FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case References	**:**	**BIR/00CQ/LSC/2022/0001** **BIR/00CQ/LDC/2022/0006**
Property	**:**	**Meridian Point Friar Road Coventry CV1 2LB**
Applicant	**:**	**Marden Limited**
Representative	**:**	**Lodders Solicitors LLP**
Respondents	**:**	**The Leaseholders**
Type of Applications	**:**	**An application in respect of the liability to pay and reasonableness of service charges under section 27A of the Landlord and Tenant Act 1985 .** **An application under section 20ZA of the Landlord and Tenant Act 1985 for dispensation of the consultation requirements in respect of qualifying works.**
Tribunal Members	**:**	**V Ward BSc Hons FRICS – Regional Surveyor** **Deputy Regional Judge D Barlow**
Date of Decision	**:**	**06 October 2022**

DECISION

Background

1. The Applicant made two separate applications to the Tribunal dated 22 February 2022.

   The first application relates to an application under section 27A of the Landlord and Tenant Act 1985 ("the Act") for determination of liability to pay and reasonableness of service charges ("the service charge application") The Applicant seeks a determination for service charge year 2022 in relation to costs of waking watch. Costs incurred to date are £119,074. 50 and are continuing at £2,184 plus VAT per week.

   The second application relates to an application for dispensation of all or any of the consultation requirements provided for by section 20 of the Landlord and Tenant Act ("the dispensation application"). The application relates to a qualifying long term agreement for waking watch with Triton Securities and Facilities Management Limited which commenced on 12 April 2022. For the reasons set out in the application the Applicant seeks a preliminary determination that the agreement is not a qualifying long term agreement.

2. Directions by Regional Judge Jackson were made on 1 March 2022. Those Directions instructed any Respondent Leaseholder who wished to oppose either the service charge application or the dispensation application, to notify the Tribunal and the Applicant by 30 March 2022 and provide a statement of reasons setting out in full, reasons as to why the application is opposed and exhibiting all documents relied upon.

3. Objections were raised by the leaseholders' of the following flats at Meridian Point: 3, 4, 6, 7, 13, 15, 18, 19, 21, 23, 25, .27, 27, 29 and 31. These leaseholders were represented by Mark Stride, leaseholder of No 31, during this process and are referred to as "the Respondents".

4. The leaseholder of Flat 29, Damian Kaczor, provided an emailed statement which is attached at Annex A and which principally refers to the fact that the leaseholder is a student who cannot afford the potential "charges for the waking watch and shortfall in funding for the replacement fire alarm system.

5. Due to the number of objections, the Tribunal considered that an oral hearing was required.

Hearing

6. The oral hearing was held by video platform on 16 June 2022. Appearances were as follows:

Applicant

Ms V Osler (Counsel)
Ms E Crofts (Lodders Solicitor)
Mr J Moore (Marden Ltd)
Mr R Philips (Marden Ltd)
Ms C Pugh (HLM Property Management)

Respondents

Mr M Stride leaseholder of 31 Meridian Point who was also representing the leaseholders of nos 3, 4, 6, 7, 13, 15, 18, 19, 21, 23, 25 and 27.

Submissions of the Parties – The Service Charge Application

7. The submissions of the parties both during the hearing and in their written submissions were as follows.

The Applicant – The Service Charge Application

8. The submissions of the Applicant confirmed that they are the freehold owner of residential premises known as Meridian Point, which comprises two joined purpose-built blocks of flats, one block rising to seven storeys and the other five. A total of 31 self-contained flats are located with the blocks.

9. The individual flats are subject to long leases of 99 years from 1 July 2006. The leaseholders of the flats are the Respondents in this matter and are also service charge payers under the terms of their leases. HLM Property Management ("HLM") act as managing agents in respect of the development. HLM Property Management is a trading style of Lambert Smith Group Limited. Other elements of this group who are styled LSH are referred to later in this decision.

10. The blocks were constructed in or around 2006, in accordance with the building regulations then in force. The blocks have external cladding on the front and rear elevations, extending from the first to sixth floors.

11. A spreadsheet detailing the timeline of the processes outlined below was provided to the Tribunal by the Applicant.

12. In December 2020, HLM instructed Hydrock Consultants Limited ("Hydrock") "to assess the suitability of the external wall systems based on the Building Regulations 2010 (as amended) and recently published design guidance". On 10 December 2020, Hydrock carried out a site survey to "intrusively inspect the

external wall systems with regard to the type of materials used, systematic arrangement and cavity barrier provision".

13. The salient findings of Hydrock's report dated 21 December 2020 was that of the nine primary wall types installed within the block, combustible materials were present in all but one. Hydrock then undertook a fire assessment, taking cognisance of three fire scenarios, which considered the likelihood of a fire reaching the external wall and the consequences of fire spread. These scenarios considered the following:

    - A fire starting within the room adjacent to the external wall
    - A fire starting externally on a balcony and affecting the external wall build up
    - A fire starting with the external wall

    The likelihood of fire was considered to be medium and the potential consequences considered to be extreme. The result of the fire risk assessment indicated that the eight external wall systems identified above present a 'substantial' risk to life from fire at the premises.

    In summary,

    "...the external wall systems present a substantial risk to occupants. This is due to the extent of the combustible material in the external wall construction and the potential fire spread over the external wall"

14. As to remedies, the Hydrock report recommended the removal and replacement of the combustible material:

    "Option 1: Replace all combustible material in all wall types which are not brickwork to brickwork construction (excluding combustible insulation in brickwork-to-brickwork construction) and provide cavity barriers and closers in these wall types. It should be noted that cavity closers will still be required around openings in brickwork-to-brickwork walls for this option".

15. As for interim measures, Hydrock advised:

    "1. Automatic detection from communal alarm system extended to include heat detectors within all apartment rooms that have an opening on to the external walls;
    2. Reliance on 'Waking Watch' to alert all residents and initiate simultaneous evacuation (including manual system to operate all apartment alarm simultaneously) of all apartments;

3. Reliance on 'Waking Watch' to alert all residential and initiate simultaneous evacuation (manually alerting residents, e.g. knocking on doors or air horn, etc.) of all apartments."

16. On 25 February 2021, HLM served on the Respondent leaseholders a notice of intention under section 20 of the Act. The notice set out the intention to enter into an agreement to provide a replacement/upgrade to the current fire alarm system in accordance with the external wall system report prepared by Hydrock. A notice of estimates in relation to proposed works again under section 20, was served on leaseholders on 7 October 2021. The Applicant did not receive from the Respondent leaseholders any response to either notice within the 30 day consultation period after each notice.

17. On 12 April 2021, the West Midlands Fire Service ("WMFS") attended the blocks for the purposes of inspection. In a letter dated 16 April 2021, the WMFS considered "some people are at risk in case of fire". To abate the risk the WMFS set out in a schedule the measures it required the Applicant to undertake:

    "You should complete the work outlined in the schedule as soon as possible balancing the need from safety against the demands on your business and undertaking. I will visit again and will contact you in approximately 6 months arrange the next visit. You should complete the actions and outcomes before that visit"

    The measures set out in the letter included:

    Outcome

    This work is necessary to help people understand what to do if fire breaks out.

    Suggested Action

    Ensure that a Waking Watch is in place as an interim measure and that they are competent, and in such numbers to allow the new evacuation procedure to be both effective and efficient.

    Outcome

    This work is necessary to detect fire and raise an alarm.

Suggested Action

Upgrade alarm system to include additional automatic detection in each apartment that has openings onto external walls and this should be interlinked to the main alarm system.

Outcome

This work is necessary to reduce the risk of the spread of fire.

Suggested Action

Remove flammable cladding/insulation from the outside of the building. Ensure that any remaining cladding/insulation does not support the spread of fire.

18. On 12 April 2021, in response to both the Hydrock and WMFS report, HLM on behalf of the Applicant entered into an agreement with Triton Securities and Facilities Management ("Triton") for the provision of a waking watch at a cost of £13 per hour. The Triton Agreement provides for the provision of the waking watch service, which can be terminated on one week's notice. The waking watch commenced on the same day as entry into the Triton Agreement.

19. Prior to entering into the agreement with Triton, the HLM sought an alternative quotation from ADANA Management Group Limited. On 15 February 2021, ADANA provided a quotation of £12 per hour, excluding VAT and toilet facilities. The quotation was not pursued because of concerns arising from ADANA's previous delivery of services to another block (of which the Applicant is not the owner).

20. On 4 May 2021, HLM served on the Respondent leaseholders a notice under section 20 advising of the intention to enter into an agreement to provide:

"...a waking watch service to be put in place until such time as the fire alarms system work is completed, at which point waking watch can be stopped. "

The Applicant stated that they considered that the works were necessary to comply with the current government guidance and to provide interim protection measures ahead of the external wall system replacement.

21. The Applicant did not receive from the Respondent leaseholders any formal response to the notice.

22. In February 2021, the Applicant applied to the Building Safety Fund ("BSF") for funding to replace the defective external wall systems. The application was initially

rejected on the basis that the blocks were under 18 metres in height (Hydrock having measured the blocks at the highest point as 17.225m). During the hearing the Tribunal asked Ms Pugh if bearing in mind the height measurement was so critical and it was so close to 18m, if anyone had thought to ask the company to check their measurement. She responded no.

23. In May 2021, the Applicant appealed the BSF's refusal of funding. A further survey carried out by Midland Survey Limited ("MSL") in September 2021 measured the blocks 18.09 metres high at their highest point. On 14 February 2022, the BSF confirmed that in relation to the majority of the works to the external walls, the appeal had succeeded and the funding for those works would be granted.

24. On 18 June 2021, the Applicant applied to the Waking Watch Relief Fund ("WWRF") for funding in respect of the provision of the waking watch. The WWRF assists with the cost of replacement fire alarms. An application was made to the Replacement Fund (the successor to the WWRF) on 27 January 2022. These applications were merged following the closure of the Relief Fund and the application was approved and funding in the sum of £65,767.20 including VAT has been granted. At the time of the hearing, the Applicant was bearing the waking watch costs.

25. The Applicant then set out the legal framework relating to the application. Under s.27A(1) of the Act, the Tribunal has jurisdiction to decide first if a cost is recoverable under the terms of the lease and, if it is, then to decide if it was reasonably incurred within the meaning of the Act: *Carey-Morgan v de Walden* [2013] UKUT 0134.

26. Under clause 3.7 of the Lease the leaseholders are obliged to pay the Service Charge:

"Pay to the Landlord the Interim Charge and the Service Charge at the times and in the manner provided in the Fifth Schedule hereto both such charges to be recoverable in default as rent in arrears."

27. Clause 1.15 of the Lease defines "the Services" as the services set out in the Sixth Schedule. Paragraph 1 of the Sixth Schedule to the Lease provides that the costs and expenses incurred in the provision of services includes:

" The compliance by the Landlord with every notice regulation requirement or order of any competent local or other authority or statute in respect of the Estate (but not in respect of the individual dwellings where these are the responsibility of the Owners)."

28. Paragraph 10 of the Sixth Schedule to the Lease provides that the costs and expenses incurred in the provision of services include:

"Providing maintaining and when necessary replacing renewing or repairing of a security patrol and/or security observation system for the Estate (including but not by way of limitation the provision of alarms apparatus and fittings designed to prevent or limit vandalism".

29. In the opinion of the Applicant, under the terms of the lease, costs incurred in respect of the provision of the waking watch are recoverable, either under paragraph 1 and/or paragraph 10 of the Sixth Schedule. In relation to paragraph 1 of the Sixth Schedule, the recommendation for a waking watch emanated first from Hydrock and then the WMFS. The latter are, in the opinion of the Applicant, plainly a competent authority and the provision of the waking watch a 'requirement' for the purpose of this paragraph: *NV Buildings (Salford Quays) Management Company Limited v Leaseholders* [2020] 2 WLUK and *Pemberstone Reversions Ltd v Leaseholders* [2018] 7 WLUK.

30. Compliance with the requirement issued by the WMFS for the implementation of a waking watch renders the costs of that waking watch recoverable under this paragraph.

31. As for paragraph 10 of the Sixth Schedule, in the opinion of the Applicant, it is hard to think of a more obvious example of a security patrol — the dictionary definition of 'security' being "the state of being free from danger or threat" — than a waking watch. The provision of a waking watch to keep lessees secure from the danger or threat of fire, plainly falls within this paragraph. There can be little doubt but that the provision of the waking watch itself was reasonable given the risk presented by the composition of the external wall system and the recommendation of both Hydrock and WMFS that a waking watch be put in place to ameliorate the risk and put in place quickly.

32. As for alternative sources of funding this has been actively pursued by the Applicant, both with respect to the BSF (with regard to major works), and in respect of the costs of the replacement fire alarm system, by applications to the Relief Fund and Replacement Fund. The Applicant's persistence with the BSF has paid considerable dividends as its appeal has now been accepted. The applications to the Relief Fund and Replacement Fund have been accepted and funding granted. That funding has not yet been received should not and cannot render the service charge in respect of the waking watch unreasonable, *Firstpoint Property Services Ltd v Various Leaseholders of Citiscape* [2018] 3 WLUK 885.

33. Further, the Applicant sought an alternative quotation from ADANA, which put the costs of the service at £12 per hour, exclusive of VAT and without inclusion of

sanitary facilities. The Applicant's concern regarding the quality of ADANA's service provision was, however, a legitimate consideration, and it was entitled within the parameters of reasonableness, to prefer the provision of services provided by Triton given their reputation for good and reliable service delivery.

34. Finally, and as set out in the s.27A application, statistics taken from Gov UK Building Safety Programme: Waking Watch Costs indicate the median monthly waking watch cost per building is £11,361. It is unclear whether this figure is inclusive or exclusive of VAT. What is clear is that the median monthly cost is almost identical to the monthly cost incurred in this case by the provision of a waking watch. Accordingly, the cost of the waking watch is in line with national rates, and eminently reasonable.

35. As for the standard of service provided by the waking watch, the Applicant has received comments in passing from a couple of the Respondent leaseholders, but no formal complaints have been received regarding the standard of service provided. In all the circumstances, therefore — and subject to any reply the Applicant may wish to make regarding any observation of the Respondent regarding the reasonableness of the service charge for the waking watch — the charges incurred in respect of the waking watch are plainly reasonably incurred.

The Applicant – The Dispensation Application

36. The Applicant again set out the statutory framework:

Section 20(1) of the Landlord and Tenant Act 1985, provides:

(1) Where this section applies to any qualifying works or qualifying long term agreement,
the relevant contributions of tenants are limited in accordance with subsection (6) or (7) (or both) unless the consultation requirements have been either—
(a) complied with in relation to the works or agreement. or
(b) dispensed with in relation to the works or agreement by (or on appeal from) [the appropriate tribunal].

37. A 'qualifying long term agreement' ("QLTA") means an agreement entered into, by or on behalf of the landlord or a superior landlord, for a term of more than twelve months (s.20ZA(2) of the Act), and section 20 applies to qualifying long term agreements if relevant costs incurred under the agreement results in the relevant contribution of any tenant being more than £100. The question which arises in this application — and which the Tribunal was invited to determine - is whether the agreement into which HLM entered with Triton to provide the waking watch service comprises a QLTA for the purposes of s20(1) of the Act.

38. Section 20ZA LTA requires landlords to consult their leaseholders in relation to any contract they intend to enter into for a term of more than 12 months. The Triton agreement, however, is not for a fixed period of 12 months, but a rolling weekly contract, determinable on one week's notice only. Similar agreements have been considered in both the lower and higher courts and found not to comprise QLTAs. In *Paddington Walk Management Ltd v Peabody Trust* [2011] L & TR 6 the agreement was: "for an initial period of one year from 1 June 2006 and will continue on a year-to—year basis with the right to termination by either party on giving three months' notice at any time". The meaning of the clause was not in dispute but the effect of section 20ZA was. The landlord argued that, although the term might be allowed to continue for more than 12 months, the only certainty was that it could be terminated at the end of that period, so it could not be said to be for more than 12 months. The tenant said it was enough that the agreement was, capable, according to its terms, of continuing for more than 12 months. HHJ Marshall QC in the Central London County Court said that the deciding factor is the length of the commitment. She agreed with the landlord and found that a contract initially for one year and thereafter on a year to year basis subject to a right to terminate on three months' notice given at any time only entails a commitment for 12 months and was not therefore a QLTA for the purposes of s.20(ZA).

39. The Court of Appeal provided similar reasoning in *Corvan (Properties) Ltd v Abdel-Mahmoud* [2018] EWCA Civ 1102. The landlord had entered into a contract with its managing agents and the term was stated in Clause 5 of the agreement which provided:

"The contract period will be for a period of one year from the date of signature hereof and will continue thereafter until terminated upon three months' notice by either party".

The landlord argued that the "term" of the agreement was expressly stated to be one year and that that term could be brought to an end on the last day of the year by giving three months' notice during the year. In the alternative, the landlord said, the agreement could be terminated by reasonable notice given during the initial year. The tenant argued that this was not what the clause said. The agreement was not a term of 12 months but rather was indefinite, although terminable on notice which could be served after a year. No notice could be given during the initial 12 months as was clear from the fact that the provision for termination appeared in the clause after the word "thereafter". The earliest date on which the agreement could be terminated was, therefore, as the FTT had found, at the end of 15 months. The Court of Appeal agreed with the tenant (and the First and Upper Tier tribunals). Correctly construed, clause 5 of the management agreement provided that the term of the contract was for a period of one year plus an indefinite period which was subject to a right of termination by giving three months' notice. As the

agreement had to continue beyond its first year, it was a QLTA for the purposes of s.20ZA(2):

"the deciding factor is the length of the commitment. That must be read as the "minimum commitment". Adopting the language of clause 5 itself, the issue is the duration of the "term" the parties have "entered into" in the "agreement"...

Whether the agreement is for a term exceeding 12 months is not about the substance of the management agreement and its various obligations. Rather, it is about whether it is an agreement for a term which must exceed 12 months"(MacFarlane LJ, at para.37).

40. The Upper Tribunal considered *Corvan* in *Bracken Hill Court at Ackworth Management Co Ltd v Dobson* [2018] UKUT 333 (LC), which concerned a management agreement. The management company gave evidence that the agency agreement was renewed annually by telephone and lasted no longer than 364 days before being renewed. The question for the Tribunal was whether that agreement amounted to a QLTA. The First - tier Tribunal (Property Chamber) ('FTT') held that the telephone conversation between the management company and the managing agents created "a continuous contract lasting 365 days, renewed on the 365th day each year". On that basis, the FTT found that the contract was a QLTA.

41. The Upper Tribunal, however, reiterated the decision of the Court of Appeal in *Corvan* that it is necessary to consider the proper construction of the management agreement and decide whether the agreement is for a term exceeding 12 months. This involves considering whether the term must exceed 12 months rather than whether in substance the parties intended or expected that the agreement would last longer than 12 months. The deciding factor is the minimum length of the commitment under the contract. Even if the parties expected the agreement to be renewed yearly and yearly renewal had been their historical practice, that was not the same as a contract for a term exceeding 12 months. The management agreement was not a QLTA and the decision of the FTT was overturned. In any event, a continuous contract lasting 365 days would still not be a QLTA as it was not for a term of more than 12 months.

42. Applying *Corvan* to the Triton agreement, and having regard to *Bracken Hill*, it is clear that the Triton agreement is a not a QLTA. The determinative factor is the minimum length of the commitment under the agreement which is one week. It matters not whether the agreement runs on longer than that period. even if over the 12 month threshold. If, as the Applicant avers, the Triton agreement is not a QLTA, the consultation requirements do not apply and an application for dispensation is unnecessary.

43. If, notwithstanding *Corvan* and *Bracken Hill*, the Triton Agreement does comprise a QLTA, in accordance with 3.20 LTA the Applicant must consult with the Respondent leaseholders before carrying out works to the blocks where any Respondent's contribution will exceed £250. The costs of the waking watch will plainly exceed £250 per Respondent.

44. Subject to certain exceptions, the consultation requirements applicable to works are those contained in the Service Charge (Consultation Requirements). (England) Regulations 2003 (SI 2003/1987) Sch.4 Pt 2 paras 1 — 6. The first stage is for the landlord to serve a "notice of intention" on each of the tenants. That notice must describe the works and explain the landlord's reasons for considering them necessary. It must invite the tenants to make observations on the works and to propose a person from whom the landlord should obtain an estimate within 30 days beginning with the date of the notice.

45. The landlord must have regard to any observations received from the tenants and must obtain at least two estimates for the proposed works: paras 3 and 4(5)(a). Detailed provision is made for obtaining estimates from at least one of the contractors proposed by the tenants: para.4(3), (4). Once the estimates are obtained, the landlord must supply the tenants with a statement setting out certain information: para.4(5)(b). All the estimates must be made available for inspection by the tenants: para.4(5)(c). The landlord must serve a notice on the tenants inviting representations on the estimates within 30 days of the date of the notice: para.4(10). The landlord must have regard to any representations received before entering into a contract for the works.

46. Unless the consultation requirements have either been complied with by the landlord or dispensed with by the LVT, a tenant's contribution to the costs of the works is limited to £250: 320(1), (3) and (6) of the 1985 Act and Consultation Regulations.

47. On application by the landlord, the FTT may dispense with all or any of the consultation requirements if it is satisfied that it is reasonable to do so: s.20ZA(1) of the 1985 Act. The principles which a Tribunal should apply when determining any application for dispensation were set down by Lord Neuberger in *Daejan Invsetments Ltd v Benson* [2013] UKSC 14; [2013] HLR 21:

> *(a) sections 19 to 202A are directed towards ensuring that tenants of flats are not required to (i) to pay for unnecessary services or poor services, (ii) to pay the correct price for appropriate services. The former purpose is encapsulated in section 19(1)(b) and the latter in s.19(1)(a). The following two sections, ss.20' and 202A are intended to reinforce, and to give practical effect to, those purposes. This view is confirmed by the titles to those two sections, which echo s.19*

[para.42];

(b) the obligation to consult the tenants in advance about proposed works goes to the issue of the appropriateness of those works, and the obligations to obtain more than one estimate and consult about them go to both the quality and the cost of the proposed works [para.42];

(c) given that the purpose of the Regulations is to ensure that the tenants are protected from (i) paying for inappropriate works or (ii) paying more than would be appropriate, the issue on which the Tribunal should focus when entertaining an application for dispensation must be extent, if any, to which the tenants were prejudiced in either respect by the failure of the landlord to comply with the Regulations. [paras.44-45];

(d) thus, in a case where it was common ground that the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the Regulations, it is hard to see why the dispensation should not be granted (at least in the absence of a very good reason). [para.45];

(e) dispensation should not be refused solely because the landlord serious breached, or departed from, the Regulations. That view could only be justified on the grounds that adherence to the Regulations was an end in itself, or that the dispensing jurisdiction was a punitive or exemplary exercise [para.46];

(f) the regulations are a means to an end, not an end in themselves, and the end to which they are directed is the protection of tenants in relation to service charges, to the extent identified above. The Regulations leave untouched the fact that is the landlord who decides what works need to be done, when they are to be done, who they are to be done by, and what amount is to be paid for them [pg.46];

(g) as for the burden of proof, while the legal burden of proof would be on the landlord, the factual burden of identifying some relevant prejudice they would or might have suffered would be on the tenants: [para.67];

(h) the Tribunal has power to grant dispensation on such terms as it thinks fit; insofar as the tenants have suffered prejudice as a result of the landlord's non— compliance, the Tribunal should, in the absence of any good reason to the contrary require the landlord to reduce the amount claimed as service charges to compensate the tenants for that prejudice; for example, where the tenants can show that the landlord's non—compliance resulted in an increase in the cost of the works, dispensation should only be granted on the

condition that the landlord reduces the service charge by that amount: [para.54, 57-58].

48. In considering the dispensation application, in the opinion of the Applicant, the Tribunal should focus on whether the leaseholders are prejudiced by any deviation from the consultation requirements of section of the Act. in this case the Respondent leaseholders will not be prejudiced by any grant of dispensation.

49. Firstly, and most obviously, the waking watch was required and necessary to ensure the safety of the leaseholder resident in the blocks, and the structural integrity and very existence of the blocks.

50. Secondly, the Applicant did comply with the first limb of the consultation process, namely the notice of intention to implement a waking watch. Given the urgency of the provision of the waking watch, the Applicant believes that it complied with the consultation requirements insofar as it was able. No observations, or indeed any formal response, to that notice was received.

51. Thirdly, the Applicant 'shopped around' for competitive quotations for the provision of the waking watch service but given the information it received regarding ADANA's service provision at other premises, it was more than entitled to prefer the Triton quotation.

52. Fourthly, the Applicant has diligently pursued other funding avenues, namely the Relief Fund and Replacement Fund.

53. Finally, the costs incurred in the provision of the waking watch are in line with national rates (see above), and therefore competitive.

54. In summary, the Applicant requests that the Tribunal determine the services charges relating to the waking watch are payable under the terms of the Lease and are reasonable. The Applicant further requests that the Tribunal determine that the Triton Agreement under which the waking watch is provided, is not a QLTA. If however, the Tribunal is of the view that the Triton Agreement is a QLTA. The Applicant humbly requests that the Tribunal grant unconditional dispensation in respect of the waking watch. The Applicant has complied with the spirit of the 3.20 to the best of its ability and the Respondents will not be prejudiced by the Applicant's inability to comply fully.

The Respondents –The Service Charge Application

55. The following comments were made by Mr Mark Stride, leaseholder of No 31 on behalf of the leaseholders of numbers 3, 4, 6, 7. 13. 15, 18, 19, '21, 23,24, 25, 26, 27 and 31.

56. The Respondents do not in principle dispute the requirement summarised by the Applicant to: a) replace certain elements of the external wall systems, b) upgrade the current fire alarm system, and c) install a waking watch until the fire alarm system is upgraded.

57. The Respondents submit however that:

    a) Substantially all of the waking watch costs would have been avoided altogether if the Applicant had acted appropriately and reasonably in seeking government funding to replace the fire alarm system via the original Waking Watch Relief Fund (WWRF); and

    b) The cost of the proposed works to upgrade the external wall and fire alarm systems appears excessive, based on the relevant government fund administrators' recent decisions to fund part but not all of the cost of the works.

58. The Tribunal advised Mr Stride at the hearing that it could not consider b) above, as it did not form part of the application. The element of the Respondent's submissions related to this point are not in principle, included in this decision.

59. The Respondents respectfully submit that paying the all of the waking watch costs via the service charge would be prejudicial as they should not be considered as 'reasonably incurred' for the purpose of service charges.

60. As the Tribunal will be well aware, any service charges ultimately levied, to the Respondents would be covered by the statutory protection afforded to leaseholders pursuant to section 19 of the Act. Consequently, if, as a result of maladministration by the Applicant acting directly or via its agent, the Respondents are unable to benefit from funding which would have otherwise been forthcoming — in whole, in part and/or in in a timely manner— then the Applicants have the right to challenge the reasonableness of any service charges levied as a result on the basis that those costs would clearly not have been "reasonably incurred".

61. Furthermore, the Tribunal will be aware that one of the aims of the emerging Building Safety Act is to ensure that landlords take reasonable steps to obtain monies from grants or the pursuit of third parties, rather than simply seeking to push remedial costs onto leaseholders. There would certainly be an expectation that a landlord should seek to exhaust all avenues of funding available first — the obvious one in this case being the WWRF - ensuring that all requisite information was provided, and deadlines adhered to.

62. The BSF Guidance makes it abundantly clear that the Respondents are entitled to regular updates and information from the Responsible Person (the Applicant in this matter) regarding the progress of any applications:

"You should inform leaseholders and residents of the nature of the works you intend to carry out and should provide them with regular updates on the progress of your funding application and remediation Works."

The Respondents consider that the Applicant has consistently, failed to provide clear and timely updates to the Respondents in relation 'to applications made to the various government relief funds.

63. The process has caused huge mental stress among the Respondents. This may be a simple contract dispute for the Applicant and its agents — large, professional, insured, limited liability companies - but for the Respondents it is no exaggeration to say that the actions, omissions and attitude of the Applicant have caused acute mental anguish.

64. In the opinion of the Respondents, substantially all of the waking watch costs should have been avoided and have therefore not been reasonably incurred. The WWRF was set up to cover the cost of fire alarms installed after 17 December 2020 "to ensure it incentivises buildings to install a common alarm system and to reduce the dependency on Waking Watch". The Respondents submit that WWRF funding to replace the fire alarm system was not obtained due entirely to the actions and omissions of the Applicant. Not only did this expose residents for an extended period to heightened risk in case of fire (as highlighted by the West Midlands Fire Services), but it resulted in substantial unnecessary waking watch costs accruing.

65. As set out by the Applicant, its agent HLM instructed Hydrock to carry out an external wall assessment report (the Hydrock Report"). The Respondents noticed immediately upon receipt of the Hydrock Report that the procedure for measuring the height of the building set out in, Annex A (Technical Information) of the BSF had inexplicably not been followed. Hydrock in section 1.6 of its report stated that it took as the lower point "the Fire and Rescue Service access level", whereas the procedure prescribed by the BSF uses plain English and a clear diagram to help applicants determine the "lowest ground level".

66. The Applicant failed to notice this clear and obvious error in the Hydrock Report. They then compounded this failure by refusing the Respondents' repeated requests to get Hydrock to check its method of measurement and/or get a second opinion. This failure was particularly egregious and impactful given the (incorrect) Hydrock measurement was within around 0.5m of the minimum height prescribed to get BSF/WWRF funding— certainly close enough that (given the potentially ruinous

consequences), a property manager acting reasonably would double-check the measurement and/or the basis of calculation to ensure eligibility.

67. Despite knowing that a) the Hydrock measurement of the building was below the prescribed minimum height eligibility limit and b) courtesy of the Respondents, that this measurement was potentially incorrect, the Applicant continued to apply throughout most of 2021 to the BSF and WWRF for funding. Those applications and appeals were not surprisingly rejected as the building was considered ineligible on height grounds. As a result, the fire alarm system, was not replaced, meaning waking watch costs started to accrue unnecessarily.

68. Exasperated at this situation and believing that the window for obtaining government funding to upgrade the external wall and fire alarm systems was rapidly closing, the Respondents decided at their own cost to instruct a surveyor to measure the height using the BSF criteria. He did so and reported on 8 July 2021 that the building is indeed above the minimum height to be eligible for BSF and WWRF funding (17.75m). The Respondents passed this on immediately to the Applicant but were told subsequently (without any direct supporting evidence at the time) that the BSF had rejected this survey.

69. As a result of the actions taken by the Respondents at their own cost and effort - and their subsequent exhortations, the Applicant eventually instructed a separate firm to carry out a second survey. This survey also concluded that the building is and was always above the minimum height for BSF and WWRF purposes, but not until September 2021: over six months from the original erroneous Hydrock survey, and several months after the BSF and WWRF applications were rejected on height grounds, leading directly to avoidable waking watch costs in the intervening period.

70. Based on this new height survey, the Applicant's subsequent appeal has eventually been allowed and some — but not all — of the requested funding for upgrading the external wall and fire alarm systems has been approved. The Applicant states that it does not know when the funds will be received, and in a letter to the Respondents dated 1 February 2022 said that it will not carry out the long-awaited fire alarm system upgrade unless and until the Respondents pay upfront not only for the system upgrade itself, but also for past and future waking watch costs, because it is “running out of funds”.

71. In conclusion, the Respondents submit that substantially all of the costs of the waking watch result from the Applicant’s failure to obtain WWRF funding for replacement of the fire alarm system on a timely basis, despite the building being eligible. The Respondents therefore believe it is neither reasonable nor proportionate to be expected to pay such costs as they have not been reasonably incurred for service charge purposes.

72. Finally, the Respondents note that where managing agents have failed to manage a building properly, for example by failing to respond to leaseholders' concerns, the FTT have in some cases from the fees claimed on the basis that the managing agent's service was not of a reasonable standard. The Respondents respectfully request the Tribunal consider reducing if not doing away altogether with the inclusion of HLM's 'management fees' within the service charges levied to the Respondents in relation to the external wall and fire alarm system upgrade works as well as provision of the waking watch, given the management has consistently been of a standard falling well below what is reasonably expected.

Applicants Reply to the Respondents' written statement.

73. The principal issues raised by the Respondents' can be summarised as follows. The original Building Safety Fund application (which relates to the cost of replacing defective cladding) and the WWRF application were rejected due to the incorrect measurements of the Hydrock survey. The Respondents allege they were instrumental in obtaining a proper survey which led to a successful appeal. The Respondents allege this caused additional delays resulting in the waking watch being required for longer than necessary. The Respondents seek that they should not be ordered to cover any shortfall in the funding provided by either the Building Safety Fund or the Waking Watch Replacement Fund. The Respondents consider that the Applicant ought to forward fund the costs of the relevant works and not request funds from the leaseholders before commencing works. Substantially all of the waking watch costs should be discounted due to the delay in obtaining WWRF funding, despite the building being eligible. The Respondents dispute the management fees incurred by the Applicant's managing agent, HLM, as they consider that HLM has not provided management to a proper standard.

Addressing each of those issues in turn:

74. The funding available for the cost of a replacement fire alarm system was originally to be provided under the Waking Watch Relief Fund ("the Relief Fund"). This fund was later merged with the Waking Watch Replacement Fund ("WWRF"). The Relief Fund opened to all eligible private sector buildings in England except in Greater London. and to all eligible social sector buildings regardless of location on 31 January 2021. The application window for this group of buildings closed on 14 March 2021. A sum of £30 million had been allocated for applications. The fund was re-opened on 26 May 2021 for a 4 week period using unallocated funding from the initial £30 million. The application period closed on 24 June 2021. On 16 September 2021, the Relief Fund reopened to applications using an additional £5 million funding. The application period closed on 10 December 2021. Applications received after this date would not be considered for funding.

75. On 27 January 2022, the Government opened the WWRF with a further fund of £27 million to install alarms in all building where a waking watch was in place at cost to the leaseholders. The Applicant applied to the Relief Fund on 18 June 2021. Despite frequent chasing, a determination was not made on funding before the Relief Fund was merged with the WWRF. An application was made to the WWRF on 27 January 2022, the first date the fund was opened. These applications were merged following the closure of the Relief Fund and funding was approved in the sum of £65,767.20 including VAT. The first half of this sum was paid by the WWRF on 28 March 2022.

76. The principal items not covered by the WWRF are contingency costs (which are standard on all construction projects and may or may not be incurred), surveyors' fees and management fees. These items would be incurred regardless of whether the alarm system proposed was of a higher specification than the minimum standard. In any event, the WWRF has agreed to fund the costs of the alarm itself, so it is irrelevant as to whether the alarm is of a higher specification than the minimum standard required.

77. It should also be noted that this application pertains specifically to the costs of the waking watch, rather than the costs of the replacement fire alarm system which have been the subject of a completed Section 20 consultation.

78. The Applicant refers to the email from BSF dated 14 February 2022 which sets out the eligibility assessment of the materials currently cladding the Building. The table sets out that six of the nine materials currently cladding the Building are eligible for funding and three (EWO1, EW03 and EW053) are not eligible for funding.

79. The materials referred to are those which are to be removed from the Building, not the Applicant's proposed replacement materials.

80. The waking watch was put in place on 12 April 2021 following the recommendation of West Midlands Fire Service. The Applicant registered for the BSF on 14 August 2020 and the Hydrock report was submitted to the BSF on 10 February 2021. The appeal was lodged on 7 May 2021, 26 days after the initial rejection. The waking watch can cease when the new fire alarm system has been installed.

81. The application to the Relief Fund was made on 18 June 2021 and the application to the WWRF was made on 27 January 2022 (being the first day this fund opened). The Applicant does not accept that these applications were unreasonably delayed; principal delays were due to waiting for a response from the Relief Fund, the BSF and the WWRF. Half of the approved funding from the WWRF has now been received; the balance will be received once the works have been completed. There remains a balance of approximately £45,828 to be paid by the leaseholders; once

this has been paid, the fire alarm works can proceed. The Applicant is prepared to proceed with the works before the second half of the funding from the WWRF is received as this funding is guaranteed.

82. The original Building Safety Fund application and the WWRF application were rejected due to the incorrect measurements of the Hydrock survey. The Respondents allege that they were instrumental in obtaining a proper survey which led to a successful appeal. The Respondents allege this caused additional delays resulting in the waking watch being required for longer than necessary.

83. It is accepted that there was an error in the measurement of the height of the building in the Hydrock Survey and that the BSF application was initial rejected on this basis. However, an appeal against the rejection was lodged in May 2021 and repeatedly chased by the Applicant. In any event, as previously stated, the termination of the waking watch is not contingent on the receipt of funding from the BSF.

84. The WWRF application was put on hold pending the outcome of the BSF application. This was outside of the control of the Applicant which had to wait until the BSF made its decision in February 2022 before the WWRF application could be determined. Whilst it is accepted that there was a delay of three months between the date of the initial BSF application and the date the appeal was made, it still took from May 2021 to February 2022 for the BSF to determine the application, and there is no guarantee that this would have taken less time had the measurement of the Building been accurate in February 2021.

85. Firstly, this application relates to the costs incurred in respect of the waking watch. The costs of the replacement fire alarm system have been the subject of a complete Section 20 application.

86. Substantially all of the waking watch costs should be discounted due to the delay in obtaining WWRF funding, despite the Building being eligible. The BSF application (which relates to the costs of removal and replacement of defective cladding. rather than the installation of a new fire alarm) was initially rejected but later allowed on appeal. It is accepted that the WWRF application was dependent on the outcome of the BSF application, which was initially delayed due to the incorrect measurement in the Hydrock report. However, as set out above, it still took from May 2021 to February 2022 for the BSF to determine the application, and there is no guarantee that this would have taken less time had the measurement of the Building been accurate in February 2021.

87. Half of the total sum of the WWRF funding was received on 28 March 2022. In addition to the fact that the WWRF application was dependant on the outcome of the BSF application, the processing of the application was also delayed by the

merging of the Relief Fund and the WWRF which is outside of the Applicant's control.

88. It is entirely unreasonable to say that "substantially all the costs of the waking watch result from the Applicant's failure to obtain WWRF funding for replacement of the fire alarm system on a timely basis, despite the building being eligible". Based on this statement, the Respondents appear to believe that the applications for funding are approved in a matter of days and funds received shortly thereafter. This is obviously not the case due to the large number of applications being made on all funds.

89. In addition, the Applicant was obliged to wait until the end of the Section 20 consultation process for the fire alarm before any works could be carried out. Due to the specialised nature of the new fire alarm system and the requirements of Section 20 of the Landlord and Tenant Act 1985, it was necessary for the Applicant to obtain formal tenders for the works from at least two independent contractors. Before contractors could be approached, the Applicant's agent, LSH, had to prepare a specification of works. The contractors approached to provide quotes needed to consider the specification of works and inspect the Building before putting together their tenders, all of which takes time. if the consultation notices were defective, for example by not providing at least two independent estimates, the leaseholders could refuse to pay for the works on statutory grounds.

90. In addition, the Respondents have been disputing the costs payable for the new fire alarm system for some months. The Applicant is not obliged to carry out the major works to the fire alarm system unless the service charges are paid in advance and, to date, no leaseholders have paid the charges. Therefore, any additional delays are solely in the hands of the leaseholders.

91. The Respondents dispute the management fees incurred by the Applicant's managing agent, HLM, as they consider that HLM has not provided management to a proper standard. The Applicant's position is that there are no management fees incurred. by HLM which specifically relate to the administration of the waking watch. There are management fees which have been incurred in respect of the Section 20 consultation for the fire alarm works, but these would have been incurred in any event. It is noted that the Respondents' Statement of Response does not make any comment in respect of the dispensation application; the Respondents' principal arguments relate to the recoverability of the fire alarm costs and the costs. of the waking watch. It is therefore submitted that the Respondents have suffered no prejudice as a result of the failure to complete the consultation procedure under Section 20 of the Landlord and Tenant Act 1985 in respect of the costs of the waking watch.

92. In conclusion, the Applicant states that is worth noting that there is no funding available to cover the costs of the waking watch itself. The BSF contributes towards the costs of the removing and replacing defective cladding and the WWRF contributes towards the cost of upgraded fire alarm systems.

93. The Applicant has at all times acted in the best interests of the leaseholders with a view to ensuring the safety of the Building. The waking watch was and is necessary to ensure the safety of the Building and the leaseholders, and it was implemented quickly upon receipt of the appropriate advice from West Midlands Fire Service.

94. It is accepted that the waking watch may cease once the new fire alarm system has been installed and it is also accepted that due to an initial error in the measurement of the Building in the Hydrock report that the initial BSF application was delayed by approximately three months.

95. However, it is not accepted that the Applicant has caused such significant delays for it to be reasonable for the leaseholders not to bear the costs of the waking watch for the reasons set out above. It is also submitted that the costs of the waking watch are in line with the average rates payable in England.

Further information

96. At the conclusion of the hearing, it was agreed that further information was required before the Tribunal could reach its determination. Accordingly, on 20 June 2022 the Tribunal issued the following further directions:

    a) By Friday 1 July 2022, the Applicant was required to provide copies of the documents indicated in the right hand column of the Timeline spreadsheet attached, to the Tribunal and the Respondents.

    b) By 15 July 2022, the Respondent was invited to submit a statement to the Tribunal and to the Applicant in connection with the additional documents provided. The Respondents were also invited to provide their opinion as to the increase in waking watch costs caused by any perceived delays in the process with the reasons behind the same.

    c) By 29 July 2022, the Applicant may submit a statement in response to that of the Respondents to the Tribunal and also to the Respondents.

Additional Submissions

The Respondents

97. In their supplementary submissions, the Respondents consider there was an unreasonable delay in processing the BSF and WWRF applications. This statement is justified by the fact that the Applicant registered the Property with the BSF in August 2020 and then did not submit the EWS1/Hydrock report until approximately 6 months later – 10 February 2021. The Tribunal's questioning of Ms Pugh at the hearing indicated that this was for several reasons:

    a) HLM is a large company and manages a significant portfolio of properties and chose to prioritise applications for buildings it considered most 'at risk'.

    b) HLM then said that based on an assessment of the original architect drawings (see paragraph 9 below), it believed the Property would likely not be eligible and so it was de-prioritised. The Respondents consider that using architects drawings as a basis for considering the buildings as flawed when the BSF set a clear protocol to measure the of buildings that is impossible to replicate from looking at architect drawings.

    The Respondents submit this approach is unreasonable and led to an avoidable delay in processing the BSF and WWRF applications.

98. HLM then compounded that error of professional judgement by not noticing that Hydrock measured the height of the building in a manner inconsistent with the clear BSF protocol. The WWRF Prospectus at section 18 states: "The Responsible Person or any entity nominated on their behalf should already have the information they need to assess their eligibility and the evidence needed to progress their application."

99. The Applicant's representatives argued at the Hearing - unconvincingly in the Respondents' opinion - that it cannot be reasonable to expect the Applicant or its agents to spot such a clear and obvious error in a report that they had commissioned. The Respondent strongly disagrees because:

    a) Both Marden and HLM are professional property management companies;

    b) The Applicant is the Responsible Person for the purposes of the BSF/WWRF; and
    c) The likely ruinous financial consequences of ineligibility must surely raise the barrier of what might be considered reasonably observant.

100. The Respondent submits that both the incorrect assumption as to height and the failure to spot the Hydrock mistake when the report was issued led to avoidable delay in processing the BSF and WWRF applications.

101. As stated in the Respondent's previous submission to the Tribunal, the BSF Guidance makes it clear that it is entitled to regular updates and information from the Responsible Person – the Applicant - regarding the progress of any applications. The Respondent believes the Applicant has consistently failed to provide clear and timely updates in relation to applications made to the various government relief funds. In particular, the Respondent recalls the first notification the Applicant made to leaseholders concerning the status – or even existence - of the BSF/WWRF applications was in May 2021, after both had been rejected, but is impossible to know for sure because HLM initially dealt with leaseholders individually. The Tribunal is asked to note this would be:

    a) Around three-quarters of a year since the initial BSF registration;
    b) Several months after the Hydrock report had been issued;
    c) Around two months after the WWRF application had been rejected; and
    d) Around a month after the BSF application had been rejected.

102. The Respondent spotted the error in the Hydrock measurement immediately and drew it to the Applicant's attention straight away . The Respondent respectfully requests the Tribunal to agree that it must be reasonable to presume that leaseholders would also have spotted the error had the Hydrock report been made available in January 2021 - as it should have been pursuant to the Applicant's general obligation as Responsible Person to keep them informed.

103. The Respondents consider that the assertion made by the Applicant in the hearing that it would not have been possible for the Applicant to simply ask Hydrock to re-measure the height using the correct protocol. The Respondent submits it is entirely reasonable to expect a professional firm (i.e. Hydrock) to correct an obvious error in fact; and this would have been the simplest, quickest and most logical solution both at the time and in June 2021 when the error was first brought to the attention of the Applicant by the Respondent.

104. The Respondent submits that both the lack of requisite transparency and the refusal to direct Hydrock to correct its mistake as soon as it was spotted led to avoidable delay in processing the BSF and WWRF applications.

105. As the Tribunal is aware, the WWRF was set up to cover the cost of fire alarms installed after 17 December 2020 "to ensure it incentivises buildings to install a common alarm system and to reduce the dependency on Waking Watch." The fact that there was a subsequent delay as the WWRF was replaced by the Waking Watch Replacement Fund must logically be considered irrelevant for these

purposes: if the WWRF application had been made sooner and on the correct basis as to height then the Respondent submits it is reasonable for the Tribunal to conclude that the application would have been approved and funding would have been forthcoming.

106. The Applicant's own timeline shows that height was the only factor holding up BSF/WWRF approval, when the height was measured correctly using the BSF guideline, both applications were approved; and based on the Government's published statistics, as at 30 June 2021 eight out of nine WWRF applications to the Birmingham Local Authority had been approved, so the administrators were evidently responding to eligible applications rapidly.

107. The Respondent reasonably estimates that the fire alarm could have been replaced – and the waking watch therefore terminated – as early as June 2021 if not sooner and therefore respectfully requests that the Tribunal concludes that:

a) The Applicant did not act in a reasonable, appropriate and timely manner in pursuing the BSF and WWRF applications;
b) As a direct result, there has been a considerable delay in obtaining government funding to replace the fire alarm system in the Property, meaning that waking watch costs have accumulated unnecessarily;
c) It is reasonable to estimate that the fire alarm could have been replaced – and the waking watch therefore terminated – as early as June 2021; and
d) Any waking watch costs from that date are – therefore - not 'reasonably incurred' for service charge purposes.

108. The Respondent also respectfully requests the Tribunal to consider that any management fees charged by HLM in relation to the commission of the Hydrock report and any other proposed works to replace the fire alarm system be excluded from the service charge, because such fees are not justified from the Respondent's perspective given the multiple errors of judgement and process detailed above, and therefore cannot be considered reasonably incurred.

The Applicant's Reply

109. From their initial submissions and the oral hearing, the Applicant's understand that the Respondents object to the payment of any service charges in respect of the waking watch, on the basis that such (a) funding for the waking watch should have been obtained so that it was in place when the waking watch commenced, and (b) the fire alarm system should have been fitted at an earlier date thereby rendering the waking watch redundant. The Applicant respectfully considers that both these points are misconceived for the reasons set out below.

110. BSF Funding. The Respondents' principal objection to incurring the waking watch costs appears to be what they consider an unnecessary delay in the progress of the BSF application. The Applicant considers this a "curious" objection given that the provision and termination of the waking watch is unrelated to the commencement of the re-cladding works at Meridian Point. The waking watch may be terminated when the fire alarm system is installed, whether or not the cladding works have commenced.

111. Notwithstanding that the Applicant considers the link between the BSF application and incurring the waking watch costs is tenuous at best, given that it forms the bulk of the Respondents' case, the Applicant answers the Respondents' points with regard to the BSF application below.

112. Instruction of Hydrock. On 14 August 2020, the Applicant – through its agents HLM Property Management - registered the property with the Building Safety Fund ("BSF"). That registration was a precaution taken by HLM in respect of all those tall buildings within its property management portfolio which might qualify for BSF funding if the cladding to those properties required replacement. In December 2020, HLM instructed Hydrock Consultants Limited ("Hydrock") to compile a report on "the suitability of the external wall systems based on the Building Regulations 2010 (as amended) and recently published design guidance". It is suggested by the Respondents that the four-month period between registration with the BSF and the instruction of Hydrock was unnecessarily elongated as HLM did not consider Meridian Point to be a priority. The Respondents suggest – with absolutely no evidence in support of this proposition – that HLM dealt with properties sequentially according to their height, with Meridian Point being some way down the list as it was not as tall as other buildings it managed, and because HLM believed Meridian Point would not be eligible for BSF funding because architect plans indicated it did not reach the required height. The Applicant does not accept these comments. At the hearing, Ms Pugh of HLM did not give any evidence of the queue system suggested by the Respondents, nor did it in any way indicate that it delayed in taking action but was clear that the BSF registration was pre-emptive of any likely cladding works and a sensible, early precautionary measure in anticipation of cladding replacement and the likely financial burden which this would place on leaseholders, and which the Applicant wished to ease. The Applicant considers this approach sensible. As for the four-month period itself, it made no difference to incurring costs in respect of the waking watch which was not implemented until April 2021, by which time the Hydrock report (dated 25 January 2021) had been compiled and sent to the BSF on 10 February 2021. The Respondents also fail to take account of the various lockdowns which were in place in 2020 and 2021; Ms Pugh in her oral evidence made it clear that Covid restrictions and a lack of suitably qualified contractors meant that there were some delays in locating a suitable company to provide the EWS1.

113. Building height. The Applicant concedes that the Hydrock report contained an error in relation to the height of the building, on the basis of which error the BSF application was refused on 12 April 2021 but notes that the appeal against that refusal was promptly filed on 7 May 2021.The Respondents' case appears to be that this was a glaring error which the Applicant should have spotted immediately, and commissioned a second report immediately.

114. Three points may be made in this regard. First, the error with regard to height was not that of the Applicant itself, but of the professional consultants it had engaged to – inter alia – measure the height of the building. Second, Hydrock are professionals and experts in this field, and the Applicant was entitled to rely on their findings. Third, this was not a glaring error. The architect plans suggested that the height of Meridian Point was insufficient to meet the BSF requirements, and the error was of a few centimetres, rather than metres. It was far from obvious that an error had been made by Hydrock.

115. In appreciation of how important it was to leaseholders that BSF funding was secured, on 4 August 2021, HLM did instruct Midland Survey Limited to measure the building again. The resulting report, dated 31 August 2021, did find that building met the required height for BSF purposes, and that report was sent to the BSF in support of the appeal which was ultimately successful on 14 February 2022.

116. In summary, therefore, the Applicant's position with regard to any delay in the BSF application is that it is regrettable that the Hydrock report comprised an error as a result of which the BSF application was initially refused, but it was not the Applicant's error, who was entitled to rely on a professional report and the findings in it, and it acted promptly and responsibly in seeking a second opinion which ultimately led to a successful appeal and qualification for BSF funding.

117. The Applicant does not accept the timeline which the Respondents state should have been achievable, the Respondent suggesting that an application be made to the WWRF in November 2020, nearly six months prior to the need for a waking watch being disclosed, and there being no account taken of the windows during which applications for funding could be made, and periods when those windows were closed, and such applications could not be made.

118. The Applicant considers the suggestion that the fire alarm be replaced in June 2021, as entirely unrealistic on several levels. First, it takes no account of the statutory consultation process, second it ignores the delay inherent in seeking funding in relation to those alarms, and third it does not account for the leaseholders' refusal to pay service charges in advance in respect of the installation of that system.

119. The Respondents do not address the delay inherent in the process of the BSF application, perhaps because – quite properly – it acknowledges that such delay was outside the Applicant's control, and that the Applicant communicated frequently with the BSF to try and speed up the appeal process. What is apposite about the delay is, of course, that even if the initial application had not been rejected because of the Hydrock error, there is no guarantee that the ultimate decision to award funding would have been received any earlier – or at least significantly earlier – than it actually was. The Respondents have certainly not produced any evidence of any more efficient applications through the BSF system to which the application material to this case can be favourably or unfavourably compared.

120. The Respondents complain of an unreasonable delay in the application for funding to the Waking Watch Replacement Fund. This application was, however, made on 27 January 2022, the first day that the fund opened. It would have been impossible to have made it earlier. As for the applications to other funds, the Waking Watch Relief Fund application was made on 18 June 2021, the window for it having re-opened on 26 May 2021, and the Applicant accepts that its progress was slow but, again, this was outside the Applicant's control. Similarly, on 24 September 2021, the Applicant was informed that a decision on Waking Watch Relief Fund funding would not be decided until the BSF appeal was determined. The Applicant had no control over that decision.

121. In short, therefore, the Applicant considers that it made applications for all possible forms of funding relief in respect of the waking watch expeditiously but could not control the pace at which those applications progressed despite chasing nor could it prevent the relief application being tied to the BSF appeal. It should not now be punished and denied those costs to which it is entitled under the lease for circumstances beyond its control, in particular when it has made and pursued those applications with alacrity.

122. Addressing the Respondent's complaint that the Applicant has delayed in installing the alarm system so that the waking watch costs continue to be incurred for an unnecessarily elongated period, the Applicant would highlight the processes by which the alarm system could be fitted. First, it had to go through the various stages of the consultation process – throughout which it received no comments from the Respondents – prior to being able to award a contract to fit the system which is a time-consuming process. To have fitted the alarm system without consultation and then applied for dispensation, that would have been a risky path to follow given the cost recovery bar if dispensation is not granted, and a risk which this landlord could not afford to take financially. Further, the Applicant has respect for the statutory process Parliament has set down and will follow it save in cases of dire emergency when circumstances do not permit the indulgence of time which the consultation process expends. The implementation of the waking watch could

not wait for the full consultation process to be followed so that the Applicant was forced to risk incurring the cost of the waking watch and subsequent dispensation application.

123. With regard to service charge payments, the Applicant is entitled to service charges in advance with respect to the cost of the fire alarm system. While funding is in place with respect to half of the cost of the alarm system, the Respondents have for months refused to pay the other half of the alarm costs, so that its fitting has been delayed. If, therefore, there has been any delay in fitting the system post the receipt of partial funding for it, that delay does not lie with the Applicant which cannot reasonably be expected to absorb half of the costs of fitting the system when it is entitled to those costs in advance under the Lease, but instead with the Respondents refusal to pay those costs for which they are liable with respect to the fire alarm.

124. The Applicant also responds to the Respondents comments regarding management fees which for reasons given below, the Tribunal does not need to consider particularly as the Applicant has repeatedly stated in writing and orally at the hearing, there are no management fees connected to the waking watch.

125. Summing up, the Applicant requests that the Tribunal consider the costs of the waking watch reasonably incurred, in particular given the multiple sources of alternative funding pursued by the Applicant with some diligence, the aim of which was to ensure that the leaseholders' financial burden was reduced. In those efforts the Applicant has been successful, with the WWRF and BSF applications approved, ultimately, to the significant benefit of the Respondents.

The Law

126. The relevant legislation is set out in the Appendices to this decision.

The Tribunal's Determination

127. In the first instance, the Tribunal considers it necessary to summarise the applications before it:

- The first application relates to an application under section 27A of the Act for determination of liability to pay and reasonableness of service charges for the service charge year 2022 in relation to costs of the waking watch. Costs incurred to date are £119,074.50 and are continuing at £2,184 plus VAT per week.

- The second application relates to an application for dispensation of all or any of the consultation requirements provided for by section 20 of

the Act in respect of a qualifying long term agreement for waking watch with Triton Securities and Facilities Management Limited which commenced on 12 April 2022. For the reasons set out in the application the Applicant seeks a preliminary determination that the agreement is not a qualifying long term agreement

128. To give context to the decision, the Tribunal has included some submissions, even if they were not directly relevant to the applications above however for the avoidance of doubt, the following matters will not form part of this decision:

- HLM's management of the development.
- The specification of the fire alarm system
- The specification of the replacement cladding system.

129. The objection raised by the leaseholder of Flat 29, Damian Kaczor, essentially that the potential costs of the waking watch and cladding upgrade would be unaffordable due to his status as a student is not a factor that the Tribunal can take into account in respect of its determination of either application although the Tribunal is genuinely sympathetically to his position and that of many leaseholders affected by cladding issues.

Issues to be determined in respect of the service charge.

130. The service charge issues to be determined are therefore as follows:

- *Are the costs of the waking watch payable under the terms of the lease?*
- *Does the agreement with the Triton Group constitute a QLTA?*
- *Are the costs of the waking watch reasonable and are they reasonably incurred?*

Are the costs of the waking watch payable under the terms of the lease?

131. Relevant elements of the lease are as follows:

Particulars

8. Service Charge on the date of the lease

£750

Definitions

1.15 "the Services" means the services set out in the Sixth Schedule

1.16 "Total Expenditure" means the total expenditure reasonably and properly incurred by the Landlord in any Accounting Period in providing the Services and may include any other costs and expenses properly incurred in connection therewith including- (without prejudice to the generality of the foregoing);
(a) the costs of employing any managing agents
(b) the costs of any Accountant or Surveyor employed to determine the Total Expenditure and the amount thereof payable by the Tenant under the terms of this Lease
(c) any interest or other charges arising from the Landlord borrowing money to enable it to carry out its obligations under the terms of this Lease
(d) all Value Added Tax or other similar tax payable by the Landlord in respect of the Services insofar as the same are not recoverable by the Landlord as an. input
(e) the the cost of calculating the service charge and the payments on account payable and the issue of the certificates referred to in the Fifth Schedule the preparation of accounts and audits made for the purpose of recovering service charges and payments from the Owners

1.17 "the Service Charge" means the sum specified in Paragraph 8 of the Particulars of the Total Expenditure or (in respect of the Accounting Period during which this Lease is executed) such amount as is attributable to the period from the date of this Lease to the end of the Accounting Period or such other reasonable amount of costs as the Landlord or their agents may consider from time to time and such decision to be final "the Interim Charge" means such sum to be paid on account of the Service Charge in respect of each Accounting Period as the Landlord shall specify to be a fair interim payment PROVIDED THAT if it should appear necessary or appropriate to the Landlord to adjust the Interim Charge during any Accounting Period the interim Charge may be increased or decreased (as the case may be) by the relevant adjustment being made to the amount of the Interim Charge demanded at any time

Tenants covenants

3.7 Pay to the Landlord the Interim Charge and the Service Charge at the times and in the manner provided in the Fifth Schedule hereto both such charges to be recoverable in default as rent in arrear

The Fifth Schedule – The Service Charge – sets out the service charge accounting mechanism

The Sixth Schedule – The Services – sets out the scope of the service charge.

1. The compliance by the Landlord with every notice regulation requirement or order of any competent local or other authority or statute in respect of the Estate

(but not in respect of the individual dwellings where these are the responsibility of the Owners)……

10. Providing maintaining and when necessary replacing renewing or repairing of a security patrol/and or security observation system for the Estate (including but not by way of limitation the provision of alarms apparatus and fittings designed to prevent or limit vandalism)…….

14. Carrying out any other works or providing services or facilities of any kind whatsoever which the Landlord or its Managing Agent may from time to time consider desirable for the purpose of maintaining or improving the services or facilities in or for the estate……

132. In the opinion of the Tribunal, leaseholders are obligated to pay a service charge and costs incurred in the provision of the waking watch could conceivably fall within any of the paragraphs of the Sixth Schedule set out above. The costs of the waking watch are therefore payable as service charges under the terms of the lease.

Does the agreement with the Triton Group constitute a QLTA?

133. The Applicant stated that the agreement with Triton was determinable on one week's notice although the copy of the Triton agreement exhibited did not appear to include termination provisions. This assertion was not challenged by the Respondents. In *Bracken Hill,* the FTT found that an arrangement concerning a management contract that was renewed annually via a telephone call, during which both parties agreed that the contract would last no longer than 364 days, was a QLTA, therefore capping leaseholders' contributions at £100 each per year. The appellant appealed. The Upper Tribunal followed the reasoning of Lewison J. in *Paddington Basin Developments Ltd v West End Quarry Estate Management Ltd* [2010] EWHC 833 (Ch) and determined that the agreement was not a QLTA and upheld the appeal. The deciding factor was the minimum length of the commitment, rather than the maximum potential length of the contract. The Triton Contract does not have a fixed contractual term – the payment terms are based on an hourly rate calculated weekly - so it can only be construed as a week to week contract. The Tribunal therefore considers that the agreement is not a QLTA accordingly, no consultation was required. The dispensation application, which in any event was not opposed by the Respondents, therefore falls away.

Are the costs of the waking watch reasonable and are they reasonably incurred?

134. Considering the first element, if the cost is reasonable, the Tribunal notes that the Applicant had obtained two quotes for the provision of the waking watch, one from Triton at a cost of £13 per hour plus VAT and another from Adana Management Group at a cost of £12 per hour plus VAT. The Applicant states that it did not

pursue the Adana quote "*because of concerns arising from ADANA's previous delivery of services to another block (of which the Applicant is not the owner)*". A waking watch performs a vital function, in the event of a fire to oversee the evacuation of the development in as short a time as possible. The Applicant was thus perfectly entitled to reject the Adana quote if there were concerns about their levels of service nor is it obliged to accept the lowest tender. In the experience of the Tribunal, the Triton cost at £13 per hour is reasonable. This is endorsed by the fact that it is not significantly different from the Adana quote and in any event the National Living Wage, from April 2022 for a person over 23 years of age is £9.50 per hour. The Respondents did not, in any event, challenge the cost of the waking watch *per se*.

135. Secondly, were the costs reasonably incurred? This is where the Respondents' principal challenge lay, that there were delays in the process generally but particularly incurred in the submission of the BSF application initially and a further one caused by the incorrect measurement of the of the height of the building. These delays lead in turn to a delay in the BSF application, and accordingly the WWRF application for the replacement fire alarm system being approved.

Delays in the process

136. The Tribunal finds it useful to summarise the timeline of relevant events:

<u>14 August 2020</u>

HLM received an email from BSF Registrations acknowledging receipt of its registration for BSF. The email requests supporting documentation for the registration, including "a survey of the cladding system carried out by a building surveyor or fire engineer". The email makes clear that the project will need to commence during 2020/21 financial year and the full application will need to based on tender prices. It also reminds HLM of the need to make the local fire authority aware of fire safety issues with the external wall system and agree any interim safety measures that should be in place, and also to keep residents informed of the remediation plans and progress with the registration application. (Applicant's Response Annexe D).

Clare Pugh confirmed in evidence that HLM had, at about the same time, registered with BSF all properties it was managing that were around 18m in height as a precautionary first step. The correspondence in the bundle, indicates that the project was overseen by one of LSH's Building Consultancy Directors, a building surveyor with engineering and design qualifications. The Tribunal assumes that HLM/LSH were fully conversant with the inherent risks of managing a seven-storey building with obvious wooden cladding, both in terms of the immediate fire

safety risks and the potentially ruinous costs of remediation. HLM were after all managing a number of other tall properties with similar issues. The Tribunal also assumes that HLM were fully conversant with the requirements of the BSF registration prospectus published in June 2020 ("the Prospectus"), including the eligibility criteria for funding and in particular the height restriction for buildings under 18m as measured in accordance with the technical information set out in Annexe A (Measuring the height of your building).

10 December 2020

Hydroc carried out an invasive survey of the Property to inspect the external wall construction on the instructions of LSH. The Tribunal were not provided with a copy of the instructions. It is not clear whether the instructions included reference to the technical information in Annexe A of the Prospectus.

It is also, unclear why it took some 4 months for the survey to be arranged. Clare Pugh said in evidence that they were dealing with a new situation, there were only a few firms qualified to carry out wall surveys and the country was in and out of lockdown throughout this period. The Applicant did not however provide details of any suitably qualified firms unsuccessfully approached by the Applicant or HLM or confirm whether any steps had in fact been taken during this period to obtain an urgent survey report. The Tribunal is aware that the national lockdown restrictions were eased on 14 August 2020, the second national lockdown not coming into force until 5 November 2020. That the Hydroc survey took place during the second period of national lockdown indicates the pandemic was not an insurmountable obstacle to progress. Scarcity of suitably qualified firms may have been an issue, but no evidence was provided of attempts made that been thwarted, such as correspondence from qualified firms that had been approached. The Tribunal is not therefore satisfied, given the urgency, that a survey could not have been arranged sooner than 10 December 2020.

25 January 2021

Hydroc issued its report. The second paragraph of the executive summary, at the beginning of the report states that the seven-storey building, constructed in 2015 was *"less than 18m (17.255m)"*. The building was in fact constructed in 2006 and the report does not explain how the height was measured.

The report confirmed that the external wall system presented a substantial fire safety risk to occupants and needed the remedial action recommended in p.7 of the report. The report also recommended that interim safety measures should be implemented by HLM adopting one of the three options detailed in Appendix 1 of '*Simultaneous Evacuation Guidance' (dated 01.10.2020) from the National Fire Chief Council (NFCC)*:– and set out for convenience in p.6.3 of the report:-

1. Automatic detection from communal alarm system extended to include heat detectors within all apartment rooms that have an opening on to the external walls;
2. Reliance on 'Waking Watch' to alert all residents and initiate simultaneous evacuation (including manual system to operate all apartment alarm simultaneously) of all apartments;
3. Reliance on 'Waking Watch' to alert all residential and initiate simultaneous evacuation (manually alerting residents, e.g. knocking on doors or air horn, etc.) of all apartments;

The report raised three immediate red flags:

a) Until the external cladding could be replaced/made safe, the occupants were at substantial risk in the event of fire breaking out.
b) Substantial costs would clearly need to be incurred on interim measures until remedial cladding works could be arranged.
c) The height of the building appeared to render it ineligible for funding under the BSF and under the WWRF introduced in January 2021 by the government to meet the cost of alarm systems/upgrades fitted after 17 December 2020.

The actions of HLM following consideration of the report were critical to the safety and well-being of the residents. The remediation cladding works were urgently required but would clearly take time to organise. HLM had apparently arrived at a ball-park figure of £4 million for the cladding remediation, based on similar projects it had some involvement with. Interim measures were therefore necessary, albeit costly to implement. It was a reasonable decision to immediately action preparatory work for the cladding remediation works, while at the same time put in place what were likely to be expensive interim fire safety measures.

The Hydroc report points to the third edition of the NFCC *Simultaneous Evacuation Guidance* issued on 1 October 2020 and recommends that one of the three interim measures set out in Appendix 1 of the guidance are adopted. In practical terms this meant upgrading the common fire alarm system to BS 5839-1 with heat detectors installed in every room that overlooked an external wall. As a transitional measure (until the fire alarm system upgrade was installed), a waking watch should be employed to manually alert occupants in the event of fire and initiate simultaneous evacuation, either by physically knocking on doors, or by manually operating then alarm systems.

LSH would, or should, have been aware that one consequence of failing to quickly remediate the cladding or, swiftly upgrade the fire alarm system, would be the extended use of a waking watch. It behoved them to consider the most cost-

effective measures and take urgent steps, to implement them regardless of whether a contribution to those costs could be obtained through WWRF or BSF.

Costs options should have been explained to the residents so that they could be involved in the choice of interim measures. It was not unreasonable for HLM to recommend that a waking watch should be put in place immediately as a transitional measure until the fire alarm system upgrade was installed. However the cumulative cost of the waking watch needed to be carefully balanced against the upfront costs of upgrading the fire alarm system (as recommended in the MHCLG's *Building Safety Programme; Waking Watch Costs, Table 3 [cumulative costs of waking watch compared to the upfront costs of installing a fire alarm system over a 12 month period*] – published in on 16 October 2020).

The data collected by MHCLG between June and September 2020 shows that the average costs of quoting/installing a suitable fire alarm system was £55,991.00. HLM were clearly aware of the MHCLG data, having quoted Table 2 in relation to median hourly rates for waking watch personnel in the application. They should therefore have been aware that the average upfront cost of the fire alarm system upgrade (albeit based on a small sample) would likely be exceeded by the cumulative costs of the waking watch after 5 months.

All this was known – or should have been known, by LSH when it was considering the Hydrock report on 25 January 2020. In the Tribunal's view the steps that it would have been reasonable for the Applicant to take immediately following receipt of the report are to:

a) Implement a waking watch.
b) Procure a detailed specification of the recommended fire alarm system upgrade for tendering and agree list of suitably qualified contractors.
c) Prepare the tender documentation for contractors and send out on receipt of the specification.
d) Ask Hydroc to explain how the height of the building had been measured and if not in accordance with Appendix A, arrange for it to be re-measured.
e) Inform the residents of the issues raised by the Hydroc report, the options for remediation, the recommended interim measures, the potential costs of each option including the availability of government funding.

The steps actually taken by LSH/ the Applicant appear to be as follows:

<u>10 February 2021</u>

The Hydroc report was sent to the BSF, notwithstanding that the height measurement clearly rendered the building ineligible. The application was subsequently rejected on this ground.

12 February 2021

Triton Group sent a proposal to HLM for a waking watch.

25 February 2021

A section 20 Notice of Intent to replace/upgrade the fire alarm system in accordance with the Hydroc report, so as to comply with current government guidance was sent to the residents (devoid of any specification, quotes or estimates which had yet to be obtained)

4 March 2021

An application for funding was sent to the WWRF with a copy of the Hydroc report. The immediate response was that the height of the building rendered it ineligible and the application was rejected.

19 March 2021

Bennet Williams was instructed to prepare a specification for the fire alarm system upgrade.

12 April 2021:

West Midland Fire Service inspected the building and provided a schedule of measures that needed to be undertaken as soon as possible (dated 16 April 2021). Those measures were entirely consistent with the recommendations of the Hydroc report. The BSF application was rejected on the grounds of height ineligibility but subsequently appealed by the Applicant on 7 May 2021. The waking watch commenced, (funded by the Applicant pending recoupment through the service charge).

21 April 2021

HLM agreed LSH's fees of £22,000.00 for overseeing the fire alarm upgrade.

4 May 2021

A section 20 Notice of Intent to implement a waking watch until the fire alarm system was upgraded, was served on the residents.

14 June 2021

The tender documents, including Bennett Williams specification was finalised and sent to contractors over following two weeks.

18 June 2021

The Applicant submitted a further application to the WWRF. This was met with a request for 3 quotes for the fire alarm system work (not yet obtained). Correspondence continued through July 2021.

1 July 2021

Meeting to discuss the three tenders received.

9 July 2021

HLM notify WWRF that the residents had appointed their own surveyor to measure the building and the height was 17.77m. The residents report was submitted on 13 July 2021.

15 July 2021

The WWRF rejected the application due to height ineligibility because it did not find the residents report convincing, particularly as the original plans indicated the height was below 17.7m. HLM were asked if they could provide any other evidence to show the height exceeded 17.7m.

19 August 2021

The Applicant confirmed to WWRF that a further height survey was being carried out on 31 August 2021.

20 September 2021

The Applicant submitted the survey report provided by Midland Survey Limited showing the height of the building was 18.09 m. WWRF were not immediately convinced because there was no explanation of the previous discrepancies. A further letter of clarification was sent but as the BSF application was still in the process of being appealed due to the same height issue, the WWRF decided that its decision should be contingent on the outcome of the BSF appeal. The final paragraph of their letter of 24 September 2021 confirming that: "*In the interim, and if not already done so, we encourage you to move quickly to install a common*

fire alarm to replace the costly waking watch measures in this building as set out in guidance published by the NFCC."

October 2021 – February 2022

Correspondence continued between HLM and the BSF appeals team on the eligibility of the cladding materials/systems for funding (not height). Eligibility of the materials and systems for funding being finally confirmed on 14 February 2022.

27 January 2022

Following the closure of the WWRF on 10 December 2021, the Applicant made an application to the Waking Watch Replacement Fund. Copies of the 3 quotations procured from the tendering report finalised September 2021, were provided and on 24 February 2022 a grant award of £65,767.20 toward the costs of the fire alarm system was offered, the first 50% of which was paid on 28 March 2022. The balance of approximately £48,828 (which includes the non-eligible surveyor and contingency fees) is to be charged to the leaseholders. Once that has been paid the fire alarm system upgrade will proceed which in turn will allow for the cessation of the waking watch.

By date on which the first 50% tranche had been paid by the WWRF the cumulative costs of the waking watch totalled approximately:

12 April 2021 – 28 March 2022

351 days (including end date) = 8424 hours

8424 hours @ £13.00 per hour plus VAT = £109,512 plus VAT.

£131,414.0 including VAT

137. The Applicant's focus and that of HLM throughout critical periods appears to have been to secure government funding through less than competent applications and appeals. Both the BSF and the WWRF required the building to be eligible. The only issue in this case was height and yet it took some 7 months for the Applicant to procure a remeasurement having ignored for months the deafening chorus of residents entreating them to do just that. In fact, it was only after the residents took action themselves that the Applicant finally instructed their agents to do what clearly should have been done on receipt of the Hydroc report. Months were lost chasing appeals that were hopeless until it could be established that the building was height eligible.

138. When asked why HLM had taken so long to address such a critical issue Ms Pugh said that it was not for her as a property manager to question the report, it has been procured on behalf of the Applicant. She said that having looked at the architects plans they were not expecting the building to be over 18 m and that the Hydroc report was in line with the original architect plans. She said that HLM thought the building might nevertheless be eligible because since the fund first opened "you can add a lot on". The Tribunal does not find the delay in seeking a remeasurement of the building to be reasonable because:

a) There was no confirmation that the Hydrock measurement complied with Appendix A of the Prospectus.

b) The shortfall on eligibility was very small and should in any event have been checked for error, particularly as the measurements on the original architects' plans were unlikely to comply with the requirements of Appendix A.

c) HLM are a highly experienced company with qualified surveyors overseeing the funding projects and therefore familiar with the eligibility criteria of each fund. The Hydroc measurement proved to be incorrect for assessing eligibility for both funds and yet this was not spotted or actioned until pressure was exerted by the residents.

139. For BSF, the cladding materials and systems also had to be eligible and satisfying BSF on that took until February 2022. WWRF does not require the building to be eligible for BSF, although both have an identical height qualification. WWRF indicated in its email of 24 September 2021 that to ensure consistency with BSF its decision on height eligibility would be contingent on the BSF appeal, which at that stage just concerned height eligibility. In other words, if BSF was satisfied on height then WWRF was also satisfied.

140. BSF appear to have accepted the Midland Survey report submitted in September 2021 because all subsequent emails through October 2021 to February 2022 concern the eligibility of cladding materials and systems. There is no further reference to height. However, the Applicant does not appear to have sought confirmation that BSF was satisfied on height, presumably because it had taken the email of 24 September 2021 to mean that the WWRF appeal was effectively stayed until the broader parameters of BSF eligibility were determined, not just height eligibility. The Tribunal find it likely that progress could have been made on the WWRF appeal as early as October 2021 had the Applicant chased for confirmation that BSF had accepted the building qualified on height.

141. The Applicant's focus should have been on procuring the interim fire alarm system upgrade by instructing Bennett Williams (or similarly qualified firm) at the earliest

date to provide a detailed specification that could be used for tendering the job. This could have happened within a few days of receiving the Hydroc report. It wasn't actioned until 19 March 2021, a delay of some 6 weeks. The tender documents including Bennett Williams drawings and specification were finalised on 8 June 2021, some three months later. The tenders appear to have been discussed at an opening meeting on 1 July 2021, with LSH issuing a final report to the Applicant on 31 August 2021. It is not clear why there was a further period of 2 months between receipt of the tenders and issue of the final report. All tenderers were able to commence work within 14 days (with an anticipated start date of early July) and complete within 4 weeks. Furthermore, from 1 July 2021 the tenders could have been used to progress the WWRF application and the s20 process (and/or a dispensation application given the urgency). A dispensation application could be fast tracked in these circumstances and the processed shortened to a few weeks.

142. For the above reasons the Tribunal finds that some of the waking watch costs have been unreasonably incurred. This is largely due to the failure of the Applicant and LSH to procure the interim fire alarm system upgrade with the degree of urgency that the situation warranted. The Tribunal considers that the works could and should have been procured urgently and has determined, using its knowledge and expertise as a specialist Tribunal, that a reasonable time scale would have been as follows:

- There was a delay of 4 months instructing a fire safety consultant to report on the cladding and wall systems. Allowing for the conditions during the pandemic and the relatively new entry of suitably qualified firms this should not have taken more than 6 weeks from receipt of the BSF email on 14 August 2020.

- Preparation of the report (assuming a similar time frame to Hydroc) – a further 6 weeks.

- Instructions to a building surveyor to prepare the alarm system specification and tender documents – 2 weeks.

- Preparation of drawings, specification and tender documents, issue and review of the same. Based on the actual process this took some 15 weeks. Not quick, but not so long as to amount to unreasonable delay.

- Review of tenders – 2 weeks

- Application to the Tribunal for dispensation from section 20 say 12 weeks from receipt of tenders. Noting that an application under these circumstances could have been fast tracked and the process shortened.

- Installation of fire alarm system upgrade - 6 weeks, based on contractors' tenders.

- Unquantifiable delays – 4 weeks

- Total period – approximately 53 weeks from identification of the issue on 14 August 2020 i.e. by 20 August 2021.

DECISION

143. The Tribunal considers that the fire alarm upgrade could have been installed by 20 August 2021, allowing the waking watch to be cancelled from this point forwards. Accordingly waking watch costs for the period from the Fire Officer's advice of 12 April 2021 to 20 August 2021 (as detailed below) are reasonably incurred but not from any point thereafter.

    The waking watch costs for the period 12 April 2021 to 20 August 2021 can be calculated as follows:

    12 April 2021 – 20 August 2021

    131 days (including end date) = 3,144 hours

    3,144 hours @ £13.00 per hour plus VAT = £40,872 plus VAT.

    £49,046.40 including VAT

144. The Tribunal cannot speculate with any certainty on how the fire alarm upgrade costs would have been raised. The Applicant has it seems been prepared to forward fund the waking watch costs so far, which now total some £156,000.00. They were not, it seems, prepared to forward fund the balance of the alarm system upgrade so as to put a stop to the ever escalating costs of the waking watch. This is precisely the situation that Table 3 of the MHCLG publication on waking watch costs was intended to highlight and to which regretfully no account appears to have been taken by the Applicant or HLM.

145. The Tribunal considers it more likely than not that a competently prepared and progressed application for WWRF using the correct height measurement, would have yielded an offer of funding shortly after receipt of three tenders, which would have been about 5 March 2020 (29 weeks after 14 August 2020 had the tender process been proceeded with expeditiously). In other words, it is likely that the bulk of the costs would have been secured by an offer of funding by the time payment under the contract was required. The balance could have been paid from

service charge reserves or an interim charge which would have been far less contentious when not issued in the back-drop of eye watering waking watch costs.

Section 20C of the Landlord and Tenant Act 1985 & Paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002

146. If any Respondent wishes to apply for Orders for Limitation of service charges: costs of proceedings under section 20C of the Landlord and Tenant Act 1985 and/ or Limitation of administration charges: costs of proceedings under paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 the Respondent must notify the Tribunal within 21 days of the date of this decision and provide a copy to the other party.

Building Safety Act 2022

147. The two applications before the Tribunal were made before the provisions in relation to Remediation Costs Under Qualifying Leases set out in Schedule 8 of the Building Safety Act 2022 came into force. Those provisions are now in force. From the evidence given by the parties at the hearing, it appears that the service charge demands in dispute may be affected by Schedule 8 of the Act. [Further information is available online at https://www.gov.uk/guidance/the-building-safety-act]

148. The provisions in the Schedule 8 apply from 28th June 2022. Protections apply equally irrespective of when any service charge demands were issued by landlords or managing agents. This means that, even if a valid service charge demand was issued prior to commencement, provided that the service charge had not already been paid by the leaseholder, the demand is no longer valid after commencement insofar as it does not comply with the provisions set out in the Schedule.

149. If either party wishes to apply to the Tribunal in connection with a provision of the Building Safety Act 2022 (in relation to the applications before the Tribunal) they should do so within 28 days of the date of this decision (and provide a copy to the other party). The Tribunal will then issue further directions accordingly.

Appeal

150. A party seeking permission to appeal this decision must make a written application to the Tribunal for permission to appeal. This application must be received by the Tribunal no later than 28 days after this decision is sent to the parties. Further information is contained within Part 6 of The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 (S.I. 2013 No. 1169).

V WARD

Appendices

Appendix 1

Application under Section 27A of the Landlord and Tenant Act 1985

Sections 18 and 19 provide:

18(1) In the following provisions of this Act 'service charge' means an amount payable by a tenant of a dwelling as part of or in addition to rent –

> (a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements, or insurance or the landlord's costs of management, and
> (b) the whole or part of which varies or may vary according to the relevant costs.

(2) The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable.

(3) For this purpose –

> (a) 'costs' include overheads, and
> (b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

19(1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period –

> (a) only to the extent that they are reasonably incurred, and
> (b) where they are incurred on the provision of services for the carrying out of works, only if the services are of a reasonable standard;

and the amount shall be limited accordingly.

(2) Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction, or subsequent charges or otherwise.

Section 27A, so far as relevant, provides:

(1) An application may be made to the appropriate tribunal for a determination whether a service charge is payable and, if it is, as to –

(a) the person by whom it is payable,
(b) the person to whom it is payable,
(c) the amount which is payable,
(d) the date at or by which it is payable, and
(e) the manner in which it is payable.

(2) Sub-section (1) applies whether or not any payment has been made.

(3) An application may also be made to the appropriate tribunal for a determination whether, if costs were included for services, repairs, maintenance, improvements, insurance or management of any description, a service charge would be payable for the costs, if it would, as to –

(a) the person by whom it would be payable,
(b) the person to whom it would be payable,
(c) the amount which would be payable,
(d) the date at or by which it would be payable, and
(e) the manner in which it would payable.

The 'appropriate tribunal' is this Tribunal.

Appendix 2

Section 20ZA of the Landlord and Tenant Act 1985

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

(2)In section 20 and this section—

> "qualifying works" means works on a building or any other premises, and
>
> "qualifying long term agreement" means (subject to subsection (3)) an agreement entered into, by or on behalf of the landlord or a superior landlord, for a term of more than twelve months.

(3)The Secretary of State may by regulations provide that an agreement is not a qualifying long term agreement—

> (a)if it is an agreement of a description prescribed by the regulations, or
> (b)in any circumstances so prescribed.

(4)In section 20 and this section "the consultation requirements" means requirements prescribed by regulations made by the Secretary of State.

(5)Regulations under subsection (4) may in particular include provision requiring the landlord—

> (a)to provide details of proposed works or agreements to tenants or the recognised tenants' association representing them,
> (b)to obtain estimates for proposed works or agreements,
> (c)to invite tenants or the recognised tenants' association to propose the names of persons from whom the landlord should try to obtain other estimates,
> (d)to have regard to observations made by tenants or the recognised tenants' association in relation to proposed works or agreements and estimates, and
> (e)to give reasons in prescribed circumstances for carrying out works or entering into agreements.

(6)Regulations under section 20 or this section—

> (a)may make provision generally or only in relation to specific cases, and
> (b)may make different provision for different purposes.

(7)Regulations under section 20 or this section shall be made by statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of Parliament.