e) the Common Parts of the Property,

notwithstanding that any such work may be necessary by reason of any latent or patent defect or of normal wear and tear or otherwise and notwithstanding that the necessary remedial work amounts to an improvement."

"**4 Staff and Security**

4.1 The employment of such maintenance, security and other staff and independent contractors as the Landlord or the Landlord's Surveyor may reasonably consider necessary for the efficient and economic management of the Property including such remuneration, statutory contributions and pension contributions and insurance as may be reasonable in the circumstances and any redundancy payments payable by law to employees."

"6 General

Costs and expenditure incurred by the Landlord (other than any costs and expenditure which are the responsibility or the intended responsibility of the Tenant or any of the tenants of the other units) in respect of: [...]

(d) all works required to ensure that the Property and all buildings on it comply with the requirements of the insurers of the Property;

(e) all works required to ensure that the Property complies with all statutory and other requirements now and from time to time in force including compliance by the Landlord with every notice, regulation, order of any competent authority in relation to the Property and any works required in connection with the prevention of fire and means of escape in case of emergency; [...]

(l) all other reasonable acts, costs, outgoings, expenses and things done which in the reasonable opinion of the Landlord are for the efficient running of the Property and for the benefit of the occupiers thereof or for the purpose of carrying out the covenants or powers of the Landlord hereunder relating to the Premises Service Charge and/or any insurance provided for under this Lease."

The law

54. The relevant provisions of sections 18, 19 and 27A of the Landlord and Tenant Act 1985 are well known and are not repeated here.

Issue 1: whether the lease permits recovery of the cost of cladding remediation, waking watch and associated costs and/or whether recovery is consistent with the principles in *Waaler v Hounslow* (the Lease Issue)

55. The costs of the fire safety works that the landlord sought to recover from One Housing comprised the costs incurred for: the physical works to remediate the cladding, the waking watch in the meantime, management fees for arranging and supervising the works and legal costs.

56. In its statement of case stated 22 December 2021 [65-78], the landlord emphasised two provisions in the leases: the repair obligation and the obligation to comply with statutes. In particular, the landlord relied upon the following key provisions in the leases:

    (i) The landlord's obligation in clause 4.3(a) to provide the Property Services and the power in clause 4.3(b) to vary those services;

    (ii) The landlord's obligation to repair in clause 4.4(a);

    (iii) The expanded definition of "repair" in clause 1.1 [271];

    (iv) The provisions of Schedule 3 ("Property Services"), in particular those in paragraphs 1 (b) and (d) (and, at the hearing, (e)) and paragraph 6 (e) and (l);

    (v) The provisions in Schedule 4 ("Calculation and payment of the Premises Service Charge");

    (vi) The provisions in Schedule 6 ("Insurance Provisions"); and

    (vii) The lease plans.

57. The landlord's position was that:

    (i) All the work to remove and replace the offensive materials in the development fell comfortably within the ambit of each of the repair and statute-compliance obligations;

    (ii) The cost of the waking watch was covered by at least three provisions: (1) the statute-compliance covenant because it was a measure to reduce the risk of the cladding as required by way of the Regulatory Reform (Fire Safety) Order 2005 ("FSO"), (2) paragraph 4.1 of Schedule 3, which provides for "employment of such… independent contractors as the Landlord… may reasonably consider necessary for the efficient and economic

management of the Property", and (3) the sweeping-up provision at paragraph 6 (l) of Schedule 3;

(iii) Managing agent's fees are recoverable under paragraph 5 of Schedule 3 [289];

(iv) The payment of legal fees is a tenant's obligation under clause 3.9(d) [274 & 275] and those fees are recoverable under the service charge provisions pursuant to paragraph 6(h) of Schedule 3 - "administering and managing the Property (including the collection of rents and service charge)…".

58. Whether the remediation costs fell within the provisions of the lease and whether, therefore, there was a concomitant obligation upon the tenant to pay for them, depended upon a construction of the lease provisions. In support of the landlord's position, Mr Bowker relied upon the judgment of Mr Justice Lindsay in *Credit Suisse v Beegas Nominees Ltd* [1994] 1 EGLR 76, referred to and applied in an earlier Tribunal decision with strong similarities to the current case, the "*Cityscape*" decision of Judge Andrew, Mrs Flint FRICS and Ms Hawkins MSc, dated 9 March 2018 (LON/00AH/LSC/2017/0435). Mr Bowker referred the Tribunal to paragraphs 56 to 58 of that decision.

59. Mr Bowker's key argument was that, in construing the words of the lease, the Tribunal has to ask: "Does the lease work properly for the benefit of the occupants?" If the arguments of the respondent are correct, namely that the cost of works cannot be recovered through the service charge, that would go completely against the grain as to how the leases in the present case should work: the entire operation of the leases breaks down. It was clear that those who drafted the lease, through the use of general wording – including an expanded definition of repair and incorporating the carrying out of improvements and the remedying of any latent or patent defect - had clearly intended to put the obligation to do such work on the landlord and an obligation on the tenant to pay for it.

60. Mr Bowker said that the lease provisions here were not the same wording as in the *Cityscape* decision, but the Tribunal should arrive at the same outcome, namely that the lease had to be made to work; and work effectively.

61. Mr Evans for the respondent referred the Tribunal to the Upper Tribunal decision in *Dell v 89 Holland Park Management Limited* [2022] L.& T.R. 27, where, at paragraph 32, Judge Elizabeth Cooke helpfully summarised the principles of lease construction in the leading case of *Arnold v Britton* [2015] UKSC 36. Submitting that the remediation costs were not recoverable under the lease provisions, Mr Evans reminded the Tribunal that "bad bargains are tough"; and, if on a true construction of the leases, the fire safety costs were not recoverable and that was "commercially tough" on the landlord, that was "their

problem". It did not mean that the Tribunal should find that these leases cover the recovery of the remediation costs.

The Tribunal's determination on this issue

62. The costs of and associated with the remediation works are recoverable under the lease and payable by One Housing/Riverside, as follows:

- The full cladding remediation costs, less deductions for the Price Bailey invoice of 31 May 2021 [693] and the re-apportioned sum of £39,201.95 (resulting from the agreement with Hampshire County Council);
- The waking watch costs in full;
- The managing agents' fees in full; and
- Legal costs in the sum of £32,962.80.

Reasons for the Tribunal's determination

63. As appears below, the Tribunal found that the landlord's obligation to carry out remediation works and the tenant's obligation to pay for them arose under several provisions of the lease.

Cladding remediation costs

Obligations to provide Property Services and to repair

64. As a reminder, clause 4.3 is the landlord's obligation to provide the Property Services, which are more clearly defined in Schedule 3; and clause 4.4 is the landlord's obligation to repair, the costs of which are also included amongst the Property Services in Schedule 3.

65. Clause 4.4 states: "At all times during the Term the Landlord shall keep in good and substantial repair and condition… the exterior and main structure of the Property…"

66. As Mr Bowker rightly points out, the covenant to repair is in wide terms given that the definition of "repair" has been expanded in clause 1.1 to include replacement and the remedying of inherent and latent defects, and, given the extended definition of works caught by "Property Services" in paragraph 1 of Schedule 3, which include improvements.

67. The tenant's obligation is to pay by way of service charge a specified proportion of the costs incurred by the landlord in providing the "Property Services" in Schedule 3, including repair that falls within the landlord's repairing covenant.

68. It is not an unlimited or open-ended obligation to pay for any work that the landlord does to the Development and, indeed, clause 4.3(e) makes clear that the tenant can object to any cost incurred by the landlord where the work or expense is not in respect of the Property Services. Where that applies, by clause 4.3(f), there must be an apportionment

between works carried out by the landlord, which do and which do not fall within the definition of Property Services.

69. What then is the limit on the landlord' obligation to do works under clause 4.4, and the tenant's liability to pay for such works? Mr Evans for the respondent says that in order for any of the landlord's works to be caught by the definition of "repair" there must first be some disrepair: that is to say, some physical damage to the building which constitutes a deterioration from a former state. This proposition is supported by case law upon which he relied, in particular, *Ravenseft Properties Ltd v Davstone (Holdings) Ltd* [1980] QB 12, CA, applied in *Waaler v Hounslow LBC* [2017] EWCA Civ 45; and *Welsh v Greenwich LBC* (2001) 33 H.L.R. 40, CA. In short, Mr Evans' submissions can be summarised as: absent any deterioration, there can be no disrepair; absent disrepair, any works carried out by the landlord cannot be repair. The expanded definition in clause 1.1 only bites once works can be first categorised as works of "repair".

70. *Ravenseft* was a case where the stone cladding of blocks of flats bowed outwards due an inherent defect, namely a lack of expansion joints. There was physical damage to the building which meant that it was in disrepair and the obligation to repair (the tenant's obligation, in that case) therefore arose. If there had not been physical damage, the building would have been in its original condition and there would have been no question of disrepair or of an obligation to repair arising.

71. *Arnold v Britton* enjoins the Tribunal to identify the intention of the parties at the time that the lease was granted, focusing on the meaning of the relevant words in the lease, in this case the repairing obligation. It is necessary to do so, by considering the meaning of those words in their documentary, factual and commercial context. It seems clear to the Tribunal that the intention of the landlord's administrators and One Housing at the date when the lease was granted was to widen the repairing obligation of the landlord to the extent that the tenant would pay for as much of such repairs as possible. However, the meaning of the repairing covenant must be assessed in the light of the natural and ordinary meaning of the clause, and of the other factors listed by Lord Neuberger.

72. Insofar as the landlord is obliged to carry out "repair", the Tribunal is persuaded by Mr Evans that there must first be some disrepair, that is to say, some physical damage or deterioration of the building, before the obligation to "repair" is engaged. In the present case, the ACM cladding was, it appears, still in very good condition with no sign of physical damage or deterioration. The investigations surrounding the cladding and the work to install it arose only because of external factors, not least the dangers from certain types of cladding made apparent by the Grenfell Tower fire. Therefore, in the Tribunal's judgment, the remediation work carried out by the landlord at the Development cannot fall within the definition of "repair" alone. This does not make the lease unworkable, as Mr Bowker feared, but merely

places a limit on the landlord's obligation and the tenant's liability to pay for works.

73. However, when putting effect to their intention, the parties did not limit the repairing covenant only to "repair": the parties chose to impose an obligation on the landlord that it "shall keep in good and substantial repair and condition" the exterior and main structure of the Property. Mr Evans urged us to say that the words "and condition" added nothing: "It is a red herring", he said. His submission was supported by the fact that the words "and condition" were not repeated in the definition of "Property Services" in Schedule 3.

74. This is, however, where the Tribunal parts company with Mr Evans. There is a clear line of authorities, not least *Credit Suisse v Beegas Nominees Ltd*, but also subsequent decisions, where it was held that a covenant which imposes or includes a liability to keep in good condition may be construed as imposing a liability which is conceptually different from an obligation to repair or keep in repair.

75. In *Credit Suisse*, a prestigious commercial office block that suffered from shortcomings in the design and construction of the cladding and glazing systems, the clause concerned was:

> "C. (Subject to the payment by the tenant of the rents and service charge) to maintain repair amend renew cleanse repaint and redecorate and otherwise keep in good and tenantable condition:
> 1. The structure of the building…"

76. Mr Justice Lindsay accepted that one cannot have an existing obligation to repair unless and until there is a disrepair but, he said, "that reasoning does not apply to a covenant to keep (and put) into good and tenantable condition." It was the duty of the court to give a proper and full effect to each word used in the repairing covenant. Not only were the verbs "amend" and "renew" capable of going outside the verb "repair" but the words "otherwise keep in good and tenantable condition" also had the potential to cover works beyond mere repair and the two phrases could each be interpreted as separate covenants. The covenant to keep the property in good and tenantable condition implied a duty to put the property into that condition, if it was not already in such condition; and that condition was the condition that a tenant of the class likely to take the building of the kind in question would require. In *Credit Suisse*, the condition that a tenant of the class of this tenant would require would be a building that was watertight.

77. In *Welsh v Greenwich LBC*, a local authority letting contained a landlord's covenant "to maintain the dwelling in good condition and repair except for such items as are the responsibility of the tenant." The Court of Appeal held that the obligation to maintain the dwelling in good condition imposed a liability conceptually different to that of the obligation to keep in repair. In that case, there was black mould in the dwelling, but no deterioration or disrepair to the structure. The

landlord was nonetheless held liable under the covenant to carry out works for which it would not have been liable had the covenant been merely to repair or keep in repair.

78. From the headnote of that case:

> "The reference to "good condition" in clause 2.1 of the tenancy agreement made a significant addition to the obligation to repair; nor was the landlord authority's obligation to maintain the flat in good condition limited to good structural condition; even though it had not damaged its structure, the severe mould growth could not be regarded as merely a matter of amenity disassociated from the physical condition of the flat; accordingly, the authority had breached the covenant to maintain the flat in a good condition by failing to provide thermal insulation for the exterior walls."

79. The Tribunal is conscious of the dangers of comparing clauses in other leases, drafted in different terms and appearing in different contexts, and drawing conclusions from decided cases based on those clauses, under differing factual circumstances. Nonetheless, in the present case, the landlord had an obligation that it "shall keep in good and substantial repair and condition… the exterior and main structure of the Property…" and the Tribunal considers, in the context of this lease and these circumstances, that the words "and condition" must have some meaning.

80. Turning back to the guidance in *Arnold v Britton*, the intention of the parties was, in the Tribunal's view, that the Development would be kept not only in repair, but also in such a condition that was suitable for a tenant of the class that would be likely to take it. In the present case, the class of tenant is a social housing association, whose main, maybe only, function is to provide safe homes for people to live in; and the "condition" which it would require for those parts of the Development that they had taken by way of head lease, is that the building is in a safe condition for those occupants. The experts' reports demonstrate that the building was not in such a condition, but that it posed a very severe fire risk, potently life-threatening, for all the respondent's tenants.

81. It is not a question of whether either party had struck a bad bargain in signing up to the lease; nor whether the result is unfair to an "innocent" social housing landlord. The respondent had already accepted a liability to pay for putting right inherent or latent defects in the case of disrepair; this result merely extends the liability to circumstances where the condition of the Development is so detrimental to the respondent's interests and requirements, and those of its tenants, that it must be put right by the landlord under its obligations under the lease. Indeed, if the boot had been on the other foot and the landlord was refusing to remedy obviously dangerous cladding, it is hard to imagine One Housing accepting the position and not seeking to enforce the landlord's obligation under clause 4.4.

82. It does not matter that the words "and condition" are not repeated in paragraph 1 of Schedule 3. The purpose of that Schedule is to further define and expand the list of work that can constitute Property Services and it is not intended by exclusion of those words to limit them. In any event, by clause 4.3(b), the landlord may from time to time vary the Property Services if it is necessary for the more efficient management of the property, and the terms of paragraph 1 of Schedule 3 shows that "maintenance" has a very wide meaning in the context of this lease. Remediation works to rectify the serious fire safety risk presented by the cladding easily falls within the Schedule. Indeed, paragraph 1 expressly covers "any latent or patent defect…notwithstanding that the necessary remedial work amounts to an improvement."

83. Once the obligation under clause 4.4 arises, it clearly applies to the cladding as being part of the "exterior". Mr Bowker also relied upon paragraphs 1(b), (d) and (e) of Schedule 3 to say that the Property Services may be delivered by the landlord. These relate to the carrying out of work (b) to party walls, (d) to all other parts of the property not the subject of repairing obligations by the tenant or the tenants of other units and (e) to the Common Parts of the property.

84. Mr Evans says, and the Tribunal agrees, that the external cladding does not amount to a party wall, boundary wall or fence and therefore sub-paragraph (b) does not apply. However, the Tribunal considers that both (d) and (e) are capable of applying to work carried out by the landlord. In the lease, the definition of Common Parts "means those parts of the Property not comprised within this demise which are capable of being enjoyed by the Tenant in common with the tenants of Other Units including the roof, foundations and main structure of the property…" In the Tribunal's view this must include the exterior cladding which provides protection for the main structure against the elements and which is enjoyed by One Housing in common with tenants of other units in the Development. Therefore, if the remediation work falls within the repairing covenant and, therefore within paragraph 1 of schedule 3, it must also fall within sub-paragraphs (d) and (e).

85. The Tribunal turns briefly to Mr Evans' argument that the works were improvements and that, therefore, the principles in *Waaler v Hounslow* apply. In that case, the local authority replaced windows and cladding, which were held to be improvements. Although the lease gave Hounslow the right to make improvements, and obliged the lessee to contribute to their cost, the Upper Tribunal held that where Hounslow had an obligation to carry out repairs and a discretion to do improvements, it ought to have taken particular account of the extent of the financial impact on lessees of proceeding; and the Court of Appeal upheld that decision.

86. Mr Evans submitted that the remediation works were clearly improvements. As such, the principles of *Waaler* applied. However, he said, in the present case there was no evidence that Mr Swycher had

taken particular account of the extent of the interests of the lessees, their views on the proposals and the financial impact of proceeding; nor the fact that One Housing was an exempt charity. As a result, any costs that the respondent was found liable to pay should be reduced.

87. The Tribunal, however, agrees with Mr Bowker's submission that there is a distinction between circumstances where improvements are optional, as in *Waaler*, and where there was an obligation to make improvements, as in the present case, where that obligation arose to rectify fire safety risks through remediation works. It is not the case that One Housing's interests were not considered: the landlord carried out a full statutory consultation before commencing works, but One Housing chose not to respond. Certainly, it made no complaints about the proposal to carry out works nor the estimates of the likely very substantial costs.

88. The Tribunal agrees with Mr Bowker that the landlord's swift action to remedy the flammable cladding was "exemplary". As he submitted, it was critical to start the remediation work as soon as possible and, by acting so quickly, the Development was made safe sooner, the waking watch was stood down and enhanced insurance premiums were avoided, thereby saving One Housing and other head leaseholders considerable, and possibly irrecoverable, further costs.

89. There is no evidence from One Housing of any financial hardship that the organisation might suffer but it is clear that One Housing has very valuable leases. These points provide an answer to the submission that the *Waaler* principles are engaged but were not applied: they were applied and clearly satisfied.

Statutory compliance provisions

90. If the Tribunal is wrong to say that the remediation work carried out by the landlord falls within the repairing obligation at clause 4.4 and the Property Services provision at paragraph 1 of Schedule 3, then the Tribunal is satisfied that the work falls within paragraph 6 of Schedule 3.

91. The two relevant sub-paragraphs relied upon by Mr Bowker are 6(e), works to comply with statutory and other requirements and any works required in connection with the prevention of fire, and 6(l), all other reasonable acts costs and things done for the efficient running of the property and the benefit of the occupiers (the sweeping-up clause).

Paragraph 6(e)

92. The Tribunal is satisfied that the work carried out by the landlord was required to ensure that the Development complied with statutory requirements and that the works were required in connection with the prevention of fire.

93. Mr Bowker relied upon the Regulatory Reform (Fire Safety) Order 2005 ("FSO").

94. The FSO is aimed at the elimination or reduction of risks caused by dangerous substances on premises. A dangerous substance includes a substance which, because of its physico-chemical or chemical properties and the way it is used or is present in or on premises, creates a risk. The hazard with which the FSO is concerned is that the substance has the potential to give rise to fire on the premises that may affect any person who is lawfully on them, or in the immediate vicinity, who was at risk from a fire on the premises. Article 12 is the duty of the responsible person (the person in control or the owner) to ensure that the risk is either eliminated or reduced so far as reasonably practicable. Mr Bowker said that the ACM cladding on the Development clearly fell within the definition of a dangerous substance which had the potential to give rise to fire.

95. It is clear from the FSO as originally drafted that it was aimed squarely at places of work and, by article 6(1), it did not cover "domestic premises". Those are defined as "premises occupied as a private dwelling (including any garden, yard, garage, outhouse, or other appurtenance of such premises which is not used in common by the occupants of more than one dwelling)".

96. An amendment was made to article 6 on 16 May 2022 (that is, after the remediation work had been completed) to insert new sub-paragraphs (1A) and (1B) as follows:

> "(1A) Where a building contains two or more sets of domestic premises, the things to which this order applies include–
>
> (a) the building's structure and external walls and any common parts;
>
> (b) all doors between the domestic premises and common parts (so far as not falling within sub-paragraph (a)).
>
> (1B) The reference to external walls includes–
>
> (a) doors or windows in those walls, and
>
> (b) anything attached to the exterior of those walls (including balconies)."

97. Mr Bowker suggested that the original wording of the FSO was limited to any work that might be envisaged *within* the flats, but that it would still otherwise apply.

98. In the event, it was common ground that the FSO would not apply to any work that might be required within a private domestic flat. The question was then whether it applied to those parts of the building used in common with other tenants, that appeared to be excluded from the

definition of "domestic premises". Mr Evans fixed on the word "used" in common, which, he said, was not as the same as "enjoyed by the Tenant in common", which forms part of the definition of Common Parts in clause 1.1 of the lease. It was clear, he said, that the amendment to insert articles 6(1A) and (1B) were introduced to bring in an obligation to deal with the building's structure and external walls. However, because those amendments were brought in *after* the work was carried out, this meant that the FSO had no application to the remediation works, which could not fall within paragraph 6(e) of Schedule 3 to the lease, not being a statutory requirement at the time the works were carried out.

99. It is clear that when it was introduced the FSO was aimed at fire hazards within the workplace, and it was not intended to involve measures within domestic premises. However, it still applied to the common parts used in common with other tenants. This would clearly cover communal corridors landings, staircases and entrances, which would constitute a workplace for any employee or contractor engaged by the landlord for the purposes of cleaning, maintenance and repair.

100. Importantly, however, the words "not used in common" in article 2 are used by way of delimiting what comprises "domestic premises", not by way of limiting those parts of premises outside of domestic premises which might within the ambit of the Order.

101. One has to remember that the Development comprised mixed-use premises, containing commercial units - clearly falling within the ambit of the FSO as workplaces - as well as individual domestic premises within some of the blocks. If necessary, the Tribunal would say that the exterior cladding of the building was "used" by the occupants of domestic premises in common with others, to the extent that they relied upon it and enjoyed it (within the definition of Common Parts in the lease) for the protection of the structure of the buildings that enveloped their premises. However, the Tribunal does not think it is necessary to go so far: the cladding clearly presented a serious fire risk to everyone within and in the vicinity of the Development, including the landlord's employees and contractors, and as such the landlord was under a duty to eliminate or reduce the risk presented by the cladding, so far as reasonably practicable. The addition of the words at (1A) and (1B) made the position crystal clear in respect of buildings that contained two or more sets of domestic premises but, as Mr Bowker submitted, a proper reading of the FSO meant that it applied before those amendments, in any event, to those parts of a building outside of the individual private flats.

102. There is some force in Mr Evans' submission that none of the applicant's evidence went to this issue and that there was no evidence that duties under the FSO were on anyone's mind at any time before the work was carried out. However, whether or not it had occurred to anyone before the works were carried out, the statutory duties were there. Mr Swycher recognised the serious fire risk presented by the

ACM cladding and ensured that the landlord, as the responsible person, took swift steps to eliminate and reduce that risk so far as reasonably practicable.

British Standards

103. If the Tribunal is wrong that the FSO applied to the Development at the time when the remediation works were carried out, it relies upon the fact that the original construction works carried out in 2019-2012, which installed the ACM cladding and failed to provide proper fire cavity breaks and fire stopping, were in contravention with British Standards then in place.

104. The external façade report produced by FR Consultants Ltd ("FRC") and dated 30 October 2020 was produced as a result of intrusive inspections of the external wall system of the Development. A copy appeared in the agreed hearing bundle [124-193]. The report was to comment on the existing building materials with reference to the provisions set out in the Approved Documents applicable at the time of construction and make recommendations to remediate items of risk resulting from ministerial guidance.

105. At section 3.0 of the report [133] the Building Regulations relevant cladding is B4(1). Paragraph 3.3 states that:

> "This provides a mandatory obligation at B4(1) which has required (from at least 2000) that: "the external walls of the building shall adequately resist the spread of fire over the walls and from one building to another having regard to the height, use and position of the building."

106. Guidance is contained in Approved Document B ("ADB"). Non-compliance with that guidance is, on the face of it, evidence of non-compliance with the Building Regulations. Without repeating all of the findings of the FRC report, in several places it concludes that:

> "The evidence we have seen suggests that there have been material non-compliances with the advisory provisions of the ADB, such that we do not think the building façade construction will suitably pass a BS8414-2 test and therefore, we suggest would also not comply with the mandatory clause within the Building Regulations, namely B4(1)."

See for example: paragraphs 8.1.3.9 [151], 8.2.33 [155], 8.3.3.3 [159] and 8.4.33 [163].

107. The Property Services in Schedule 3 to the lease cover, in paragraph 6, the:

> "Costs and expenditure incurred by the Landlord… in respect of: … (e) all works required to ensure that the Property complies with all statutory and other requirements now and from time to

time in force… and any works required in connection with the prevention of fire and means of escape in emergency; …"

108. Simply put, the original construction work carried out between 2009 and 2012 did not comply with statutory requirements then in force, or as subsequently amended, and they created a fire risk. The landlord's costs of ensuring that the Development complied with the statutory requirements at the time and now in force and to prevent fire, fall within paragraph 6(e).

Costs of the waking watch

109. While the Tribunal finds that the remediation works carried out in 2019-2012 fell within the "works" envisaged by paragraph 6(e), there was a dispute as to whether such "works" could cover the costs of the waking watch put in place until the remediation works were completed.

110. Regarding the use of use of the word "works" in paragraph 6(e) and, for that matter in paragraph 6(d) (works required to comply with the requirements of the insurers), Mr Bowker said the word should be construed as meaning "work, endeavours or activities" rather than restricted to physical works. He said that if "works" were construed narrowly it wouldn't cover, for example, the installation of a fire extinguisher, but if it were interpreted in a meaningful, purposeful way, it would cover both the waking watch and the remediation works. However, Mr Evans argued that the word "works" should be construed narrowly and restrictively to exclude the costs of the waking watch, which were services, not "works".

111. The Tribunal's view is that the word "works" has to be construed in the context of the whole of Schedule 3. Paragraph 1 is expansive in the nature of activities that the landlord can undertake to ensure that the Development is kept in good and tenantable repair and condition. The draughtsman has tried to cover as many eventualities as possible, including compliance with the requirements of insurers and with all statutory requirements, especially for the prevention of fire. To construe "works" narrowly would remove an obligation on the landlord to provide services that were clearly necessary for the safety of occupants, such as the waking watch, the lack of which, in the present circumstances, could have had significant consequences for the insurance of the building and the continued occupation of it, including by the Respondent's tenants. The Tribunal therefore considers that the word "works" should be construed widely as meaning "works, endeavours or activities" rather than only physical work; and to do so does not stretch the natural meaning of the word in the context of this lease.

112. However, if the Tribunal is wrong about that, the Tribunal finds that the waking watch falls within the following paragraphs of Schedule 3, so that the applicant landlord may provide the service and One Housing is required to pay for it, namely:

(i) Paragraph 1, the waking watch being a form of continuous "inspection",

(ii) Paragraph 4.1, which provides for: "The employment of such maintenance, security and other staff and independent contractors as the Landlord or the Landlord's Surveyor may reasonably consider necessary for the efficient and economic management of the Property…", and

(iii) Paragraph 6(l), which is the sweep-up clause, for "all other reasonable acts, costs, outgoings, expenses and things done which in the reasonable opinion of the Landlord are for the efficient running of the property and for the benefit of the occupiers thereof…"

113. The terms "efficient" and "efficient and economic" are words apt to describe matters which provide value for money.

114. The evidence was that insurers insisted on the instigation of a waking watch when the fire hazards of the ACM cladding became apparent; and if the requirements of insurers had not been complied with, there was a risk that insurance cover would be withdrawn and/or without cover a risk that the whole Development would have to be evacuated. It was therefore reasonable for the landlord to instigate the waking watch and it was clearly for the "efficient and economic" management and running of the Development and for the benefit of occupiers, pending the remediation works. The financial costs of having to evacuate the Development if insurers withdrew cover would have been enormous.

Managing agents' fees

115. The key invoices claimed by the Applicant landlord through the service charge for managing the cladding remediation works were:

(i) The invoice from London & Lisbon Properties Limited dated 21st April 2022 for £45,000 plus £9,000 VAT (totalling £54,000), which was the "Fee relating to the Cladding of Brewhouse Yard including preparing and supervising the tender and appointment of the successful contractor including preparing and executing the design and build contract and supervising the works dealing with all matters ancillary there to and all day-to-day matters associated therewith" [673], and

(ii) The invoice from Tideway dated 13 May 2022 for £10,000 plus £2,000 VAT (totalling £12,000), which was the "Fee in connection with remediation work to defective cladding including commissioning initial specialist survey, issuing Section 20 Notices, revision of service charge budgets, liaison with the landlord, insurance consultants, the development team, contractors, lawyers and tenants" [699].

116. While Mr Swycher and Mr Burbage had each commented in their witness statements on the steps taken by Tideway in relation to the remediation works, Mr. Evans cross examined them closely about both invoices.

117. In relation to the first invoice, it transpired that the work was carried out by Mr Swycher in his capacity as the sole director of his family firm, London & Lisbon Properties limited. He had not used a time recording system, but he had agreed the amount with Mr Burbage of Tideway. Mr Swycher said that ordinarily for such works there should be a clerk of works and a quantity surveyor, but he and Mr Burbage thought the remediation works, while significant, were relatively straightforward and that there were substantial savings to be gained by Mr Swycher using his experience as a property developer and doing the supervisory works himself.

118. The amount of the second invoice was also agreed between Mr Swycher (in his capacity as director of the landlord company) and Mr Burbage. Although there was a management agreement in place between the Applicant and Tideway, this was non-standard work agreed as a lump sum. Mr Swycher said it represented good value and he was happy to agree the amount proposed to him by Mr Burbage for this work.

119. In his closing submissions, Mr. Evans said that Mr Swycher's fee (the first invoice) could not fall within paragraph 5 of Schedule 3, which permitted the landlord to employ managing agents. In any event, he said the Tribunal had to be very critical of it, because this was an invoice agreed between the sole director of one company with the sole director of another.

120. Paragraph 5 of Schedule 3 to the lease permits:

> "The employment of managing agents at a reasonable and proper fee for the management of the Property and the provision of the Property Services Provided always that if the Landlord fulfils such duties itself or through its own management company it may levy a reasonable charge."

121. In the Tribunal's view, paragraph 5 of Schedule 3 covers the cost of the Tideway invoice, which is manifestly reasonable in amount for the work it covered. The invoice from London & Lisbon could arguably fall within paragraph 5, but it certainly falls within paragraph 4.1 of Schedule 3, which permits the landlord to employ other staff and independent contractors who are considered necessary for the efficient and economic management of the property. In the Tribunal's view, that would easily cover the work carried out by London & Lisbon.

122. As to the amounts charged by London & Lisbon, the Tribunal is satisfied that Mr Swycher achieved significant savings in carrying out the supervision of the remediation contract himself. Had an independent contractor being engaged to supervise a contract worth around £1.5 million, supervision fees of between 5% and 10% of the

contract sum would have been between £75,000 and £150,000 – much higher than London & Lisbon charged. Therefore, the Tribunal considers that these fees are reasonably incurred, reasonable in amount and payable by One Housing.

123. Regarding the Price Bailey invoice of 31 May 2021 [693], Mr Evans elicited from Mr Swycher in cross examination that this invoice had been challenged by the landlord itself, for having given inaccurate advice that the contractors would charge 5% VAT on the remediation costs when the current rate of 20% was charged; that the landlord had recovered the sum paid (£18,739.20 on the invoice); and that the amount recovered would be credited to the head leaseholders in their respective shares. Therefore, this sum is to be excluded from the reasonably incurred service charge costs.

Payment of legal fees

124. Prior to the current Tribunal application dated 16 July 2021, the applicant instructed Bradys solicitors and incurred significant legal fees amounting to around £60,000. The relevant invoices appear in the hearing bundle, though only two of them pre-date the issue of these proceedings: the invoice dated 31st March 2021 for £6,066.00 [689] and that dated 12 July 2021 for £26,896.80 [690]. Few details were given, but it appears that these legal costs were in relation to seeking advice about a possible claim for damages against Ardmore, and in relation to the dispute with Hampshire County Council, when it refused point blank to pay the advance service charge demands for the remediation costs. Certainly, there was correspondence in the agreed hearing bundle between solicitors for the applicant and Hampshire County Council in March, May and September 2021 [1053- 1063]. In cross-examination, Mr Swycher also explained that the landlord had taken legal advice about the head leases, and its liabilities under them, from specialist construction counsel (not named on the Bradys' invoices, but possibly, Mr Swycher suggested, a Mr (James) Hatt).

125. The other invoices from Bradys all post-date the issue of the Tribunal application [694, 695, 696 & 698]. There was no breakdown of the work carried out by the solicitors and no narrative explanation on the invoices. However, the first three invoices, at least, referred either to the Tribunal proceedings or to the instruction of Mr Robert Bowker of counsel, who appeared before us at the hearing.

126. Therefore, in the absence of further detail, the inference to be drawn is that the first two invoices related to liability of third parties to contribute to the service charge costs for cladding remediation, while the remaining invoices related to the Tribunal application.

127. Mr Bowker relied upon the tenant's obligation clause at 3.9(d) of the lease [274 & 275], which was:

> "To pay and reimburse the Landlord and the Administrators on demand all costs, fees, damages, charges and expenses

> (including proper and reasonable legal costs, bailiffs fees and fees payable to a surveyor) which may be reasonably and properly incurred or suffered by the Landlord and the Administrators in connection with or incidental to:... (d) the recovery or attempted recovery of arrears of the rents or other sums due from the Tenant under this Lease."

128. Mr Bowker also relied upon paragraph 6(h) of Schedule 3 [289] which covered the:

> "Costs and expenditure incurred by the Landlord... in respect of: ... (h) administering and managing the Property (including the collection of rents and service charge) performing the Landlord's other obligations in this Lease insofar as they relate to the Property and including the preparation of accounts relating to the Premises Service Charge and the auditing thereof..."

129. Mr. Evans relied upon the Upper Tribunal decision of Judge Elizabeth Cooke in *Dell v 89 Holland Park (Management) Limited* [2022] UKUT 169 (LC) to say that a general sweep-up clause in a lease could be used to recover legal costs incurred for the proper maintenance of a building (giving the example, at paragraph 36 of that case, of a damaged roof where there is a linked landlord's obligation to maintain and repair the structure of the building), but *not* to recover legal costs in litigation against a third party.

130. While acknowledging that the Upper Tribunal decision is to be considered soon by the Court of Appeal, the Tribunal's view is that none of the legal costs can be recovered under the tenant's obligation clause 3.9(d), because, first, none of those costs were incurred to recover arrears of rent or service charges "due from the Tenant under this Lease", but rather in the case of the first two invoices, such arrears were due from third parties; and, secondly, the Tribunal proceedings do not relate to the recovery of arrears from the respondent, but a determination of the payability and reasonableness of advance (and, now, final) service charge demands, all of which were paid by the respondent.

131. However, the first two invoices, at least, are capable of being recovered through the service charge under paragraph 6(h) of Schedule 3, notwithstanding the decision in *Dell*. This is because the clause makes express reference to "administering and managing the Property (including the collection of rents and service charge)" which quite clearly could relate to service charge arrears owed by others on the Development; and the words "collection of rents and service charge" do not appear in clause 4(4) of the lease relied upon in *Dell*.

132. As the first two invoices for legal costs related to the attempted recovery of service charge arrears from Hampshire County Council, the Tribunal therefore determines that the first two invoices for legal costs are payable under the lease. These are the invoices dated 31st March

2021 for £6,066.00 [689] and that dated 12 July 2021 for £26,896.80 [690]. There was no challenge to the amounts payable, so the amount payable is £32,962.80.

133. Insofar as any arguments remain about the applicant's ability to pass its costs of these Tribunal proceedings through the service charge, those may be left to submissions on the respondent's application for an order under section 20C of the 1985 Act, after this decision has been issued.

Issue 2: whether the applicant has failed to evidence that it has taken steps to establish whether third-party funding was available to pay for the cost of cladding remediation, waking watch and associated costs (i.e. whether such costs were therefore "reasonably incurred" under section 19 of the 1985 Act) (the Funding Issue)

134. Mr Evans challenged the fact that the costs incurred by the landlord in carrying out the remediation works, and the associated costs of the waking watch, management fees and legal costs, were "reasonably incurred" within the meaning of section 19(1) of the 1985 Act. He argued that the applicant had failed to evidence that it had taken steps to establish whether third-party funding was available to pay for the cladding remediation and associated costs and that it should have done so before a service charge was demanded.

135. Although initially One Housing claimed that the landlord should have explored the possibility of funding from the Building Safety Fund, at the hearing it accepted that there is no possibility of recovery of a grant, and it no longer advanced this point.

136. However, Mr Evans submitted that the applicant had failed to produce any contractor's guarantee(s) or warranty(ies) or insurance policy, whether it be the buildings insurance policy or any National House Building Council ("NHBC") policy and, in each case, it had failed to take reasonable steps to ascertain whether monies may be obtained via any of these routes.

137. Mr Evans also submitted that there were clear potential claims against the contractor, Ardmore, for breach of contract and/or under section 1 of the Defective Premises Act 1972. Although the applicant was apparently in communication with Ardmore regularly from November 2020 to February 2021, and then less regularly in May, July and September 2021 alleging such a breach [721-733], the applicant had failed to take reasonable steps to ascertain whether monies may be obtained from Ardmore and, if so, obtain them. Mr Evans submitted that recent correspondence between the landlord and Ardmore indicated a strong claim against the contractor, with probable prospects of success. The Tribunal was therefore invited to determine that all or part of any remediation costs in the demands are not to be regarded as

relevant costs to be taken into account in determining the amount of any service charge payable by the respondent.

138. Mr Evans relied upon *Oliver v Sheffield City Council* [2017] 1 WLR 4473, CA, to say that the lease should not be interpreted so as to allow double recovery. The point was that if the Tribunal found One Housing/ Riverside liable for the remediation costs, the landlord would still have a claim to recover damages from Ardmore, which could lead to double recovery.

139. Mr Evans also relied upon the case of *Avon Ground Rents Limited v Cowley and others* [2020] 1 WLR 1337, CA. That case concerned a mixed-use development where rain was leaking into one of the commercial units and a claim was made to the NHBC. The First-tier Tribunal extinguished one tenant's payable service charges and reduced those of the other tenant, to reflect the imminent payment of monies by the NHBC. On appeal, the Upper Tribunal saw no reason why the prospect of a receipt should be certain before giving credit. The Court of Appeal was content that there was a "possibility" of a receipt from a third party not, Mr Evans submitted, a "probability".

140. Mr Evans also drew attention to one of the commercial leases which expressly stated that the landlord:

> "… will not include within the calculation of the Estate Total expenditure and the Tenant shall not be liable for… (vi) any costs which are recovered from a third party and the landlord shall use reasonable and commercially sensible endeavours to do so…"

The Tribunal's determination on this issue

141. The Tribunal is satisfied that the landlord had taken sufficient steps to establish whether third-party funding was available to meet the remediation costs; that it was not so available; and that the service charge costs were reasonably incurred despite there having been no third-party funding.

Reasons for the Tribunal's decision

142. The Tribunal had no difficulty in distinguishing *Avon Ground Rents v Cowley*. On the facts of that case, payment by the NHBC was not just a "possibility" but a near certainty: the funds from a third party were far more readily available than any money that might be realised from a prospective damages' claim against Ardmore. Although it does appear that there might be a strong claim against Ardmore for the inadequacies of their work, there is no certainty in litigation; and, therefore, no certainty that full, partial or even any recovery, would be made.

143. The Tribunal considers that the landlord cannot reasonably be required to litigate as a precondition to recovery of service charges. It is

impossible to say how long litigation would take and how much it would cost. A similar argument by tenants was rejected in the *Cityscape* decision, where potential claims were said to be speculative with uncertain outcomes, with the risk of further time-consuming and expensive litigation that might generate further service charges.

144. When the landlord made its first tentative claim against Ardmore, Mr Swycher explained, and the Tribunal accepts, that he had no means to bring court proceedings against Ardmore at the time; and he had identified no solicitor who would take on the case. The potential difficulties of litigation that would have been experienced at the time are brought into sharp focus by the applicant's recent letter before action dated 4 April 2023, sent on the applicant's behalf by Escalate Law Limited [734-742], which was met by Ardmore's denial of liability, in the strongest terms, in its letter of 28 April 2023 [745-749].

145. The Tribunal therefore concludes that it is not appropriate to discount any of the service charges in this case against the mere possibility that a successful action against Ardmore might produce some payment from the third party at some date in the future.

146. It is obviously in the parties' interests to consider making such claims against third parties as might result in a recovery of a receipt to defray some or all of the remediation costs. As submitted, Ardmore is a clear target as are potentially the architects, Rolfe Judd Limited, and the company that supervised the works, Avison Young Project Management Limited. However, at this stage, the prospects of success are too remote for the Tribunal to reach the conclusion that the applicant failed to take reasonable steps to pursue third parties or to determine that any part of the remediation costs were not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by One Housing.

147. The Tribunal accepts that a lease should not be interpreted to allow double recovery: *Oliver v Sheffield CC*. Mr Swycher dealt with that in his evidence by saying that if he were to recover any monies from Ardmore, they would be reimbursed to the head leaseholders in the relevant proportions that they contributed to the service charges. Mr Evans was concerned that, if One Housing/Riverside were found liable to pay for the remediation works in this case, there would be no incentive for Mr Swycher to bring proceedings against Ardmore to recover funds.

148. The Tribunal cannot speculate on what litigation may or may not follow this determination. Mr Swycher acts as a director not only of the landlord, St John, but also as a director of one of the head leaseholders, Brewhouse Yard, both of which have suffered or may suffer losses arising from the need to remediate the cladding and this determination. Their potential claims against Ardmore and others are joined by One Housing's potential claim against St John, Ardmore and others, as set out in Devonshires' letter of claim dated 7 June 2023, provided to the

Tribunal at the hearing. With apparently strong claims under the Defective Premises Act 1972 and/or for a remediation contribution order under the Building Safety Act 2022, the incentive to seek recovery would appear to be strong.

149. Regarding the other potential sources of third-party funding, there were copies of the available guarantees and warranties in the agreed hearing bundle. The Tribunal was told that none of these would cover the cost of the necessary remediation works.

150. Notably, there appeared to be no contractor's guarantee for the works carried out by Ardmore. Mr Swycher said that he had received all available guarantees from the administrators of the former landlord, St John Street Limited, when the current landlord acquired the freehold. He was unaware of there being any other guarantees or warranties. Mr Bowker said that if this had been a concern of the respondent, application for specific disclosure could and should have been made at an early stage; but, so far as anyone knew, there were no further guarantees or warranties upon which the landlord could rely. Equally, there did not appear to have been any agreement with the NHBC or other external guarantor of works and therefore nothing that could be relied upon by One Housing to say that the costs had not been reasonably incurred by reason of the failure to pursue any third-party source of funding.

151. Turning to the commercial leases, no copies were included in the agreed hearing bundle but, given the source of the quote (the former Fifth Respondent's (Superunion's) statement), the Tribunal has no reason to think that it was inaccurate. However, the Tribunal does not know how those leases arose; and concluded that such a clause can only benefit the commercial lessee itself and cannot be relied upon by One Housing. In any event, it is limited to sums that are actually recovered from a third party and it only requires "reasonable and commercially sensible endeavours." The clause does not prevent a leaseholder having to pay a service charge in advance before recovery from a third party is achieved.

152. Lastly, Mr Evans invited the Tribunal to adopt a similar approach to that taken by section 133 of the Building Safety Act 2022, albeit that it was not yet in force. Section 133 of the 2022 Act includes amendments to the 1985 Act to insert a new section 20D, which would have the effect of limiting service charges in respect of remediation works, and which would imply introduce a "just and equitable" test. Although interesting and on the point, as it is not yet in force the Tribunal cannot take it into account.

Issue 3: the payability and reasonableness of the apportionment of charges to the respondent

153. As mentioned above, St John reached an agreement with Hampshire County Council to cap its liability for the costs of remediation – its

Schedule 3 costs – to £500,000, leaving a shortfall of £182,009.02. St John then apportioned that shortfall between the remaining four head leaseholders. The additional sums demanded from One Housing were, in respect of block B, £30,801.53 and, in respect of Block D, £8,400.42, increasing One Housing's percentages from 11% for Block B and 3% for Block D to 17% and 5% respectively [710].

154. The agreed hearing bundle contained solicitors' correspondence with Hampshire at the time [1053-1063], which showed the steps St John took to try and force Hampshire to pay the interim demands. Mr Swycher dealt with the problems in his witness statement [103] and in cross-examination he gave oral evidence about how the agreement with Hampshire was reached. When Hampshire refused to pay the interim demands, Mr Swycher approached their sub-lessees to persuade them to apply pressure on Hampshire to settle. His main concern was to secure funds to do the remediation works as quickly as possible, to stop the ongoing waking watch costs and to complete the new cladding works before the next insurance renewal, with its elevated premium. He managed to persuade the sub-lessee to pay £500,000 and considered it best to proceed with that, rather than engage in litigation.

155. Mr Swycher was unable to answer Mr Evans' question as to why St John had not just served Hampshire with a notice under section 146 of the Law of Property Act 1925; but he did indicate that Hampshire took an uncompromising position, it had "deep pockets" and St John was not in a position to litigate. He was also unsure about the re-apportionment of the shortfall, preferring Mr Burbage to deal with that, but said "Looking at it now, I wouldn't be averse to thinking about that again."

156. Mr Burbage's witness statement gave details of the apportionment [108]. In cross examination, Mr Burbage gave further explanation of how the apportionment was calculated, referring to the spreadsheet prepared by JPS Accountancy Limited [710-711]. He confirmed the apportionment had been done by the accountants not, as Mr Evans pointed out, by the landlord's surveyor, as required by the lease.

157. Mr Evans contended that the lease provides for the landlord's surveyor to act reasonably in determining the proportion of the service charge: Schedule 4, paragraph 1 [291]. The act of increasing One Housing's charges in the above circumstances was not acting reasonably under the terms of the lease and therefore, for the purposes of section 19 of the 1985 Act, the sums charged to One Housing were not reasonable in amount.

158. Mr Bowker said that the apportionment was reasonable because the landlord had the choice of suing Hampshire for the shortfall, a step it could not afford to take, or recover such money as it could to put towards the urgent necessary remediation works and to reapportion the shortfall amongst the other head lessees, all of whom would benefit from the works being carried out swiftly. Viewed objectively, Mr Barker

said that it was a fair and reasonable apportionment and within the surveyor's powers under the lease.

159. The Tribunal disagrees. The lease has a clear mechanism for the allocation and recovery of service charges. The landlord took a commercial decision for its own benefit about Hampshire's liability for the remediation costs. The landlord did not consult One Housing beforehand, either about that decision or about the apportionment of the shortfall amongst the remaining head leaseholders. It was not reasonable to change the percentages payable by One Housing: by clause 1.1 of the lease [258], the percentages were calculated on the basis of floor area [599], but there had been no change to the floor area and the only reason for seeking to recover additional sums from One Housing was purely because of the dispute with Hampshire.

160. The landlord had not acted in a transparent manner in relation to this. The two amounts, totalling about £39,201.95, are not reasonably incurred and are not payable by One Housing. The landlord must recalculate the figures and, as Mr Bowker suggested could be done, refund this money to One Housing or give it credit for this sum.

Issue 4: whether and to what extent the potential for a successful claim under the Building Safety Act 2002 affects the payability of the service charge costs

161. Mr Evans argued that when answering the question as to whether a service charge is payable and by whom, pursuant to section 27A(1) of the 1985 Act, the Tribunal should consider whether One Housing/ Riverside would have real prospects of success in an application for a remediation contribution order ("RCO") against St John, pursuant to section 124 of the Building Safety Act 2022. He said that the criteria for making an RCO were satisfied, and it would be just and equitable under the 2022 Act to make such an order. Indeed, on the second day of the hearing, the Tribunal was presented with a letter of claim dated 7 June 2023 sent by Riverside's solicitors, Devonshires, to St John, claiming damages under the Defective Premises Act 1972 and setting out the case, in some detail, why it would be just and equitable for an RCO to be made in respect of the total losses incurred, now totalling £286,210.26.

162. Mr Bowker said that One Housing had had the opportunity to investigate and apply for an RCO since 28 June 2022, when section 124 of the 2022 Act came into force, and, because it had not done so, it should not now be allowed to raise this prospect as a reason for saying that the Tribunal should reduce or extinguish the amount otherwise payable by the One Housing for the remediation works.

163. The Tribunal's view is that there do appear to be strong grounds for One Housing/ Riverside to apply for an RCO against both St John as landlord and against Ardmore as developer. However, the Tribunal cannot pre-judge any such application, as there may be arguments on

both sides; and, as mentioned above, all litigation is speculative and uncertain.

164. It is also not clear when any RCO might be made and, if one were made, in what amount. To date, there has only been one first-instance decision making an RCO (*9 Sutton Court Road, Sutton, Surrey SM1 4FQ*: LON/00BF/HYI/2022/0002) and there has been no full argument on the "just and equitable" test that any Tribunal would have to apply. There are also issues relating to the evidence that could be used in any RCO application, discussed at the hearing, but inconclusively. Those are matters that would have to be ironed out before any application were made.

165. In the circumstances, as with the potential claim against Ardmore, the Tribunal considers that the prospect of an RCO being made was too remote from these proceedings for it to say that the amount of service charges payable are not reasonable or should be reduced in amount.

166. Of course, that is not to say that this decision may not be useful to a future Tribunal when considering any prospective claim for an RCO.

Issue 5: whether the respondent's payment of the service charges affects the Tribunal's decision

167. Mr Bowker pointed to the fact that One Housing had paid in full both the interim service charge demands and the subsequent final balancing charge. He said that should be taken into account when deciding whether the costs had been reasonably incurred and were payable.

168. The Tribunal is not willing to take those matters into account. Clause 2 of the lease makes clear that One Housing must pay the service charges "without any deduction whatsoever" [272] and section 27A(5) of the 1985 Act states clearly: "But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment". It is correct that the payments made by One Housing/ Riverside were not made under protest, but they were made against the background of this ongoing Tribunal application in which they clearly and strongly disputed liability to pay those service charges.

Section 20C application

169. As agreed with the parties during the hearing, the issue of any section 20C application is to be left to written submissions after the issue of this decision.

170. The parties should file and serve their submissions within 28 days of the date of this decision.

Name: Judge Powell **Date:** 25 July 2023

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the Tribunal is required to notify the parties about any right of appeal they may have.

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

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

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

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

If the Tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).