

UPPER TRIBUNAL (LANDS CHAMBER)



[2023] UKUT 209 (LC)

UTLC Case No: LC-2022-607

Royal Courts of Justice, Strand,
London WC2A

22 August 2023

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

AN APPEAL AGAINST A DECISION OF THE FIRST-TIER TRIBUNAL
(PROPERTY CHAMBER)

*LANDLORD AND TENANT – SERVICE CHARGES – waking watch – landlord failing to
carry out fire risk assessment – whether cost of waking watch payable – appeal dismissed*

BETWEEN

RADCLIFFE INVESTMENT PROPERTIES LIMITED

Appellant

-and-

**NIGEL KEITH MEESON and GAYLE LEE MEESON
and others**

Respondents

**Re: Park Rise,
Trafford Plaza,
Manchester M16**

Martin Rodger KC, Deputy Chamber President

21 July 2023

Tom Morris, instructed by J B Leitch Solicitors, for the appellant
Nigel Meeson KC, on his own behalf, and for the other respondents

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The following cases are referred to in this decision:

Avon Ground Rents Ltd v Cowley [2019] EWCA Civ 1827

Continental Property Ventures Limited v White [2007] L&TR 4

Daejan Properties Ltd v Griffin [2014] UKUT 206 (LC)

Introduction

1. Park Rise is a former office building in Manchester which was converted in 2018 to provide 96 residential flats. On 30 May 2019 the building came to the attention of the Greater Manchester Fire and Rescue Service when the fire alarm was disabled by a water leak. A fire officer inspected the building and found not only that the fire alarm was inoperative, but that there was evidence of inadequate compartmentation and fire separation measures, and an absence of any information about the material used to clad the exterior of the building. The fire officer assumed that the material was an aluminium composite which represented a risk to the safety of all residents. He threatened to prohibit occupation of the building unless fire safety measures were instigated, including a 24 hour “waking watch”.
2. This appeal is about the liability of the leaseholders of the building to pay for the waking watch mounted at the building from 30 May to 20 September 2019 at a total cost of £57,894.
3. By a decision issued on 31 July 2022 the First-Tier Tribunal (Property Chamber) (the FTT) determined that the leaseholders were liable to contribute towards the cost of the waking watch for only part of the period it was in place, and that their liability ended when the fire alarm was reinstated. That cost was only £5,859. The FTT determined that the rest of the cost was attributable to the failure of the appellant, Radcliffe Investment Properties Ltd, to undertake a proper fire assessment and that the additional cost was unreasonable.
4. The appellant was given permission to appeal by this Tribunal. At the hearing of the appeal, it was represented by Tom Morris. The respondents, Mr and Mrs Meeson and the leaseholders of 79 of the 96 flats in the building, were represented by Mr Meeson. I am grateful to them both for their assistance.

The facts

5. When it was constructed, Park Rise was an office building on 9 floors standing 28m tall. Its height may have been increased by the addition of a further storey on top of the building as part of works undertaken in 2017 and 2018 to convert it to residential use. The developer responsible for the conversion of the building was Mandale Homes but leases of the flats were granted by a company named Hazelloch Limited.
6. The freehold interest in the building was acquired by the appellant in August 2018. By that time most of the flats in the building had already been let on long leases which included provision for a service charge to be payable by the leaseholder to meet the costs incurred by the landlord in providing the usual services.
7. One of those leases was granted on 12 February 2018 to the respondents, Mr and Mrs Meeson, for a term of 250 years.
8. On 24 January 2018, before the work to convert the building had been completed, a fire risk assessment was undertaken on behalf of the developer by H A Woolley Ltd. The completion of a fire risk assessment is an obligation of the building owner under the Regulatory Reform (Fire Safety) Order 2005 (the “Fire Safety Order”).

9. The assessment was a detailed document of 27 pages with a schedule of photographs attached. At section 5 it was recorded that the building was not occupied at the time of the survey and was due to be handed over. At paragraph 17.4 it was noted that one means of escape in the event of fire was a route across the roof of the building between the two stair heads, and area which was due to be filled with additional flats.
10. At page 23, after reviewing the fire protection and procedural arrangements observed by the assessor at the time of his inspection, the assessor recorded that the likelihood of fire at the premises was “medium” and that there was a risk of “moderate harm” in the event of a fire. That rating was explained as meaning that an outbreak of fire could foreseeably result in injury (including serious injury) of one or more occupants but was unlikely to result in multiple fatalities. It was therefore considered that the risk to life and fire at the premises was “moderate” and it was said to be “essential that efforts are made to reduce the risk”.
11. On the front of the document it was suggested that the risk assessment should be reviewed by a competent person by January 2019 or earlier if there had been significant changes. A more detailed explanatory text on page 3 informed the reader that the assessment should be reviewed at regular intervals, usually not exceeding 12 months, and must be reviewed when material alterations were made to the structure or the layout of the building, or when there were changes in the use of the building, or significant changes to the occupancy type or numbers or changes to the management of the organisation to whom the document was addressed.
12. There is no evidence that the appellant, or Inspired Property Management Limited, its managing agents, took any steps to review the fire risk assessment or to commission a further assessment after the appellant acquired freehold of the building on 15 August 2018.
13. Article 9 of the Fire Safety Order imposes a duty on the owner of a building to make a “suitable and sufficient” fire risk assessment. Article 9(3) requires that the responsible person review the assessment so as to keep it up to date, particularly if there is reason to suspect that it is no longer valid or there has been a significant change in the matters to which it relates.
14. On 18 December 2018 the Ministry of Housing, Community and Local Government advised that “building owners or their appointed competent professional advisers should check that the external wall systems on their buildings are safe.” No such check was carried out by the appellant or its managing agents.
15. On 30 May 2019 water leaked onto the fire alarm control panel in the building and caused it to malfunction. The malfunction registered automatically with the Fire Service and either on the same day or the following day a fire officer attended the building to investigate. He expressed concern over a number of features of the building. He observed multiple failings of fire compartmentation including holes above ceiling tiles; he formed the view that neither of the lifts was adequately protected from fire given the height of the building; he was concerned that the cladding on the exterior of the building was of unknown material which appeared to him to be an aluminium composite; and he observed a high level of short-term occupancy within the building. His advice (backed by a threat of a prohibition order if it was not complied with) was that a waking watch be implemented with immediate effect.

By 3 June that advice had been followed and a two-person waking watch had been introduced. The waking watch was reduced after 7 days when repairs were made to the fire alarm panel.

16. On 7 June the fire officer served an enforcement notice informing the appellant that, in the opinion of the fire authority, it had failed to comply with the requirements of the Fire Safety Order in the following respect:

“The fire risk assessment for the premises is not suitable and sufficient and does not identify the general fire precautions required to ensure the premises are safe specifically in relation to the spread of fire on the premises.”

The breach was identified as being of article 9 of the Fire Safety Order and the following explanation was given:

“The fire risk assessment for the premises pre-dates the occupation of the premises and is not suitable and sufficient. There is a risk of internal fire spread because of breaches in compartmentation and these have not been identified or addressed as part of the fire risk assessment. The fire risk assessment does not identify the materials used as part of the external wall system and whether the external wall system poses a risk of external fire spread.”

The enforcement notice required the appellant to undertake a fire risk assessment to identify the fire precautions needed to ensure the safety of occupants. That assessment was to include “an invasive/destructive assessment of compartmentation throughout the premises including the separation between flats, flats and communal areas, and communal areas and staircase.”

17. Further discussion took place between the fire officer, the appellant, and Mandale Homes, the original developer. On 13 August the fire officer confirmed that he would accept a survey undertaken by a third-party accredited compartmentation contractor confirming that the problems he identified had been remedied, and confirmation from a suitable qualified person that the façade of the building was of limited combustibility. A joint inspection was undertaken on 19 August at which it was established that the external surfaces of the building were clad in painted glass rather than a composite cladding material. The scope of the necessary compartmentation remediation works was also agreed. By 20 September the fire officer’s requirements had been satisfied and the waking watch was discontinued.

The proceedings

18. The total cost of the waking watch was £57,894. That cost was first notified to leaseholders in February 2021 when a balancing payment for the 2019 service charge year was demanded. Mr and Mrs Meeson paid their contribution under protest and on 4 May 2021 they applied to the FTT under section 27A, Landlord and Tenant Act 1985 for a determination whether the cost of the waking watch was payable by them. In an accompanying statement of case they explained that the imposition of the waking watch was caused solely by the appellants’ failure to comply with article 9 of the Fire Safety Order, which was a criminal offence under article 32 of the Order. They asserted that because the

costs of the waking watch were attributable to a criminal act by the appellants they could not be “service costs” within the terms of the lease or alternatively they could not have been reasonably incurred for the purpose of section 19, 1985 Act.

The FTT’s decision

19. By the time the application came to be determined by the FTT Mr and Mrs Meeson had been joined as applicants by the leaseholders of 78 other flats in the building.
20. The FTT recorded that the landlord had applied to adjourn the hearing to enable it to consider the effect of the Building Safety Act 2022, relevant parts of which had come into force three weeks earlier, on 28 June 2022. The FTT refused that request. The leaseholders had not relied on the new statutory provisions, and the FTT did not have evidence enabling it to determine whether the relevant qualifying conditions were satisfied. It is not necessary for me to say anything about the 2022 Act in order to determine this appeal.
21. The FTT was satisfied that, in principle, the cost of providing a waking watch was capable of being a service charge item. The landlord’s obligation under the leases of the flats was to provide the services identified in Part 1 of Schedule 7 and the leaseholders were obliged to contribute towards “all of the costs reasonably and properly incurred” in providing those services. The services included, at paragraph 1.1.1, maintaining, repairing and replacing the retained parts of the building and remedying any inherent defect, and at paragraph 1.1.14, “any other service or amenity that the Landlord may in its reasonable discretion (acting in accordance with the principles of good estate management) provide for the benefit of the tenants and occupiers of the Building.”
22. The FTT did not find it necessary to decide whether the landlord had been in breach of the criminal law and did not specifically address the leaseholder’s case that costs which had been incurred as a result of a breach of the criminal law could not be said to have been “reasonably and properly incurred” and so ought not to be treated as relevant costs in calculating the service charge.
23. The FTT determined that only the cost of the first 7 days of the watch was recoverable. There was no challenge to the quality of the service and the leaseholders accepted that, for that service, the cost incurred was reasonable. Having referred to the January 2018 fire risk assessment and its recommendation that a further assessment should take place within 12 months, the FTT continued at paragraph 50 of its decision as follows:

“(9) The developer and previous landlord had allowed short term lets to take place which were in breach of the terms of the tenant’s leases and an increase in their number had clearly gone unchecked.

(10) The tribunal agrees with Mr Meeson that a reasonable fire risk assessment carried out after the completion of the building and certainly by January 2019 would have discovered the defects and action could properly have been taken.

(11) Given the situation surrounding the completion of the building and the comments in the first fire risk assessment the tribunal is satisfied that the

landlord and/or its agents were remiss in not obtaining either a review or further assessment considering the manner in which the building was being occupied.

(12) On balance the tribunal is satisfied the waking watch costs, after the rectification of the fire alarm defect, are attributable to the acts and omissions of the landlord or its agents in relation to fire risk assessment. In the circumstances those acts and omissions render the costs of the waking watch unreasonable. They should not be paid by the leaseholders.

(13) In the absence of any clear evidence to the contrary indicating that a waking watch had not have been necessary had the only issue been the defective alarm, the tribunal is not prepared to say that the first 7 days costs have been unreasonably incurred.”

The appeal

24. The appellant was granted permission to appeal by the FTT on three grounds.
25. The first ground was the FTT had taken into account irrelevant matters by referring to the number of short-term lettings in the building in breach of the terms of leases. Mr Morris said nothing about that ground in his oral presentation, and in his skeleton argument he simply referred to his grounds of appeal. There does not seem to me to be anything in the first ground. The fact that there were short term lettings in the building was a matter of concern to the fire officer and was therefore at least capable of being a relevant consideration for the FTT when it asked whether the costs of the waking watch had been reasonably incurred. Whether the lettings were in breach of the terms of the leases was not explored but there was evidence that specific consent had been given by the landlord’s predecessor for short-term letting of at least two floors of the building.
26. The second ground of appeal was expressed at some length but boiled down to the proposition that even if the appellant had undertaken a timely fire risk assessment the same issues would have been identified and the waking watch would have been necessitated at an earlier time. The FTT’s decision was said to be “tantamount to a conclusion that the landlord cannot recover costs in circumstances where there is an inherent/blatant defect.” Once again, this ground did not feature significantly in Mr Morris’s argument. He acknowledged that there was no evidence of the view which the fire officer would have taken if a proper fire risk assessment had been available on 30 May 2019. Such an assessment would have confirmed that the exterior of the building did not comprise a combustible material and would have eliminated one of the concerns which prompted the instigation of the waking watch. Nor was it suggested that the appellant would have been under any obligation to notify the fire officer of the result of a fire risk assessment undertaken in January 2019, even if it had revealed the inadequate fire protection of the lift and the breaches in compartmentation. If a proper fire risk assessment had been undertaken after the building had become fully occupied there is no reason to think that the same remediation measures as were eventually commissioned on 9 August and completed on 20 September 2019 would not have been capable of being undertaken within a similar time. As it was no part of the leaseholder’s case that it was unreasonable for the landlord to instigate the waking watch in response to the fire officer’s advice, there seems to be nothing left in the second ground of appeal.

27. The main ground of appeal on which Mr Morris concentrated his submissions was the proposition that the FTT applied the wrong test to determine whether the costs of the waking watch were reasonable. Mr Morris referred to the observations of the Lands Tribunal (Judge Rich QC) in *Continental Property Ventures Ltd v White* [2007] L&TR 4, at [11]:

“The question of what the cost of repair is does not depend upon whether the repairs ought to have been allowed to accrue. The reasonableness of incurring costs for their remedy cannot, as a matter of natural meaning, depend upon how the need for remedy arose.”

Mr Morris submitted that it was therefore irrelevant to the reasonableness of the costs of the waking watch that they might have been avoided if a fire risk assessment had been carried out earlier. The FTT had erroneously asked itself why the costs of the waking watch needed to be incurred and had not asked whether it was reasonable for the landlord to incur it.

28. I do not accept Mr Morris’s submission. The paradoxical proposition that the reason why a cost has been incurred is irrelevant to the reasonableness of incurring that cost may be an appropriate analysis in some cases, but it is not a rule of general application. In considering questions of reasonableness, it is rarely appropriate to begin with an inflexible rule. In *Avon Ground Rents Ltd v Cowley* [2019] EWCA Civ 1827, to which Mr Morris also referred, Nicola Davies LJ approved, at [31], this Tribunal’s conclusion in the same case that “whether an amount is reasonable as a payment in advance is not generally to be determined by the application of rigid rules but must be assessed in the light of the specific facts of the case”. That was said in the context of a payment of service charges in advance, which is regulated by section 19(2), 1985 Act, but it is equally applicable to a determination under section 19(1) whether a cost was reasonably incurred, or under a determination of the same question under the provisions of a contract.
29. *Continental Property Ventures Ltd v White* was concerned with costs incurred by a landlord in 2002 in damp proofing and redecoration work which had been made necessary because of a leaking pipe. The cost of the work would largely have been avoided if the landlord had carried out repairs between 1994 and 1997 when the need for them first arose. The landlord’s failure to carry out the repairs within a reasonable time was a breach of its repairing covenant. At first instance the LVT held that most of the cost of the work had not been reasonably incurred and that only the cost of repairing the leaking pipe was recoverable; the rest was irrecoverable because it was the cost of remedying the landlord’s historic breaches of covenant. The Lands Tribunal disagreed with the LVT’s reasoning, but agreed that only the lesser sum was recoverable, because the tenants were entitled to set off a claim for damages for breach of covenant to reduce the cost which had been reasonably incurred.
30. The Tribunal adopted the same approach in *Daejan Properties Ltd v Griffin* [2014] UKUT 206 (LC) when it held that the fact that the landlord had been under an obligation to carry out remedial works for many years could not be shown to have increased the cost of the works and did not mean that that cost had been unreasonably incurred.
31. In this case, the landlord was in breach of its duty under article 9 of the Fire Safety Order to commission a suitable and sufficient fire risk assessment by January 2019. That duty was

a continuing one and it remained unfulfilled in May 2019 when the waking watch was imposed. The FTT found that, had it done so, the defects would have been discovered. It expressed its conclusion succinctly in paragraph 50(12) of the decision when it said that the waking watch costs were “attributable to the acts and omissions of the landlord or its agents in relation to fire risk assessment. In the circumstances those acts and omissions render the costs of the waking watch unreasonable.”

32. In order to determine what amount the leaseholders were required to pay (which was the question referred to it under section 27A, 1985 Act) the FTT had to consider two questions. It was first required to determine the contractual question whether the costs of the waking watch were “reasonably and properly incurred” in providing a service to which the leaseholders were required to contribute. It then needed to consider whether that contractual cost was limited by the statutory cap imposed by section 19(1)(a), 1985 Act which restricts the costs which could be included in the service charge to those which were “reasonably incurred”. The FTT did not address these questions separately and may have considered that there was little or no difference between them. If there is a difference, it is that the contractual question includes consideration of whether the costs were “properly” incurred, and not simply whether they were reasonably incurred.
33. Mr Meeson submitted that the FTT was obviously right to decide that the landlord could not recover costs in circumstances where it or its agent were responsible for those costs being incurred. The case was even stronger where the failure which led to the costs being incurred involved a breach of the criminal law. It is an offence under article 32 of the Fire Safety Order to fail to comply with a requirement imposed by articles 8 to 22 of the order, and the fire officer had been satisfied that the landlord was in breach of article 9 and said so in the enforcement notice he served on 7 June. The landlord had the right to appeal against the enforcement notice but did not do so. Had the landlord complied with the law no waking watch would have been required because the fire safety defects would have been rectified long before the fire alarm panel was disabled by the water leak.
34. In my judgment the FTT was entitled to conclude that the costs of the waking watch were not payable by the leaseholders. This was not a case in which many years elapsed between the omission or breach of duty and the incurring of the cost made necessary by it. The waking watch was one part of the cost of making the building safe. The cost of the necessary remedial work to put right the fire safety defects was increased by the cost of the waking watch, but that increase was wholly avoidable. If the landlord had been aware of the need to put right the defects in compartmentation and the inadequate fire protection for the lift, as it would have been if it had commissioned an up-to-date fire risk assessment when it should have done, the cost of the necessary works would not have been increased by the cost of the waking watch. The FTT considered that the cost was “unreasonable”. That was an assessment which it was open to the FTT to make. As a result, the disputed cost was not payable under the Lease and the section 19(1) cap did not take effect. The appeal is therefore dismissed.
35. The leaseholders sought an order under section 20C, 1985 Act that the costs incurred by the landlord in connection with this appeal are not to be taken into account as relevant costs in determining the amount of any service charge payable by them. A similar request was made to the FTT, but I was told it has not yet been determined. If the parties are able to agree that

such an order is appropriate it can be made without further submissions. If the landlord does not agree to an order it may make submissions within 14 days of this decision.

Martin Rodger KC
Deputy Chamber President
22 August 2023

Right of appeal

Any party has a right of appeal to the Court of Appeal on any point of law arising from this decision. The right of appeal may be exercised only with permission. An application for permission to appeal to the Court of Appeal must be sent or delivered to the Tribunal so that it is received within 1 month after the date on which this decision is sent to the parties (unless an application for costs is made within 14 days of the decision being sent to the parties, in which case an application for permission to appeal must be made within 1 month of the date on which the Tribunal's decision on costs is sent to the parties). An application for permission to appeal must identify the decision of the Tribunal to which it relates, identify the alleged error or errors of law in the decision, and state the result the party making the application is seeking. If the Tribunal refuses permission to appeal a further application may then be made to the Court of Appeal for permission.