FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case References	**:**	**(1) BIR/41UE/LVM/2020/0003** **(2) BIR/41UE/LSC/2020/0005**
Subject premises	**:**	**Tower Court/Trinity Court/Windsor Court** **No 1 London Road** **Newcastle-under-Lyme** **ST5 1LT**
Application (1)	**:**	**Application under section 24(9) of the Landlord and Tenant Act 1987 for the discharge of an order appointing a manager**
Applicant	**:**	**Number One London Road Management Company Limited**
Representative	**:**	**Freeths LLP**
Respondent	**:**	**Ian Hollins**
Application (2)	**:**	**(a) Application under section 24(4) of the Landlord and Tenant Act 1987 for directions** **(b) Application under section 27A(3) of the Landlord and Tenant Act 1985 for the determination of the reasonable and payability of proposed service charge costs**
Applicant	**:**	**Ian Hollins**
Respondents	**:**	**Leaseholders of the subject properties**
Tribunal members	**:**	**Deputy Regional Judge Nigel Gravells** **Graham Freckelton FRICS**
Date of decision	**:**	**18 December 2020**

DECISION

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1 The Tribunal has received a number of applications relating to the management of the No 1 London Road development ('the development') -

(a) an application from No 1 London Road Management Company Limited under section 24(9) of the Landlord and Tenant Act 1987 ('the 1987 Act') for the discharge of the Order dated 11 February 2020 by which the Tribunal appointed Mr Ian Hollins as manager of the development ('the section 24(9) application');

(b) interrelated applications from Mr Hollins (i) under section 24(4) of the 1987 Act for Directions in relation to the management of the development ('the section 24(4) application') and (ii) under section 27A(3) of the Landlord and Tenant Act 1985 ('the 1985 Act') for a determination as to the reasonableness and payability by the leaseholders of the development of the costs which Mr Hollins has incurred or proposes to incur in relation to the management of the development ('the section 27A(3) application').

2 Pending a hearing and decision on the section 24(9) application, on 11 December 2020 the Tribunal held a preliminary hearing to determine urgent matters relating to the section 24(4) and section 27A(3) applications.

3 Mr Hollins is the Applicant in those latter applications. The Respondents are 78 leaseholders, listed in the section 24(9) application.

4 Mr Hollins requested the Tribunal to make the following directions –

(a) *Insurance*: That Mr Hollins may recover from the Respondents and the other leaseholders of flats in the development ('the leaseholders') (in the proportions set out in the leases) the sum of £317,163.19 in respect of insurance premiums for buildings insurance for the period 1 August 2020 to 31 July 2021; and that the premium for the period 1 August 2021 to 31 July 2022 shall be determined by the Tribunal by paper determination following an application for directions made no later than 31 May 2021.

(b) *Waking watch*: That Mr Hollins may recover from the leaseholders (in the proportions set out in the leases) the sum of £2,318.40 per week in respect of the waking watch until such time as Vemco Consulting Ltd (specialist fire safety engineers instructed by Mr Hollins to carry out a technical assessment of the external wall construction of the development) and the Staffordshire Fire and Rescue Service certify that such waking watch is no longer necessary.

(c) *Fire alarms*: That Mr Hollins may recover from the leaseholders (in the proportions set out in the leases) the sum of £67,500 (exclusive of VAT) in respect of the upgrade of the fire alarm system in the development; and that he may incur and recover further costs in respect of the installation of fire alarms that are reasonably necessary in the circumstances.

(d) *Professional fees*: That Mr Hollins may recover from the leaseholders (in the proportions set out in the leases) the sum of £43,717.00 in respect of professional fees and the further sum of £11,634.10 in respect of a professional indemnity uplift on behalf of Clear Building Management, Mr Hollins' management company; and that he may incur and recover any further professional fees that are reasonably necessary in the circumstances.

5 On behalf of the Respondents, Ms Miriam Seitler of Counsel made the following arguments –

(a) Ms Seitler submitted that Mr Hollins' application confused the recovery of costs that he had already incurred and costs that he proposed to incur. In summary, she argued that the lease makes no provision for interim or on account demands for costs already incurred when Mr Hollins issued the service charge demand on 28 July 2020; and that such costs cannot be recovered except as part of the balancing charge exercise at the end of the 2020/2021 service charge year.

(b) Ms Seitler submitted that Mr Hollins' application failed to make clear –

- whether he is seeking a determination that the service charges demanded on 28 July 2020 are payable, in which case (i) the application should properly have been brought under section 27A(1) (not section 27A(3)) of the 1985 Act, (ii) the application should be assessed by reference to the estimated costs, (iii) those costs must be reasonable and (iv) the demands must be valid; or

- whether he is seeking a determination relating to future costs, in which case (i) the application is properly brought under section 27A(3) of the 1985 Act, (ii) the application should be assessed by reference to the proposed costs and (iii) those costs must be reasonable and recoverable under the terms of the lease. The actual recovery of those costs would be dependent upon compliance with any statutory consultation requirements and the issue of a valid demand.

(c) Ms Seitler submitted that Mr Hollins' application for directions that in their terms would permit him to incur and recover as yet unquantified costs and to bypass the statutory and contractual restrictions on their recoverability.

6 In respect of the specific issues set out in paragraph 4, Ms Seitler argued –

(a) *Insurance*: That Mr Hollins had failed to explain the very significant increase in the insurance premium from approximately £40,000 in the service charge year 2019/2020 to an estimated £400,000 in the service charge year 2020/2021; that he had failed to provide evidence to substantiate his claim that insurance for 2020/2021 could not be obtained from the existing insurer or through the existing broker; that he had failed to obtain any alternative quotations showing that the quotation agreed was a competitive one; and that he had failed to explain the process by which the policy and premium were selected (as required by *Cos Services Ltd v Nicholson* [2017] UKUT 382.

(b) *Waking watch*: That Mr Hollins had provided no evidence to justify the waking watch; and that he had failed to obtain any alternative quotations showing that the quotation agreed was a competitive one.

(c) *Fire alarms*: That Mr Hollins had provided no evidence to justify the upgrade/installation of fire alarms; and that he had failed to obtain any alternative quotations showing that the quotation agreed was a competitive one.

(d) *Professional fees*: That Mr Hollins had failed to justify the use of a different company (Vemco) from the company that had previously provided fire safety advice; and that he had failed to provide any detail or breakdown of the professional fees. In any event, Ms Seitler argued that professional fees incurred prior to 28 July 2020 cannot be recovered except as part of the balancing charge exercise at the end of the 2020/2021 service charge year (see paragraph 5(a) above).

7 In making its determinations the Tribunal took into account, so far as relevant, all written representations of the parties, together with the oral evidence and arguments advanced at the hearing.

8 The Tribunal is familiar with the serious fire safety issues affecting the development. Given the potential consequences of failing to address those issues in a timely fashion, the Tribunal is of the view that, if possible, it should construe the provisions of section 27A of the 1985 Act in a way that permits Mr Hollins, with the assistance of the Tribunal, to recover the costs of essential action in relation to the development. At the same time, the Tribunal accepts that the Respondents and other leaseholders should not be required to contribute to costs that are not reasonable. If Ms Seitler's submissions outlined in paragraph 5(b) prevent the Tribunal from taking that approach, the Tribunal does not accept those submissions.

9 Applying that approach, the Tribunal makes the following determinations.

Insurance

10 The issue of the reasonableness of insurance premiums has been considered by the Upper Tribunal on a number of occasions. In *Forcelux Limited v Sweetman* [2001] 2 EGLR 173, a decision of the then Lands Tribunal, the Tribunal stated -

> [39] I consider, first, [the] submissions as to the interpretation of section 19(2A) of the 1985 Act, and specifically [the] argument that the section is not concerned with whether costs are 'reasonable', but whether they are 'reasonably incurred'. In my judgment, [that] interpretation is correct, and is supported by the authorities .... The question I have to answer is not whether the expenditure for any particular service charge item was necessarily the cheapest available, but whether the charge that was made was reasonably incurred.
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> [40] But to answer that question, there are, in my judgment, two distinctly separate matters I have to consider. First, the evidence, and from that whether the landlord's actions were appropriate and properly effected in accordance with the requirements of the lease, the RICS Code and the 1985 Act. Second, whether the amount charged was reasonable in the light of that evidence. This second point is particularly important as, if that did not have to be considered, it would be open to any landlord to plead justification for any particular figure, on the grounds that the steps it took justified the expense, without properly testing the market.

11 That decision has recently been elaborated upon in *Cos Services Ltd v Nicholson and Willans* [2017] UKUT 382 (LC). In that case, HHJ Stuart Bridge, having referred to the case of *Waaler v Houslow LBC* [2017] EWCA Civ 45, in which the Court of Appeal analysed the concept of 'reasonably incurred' in section 19(1) of the 1985 Act, stated –

> [47] This is in my judgment a crucial point. If, in determining whether a cost has been 'reasonably incurred', a tribunal is restricted to an examination of whether the

landlord has acted rationally, section 19 will have little or no impact for the reasons identified by the Court of Appeal in *Waaler*. I agree with the Court of Appeal that this cannot have been the intention of Parliament when it enacted section 19 as it would add nothing to the protection of the tenant that existed previously. It must follow that the tribunal is required to go beyond the issue of the rationality of the landlord's decision-making and to consider in addition whether the sum being charged is, in all the circumstances, a reasonable charge. It is, as the Lands Tribunal identified in *Forcelux*, necessarily a two-stage test.

[48] Context is, as always, everything, and every decision will be based upon its own facts. It will not be necessary for the landlord to show that the insurance premium sought to be recovered from the tenant is the lowest that can be obtained in the market. However, the Tribunal must be satisfied that the charge in question was reasonably incurred. In doing so, it must consider the terms of the lease and the potential liabilities that are to be insured against. It will require the landlord to explain the process by which the particular policy and premium have been selected, with reference to the steps taken to assess the current market. Tenants may, as happened in this case, place before the Tribunal such quotations as they have been able to obtain, but in doing so they must ensure that the policies are genuinely comparable (that they 'compare like with like'), in the sense that the risks being covered properly reflect the risks being undertaken pursuant to the covenants contained in the lease.

12 It cannot be denied that the increase in the insurance premium for 2020/2021 represents a very significant increase over the premium for the previous year. Indeed the figure in the service charge demand dated 28 July 2020 represents a tenfold increase, although the figure that Mr Hollins seeks to recover in the present application is lower. Such an increase inevitably raises the issue of reasonableness. However, the current circumstances are extreme. The Tribunal accepts the statements of Mr Hollins and finds (i) that in the light of the Vemco report the existing insurer (NIG) was not willing to insure the development; (ii) that the existing insurance broker (Towergate Insurance) could not obtain insurance from an alternative insurer; (iii) that Mr Hollins instructed an alternative broker (Bridge Insurance Brokers Ltd), which had experience in obtaining insurance in difficult circumstances; (iv) that Bridge was only able to obtain 'layered' insurance cover through a combination of insurers.

13 On the basis of those findings, the Tribunal determines that Mr Hollins followed an appropriate procedure to obtain insurance cover for the development; and that, to the extent that there was a current market to assess (which is questionable), the procedure assessed that market. The Tribunal notes that the Respondents suggested no alternative procedure for obtaining insurance and adduced no evidence of any comparable insurance quotation.

14 In the circumstances the Tribunal determines that the total insurance premiums of £317,163.19 cannot be regarded as unreasonable.

15 The Tribunal further determines that the demand dated 28 July 2020 complied with the statutory and contractual requirements; and that the sum of £317,163.19 is payable by the Respondents (in the proportions set out in the leases).

16 If the final layer(s) of insurance are obtained, the reasonableness and payability of the additional premiums can be determined in the context of the balancing payment exercise in respect of the service charge year 2020/2021.

17 The Tribunal sees no need to determine in advance the procedure for determining the reasonable insurance premiums for the service charge year 2021/2022.

Waking watch

18 Pursuant to the advice contained in the Vemco report, a waking watch was introduced on 16 September 2020 'to ensure that all residents are made aware of a fire and the importance of immediate simultaneous evacuation as quickly as possible'. In email correspondence with Mr Hollins, Mr Kelvin Knapper, of the Staffordshire Fire and Rescue Service, confirmed that 'in the absence of a waking watch (and a programmed fire alarm upgrade within the next few months) [he] must seriously consider taking enforcement action and prohibiting the use of the building for living accommodation'.

19 Against that background, and contrary to the suggestion of the Respondents that a waking watch is neither necessary nor effective, the Tribunal is satisfied that it was reasonable for Mr Hollins to incur the costs of a waking watch.

20 Mr Hollins placed a contract with Triton Security & Facilities Management Ltd ('Triton') at a cost of £2,318.40 per week (equivalent to an hourly charge of £13.80). Mr Hollins stated that he selected Triton on the basis of its experience of providing waking watch services to property management companies, local authorities and housing associations.

21 Although the Respondents argued that Mr Hollins failed to obtain any alternative quotations showing that the quotation agreed was a competitive one, the Tribunal notes that the Respondents adduced no evidence of any comparable quotation.

22 Recent figures published by the Ministry of Housing, Communities and Local Government indicate that the average monthly cost of waking watch outside London is £137.00, compared with the figure of £108.00 under the contract with Triton. Bearing in mind also that the minimum wage is currently set at £8.72 per hour and that the waking watch is a 24/7 service, the Tribunal determines that the cost of £13.80 per hour - £2,318.40 per week - cannot be regarded as unreasonable.

23 However, the Tribunal notes that the waking watch is a temporary measure pending the updating of the fire alarm system. It therefore determines that it would be reasonable for Mr Hollins to incur the costs only until such time as Vemco and the Staffordshire Fire and Rescue Service certify that the service is no longer necessary. Moreover, subject to that condition and any further application to the Tribunal, the determination does not extend to costs incurred after the end of the current service charge year.

24 The Tribunal therefore determines that it would be reasonable for Mr Hollins to incur costs up to £67,233.60 (29 weeks from 16 September 2020 to 31 March 2021 at £2,318.40 per week). If the waking watch service is discontinued prior to 31 March 2021, or if external funding becomes available, any surplus should be credited to the service charge account.

25 The Tribunal further determines that the demand dated 28 July 2020 complied with the statutory and contractual requirements; and that the sum of £67,233.60 is payable by the Respondents (in the proportions set out in the leases).

Fire alarms

26 Although both Vemco and the Staffordshire Fire and Rescue Service advise that the fire alarm system requires to be updated, there are some unresolved issues: (i) whether the proposed update is necessary when extensive remediation works are to be carried out to the development; (ii) whether the installation of fire alarm equipment in the individual flats of the development can be carried out, and the attendant costs recovered, under the terms of the lease; (iii) whether the proposed costs are reasonable.

27 There is a further issue in that the update of the fire alarm system almost certainly constitutes 'qualifying works' within the meaning of section 20ZA of the 1985 Act so that the statutory consultation requirements must be complied with if Mr Hollins is to be able to recover the full reasonable costs through the service charge.

28 For these reasons the Tribunal is of the view that it would be inappropriate at this stage to make any determination as to the reasonableness and payability of the costs claimed by Mr Hollins.

29 In the view of the Tribunal, it would be appropriate for Mr Hollins to initiate the consultation procedure as soon as possible. That procedure may also assist in resolving some of the issues identified in paragraph 26 above.

Professional fees

30 It was suggested on behalf of the Respondents that the professional fees listed in paragraph 4(d) above were incurred prior to the service charge demand issued on 28 July 2020. Mr Hollins did not appear to challenge that suggestion. On that basis Ms Seitler submitted that those costs cannot be recovered from the Respondents except as part of the balancing charge exercise at the end of the 2020/2021 service charge year.

31 The Tribunal accepts that submission. Moreover, given the absence of a detailed breakdown of the listed fees, the Tribunal is of the view that a determination on the reasonableness and payability of those fees should await any challenge to the certified service charge costs for 2020/2021.

Further costs and fees

32 Mr Hollins requested the Tribunal to direct that he may incur and recover from the Respondents 'further' costs and fees in respect of the installation of fire alarms and professional services.

33 As Ms Seitler argued (see paragraph 5(c) above), such a direction would permit Mr Hollins to incur and recover as yet unquantified costs and to bypass the statutory and contractual restrictions on their recoverability. The Tribunal cannot make such a direction.

18 December 2020

Professor Nigel P Gravells
Deputy Regional Judge