FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case reference	:	**BIR/00FY/LDC/2020/0018** **BIR/00FY/LSC/2020/0007**
Property	:	**The Hicking Building, Queens Road, Nottingham NG2 3BX**
Applicant	:	**The Hicking Building RTM Company Ltd**
Representative	:	**Mr C Bryden (Counsel) instructed by Brady's Solicitors**
Respondents	:	**The 329 leaseholders at the Hicking Building (1)** **Abacus Land 4 Ltd (2)**
Representative	:	**For leaseholders holding 39 flats at the Hicking Building – Mr A New**
Type of applications	:	**Application for determination of liability to pay and reasonableness of service charges under sections 27A and 19 of the Landlord and Tenant Act 1985 (1)** **Application for the dispensation of all or any of the consultation requirements provided for by section 20 of the Landlord and Tenant Act 1985 (2)**
Tribunal members	:	**Judge C Goodall** **Mr R P Cammidge FRICS** **Mr A McMurdo MCIEH**
Date and place of hearing	:	**11 and 12 March 2021 by Remote Video Platform**
Date of decision	:	**15 April 2021**

DECISION

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Background

1. These cases relate to a building on Queens Road, Nottingham known as the Hicking Building ("the Building"). It is managed by The Hicking Building RTM Company Ltd ("the Applicant"), which employs a professional managing agent called Walton & Allen and/or Stoneyard Ltd. We refer to the managing agent in this decision as "Stoneyard". The Building comprises 329 residential flats and two commercial units.

2. There are two applications from the Applicant ("the Applications") which are determined in this decision. They are:

    a. an application under section 27A of the Landlord and Tenant Act 1985 ("the Act") for a determination that costs for proposed works would be reasonably incurred. The proposed works are to remove combustible insulation and replace with non-combustible material, to install cavity barriers where required ("the Cladding Works"), and to strip and replace existing balcony decking ("the Balcony Works"). The Cladding Works and the Balcony Works are together referred to as the "Works";

    b. an application under section 20ZA of the Act for dispensation from consultation on the Works, as quotes for the Works were in excess of £110,000 and the section 20 threshold was believed to be £82,250.

3. The Applications are dated 17 December 2020. Directions were issued following a case management conference on 19 January 2021. Because a separate application from 11 lessees (representing 39 flats) asking for a determination under section 27A that the Works would **not** be reasonably incurred had crossed with the Applicant's first application, those objectors were represented at the case management conference. The cross application in relation to the Works was stayed, but as that application also raised an objection to other works carried out or intended to be carried out at the Building ("the Internal Works"), the Tribunal directed that the Applications and the cross-application relating to the Internal Works both be heard together.

4. All residential lessees at the Building were served with the Applications as was the freeholder. The freeholder is Abacus Land 4 Ltd, who has taken no part in these proceedings.

5. 48 lessees responded to a questionnaire set out in the directions, of whom 15 opposed the Applications. The 11 lessees who submitted the cross-application also oppose them, through their representative, Mr New. There appears to be only one lessee who is in both groups. 7 lessees provided a short statement setting out their position. One, Ms Bristow, who is a director of the Applicant, provided a longer statement and also gave evidence to the Tribunal at the hearing.

6. The Applications were heard over a 2-day video hearing on 11 and 12 March 2021. The Applicant was represented by Mr Chris Bryden, of counsel. The objecting respondents were represented by Mr Adam New. When invited to do so, no respondents who were not already represented by Mr New wished to give evidence or make submissions.

7. This determination is the Tribunal's decision on the Applications. The Tribunal was unable to make a final decision on the cross application following the hearing and further directions were issued. That application is therefore ongoing.

The Building

8. The Tribunal was not able to inspect the Building due to Covid restrictions. Mr Brent Weightman, who is the representative from Stoneyard, firstly explained the layout and facilities at the Building.

9. The Building comprises one single structure built in a "U" shape. The southern part of the "U" shape is longer than the northern part, and the extra length is Block 4, which has commercial units on the ground and first floor and then 54 flats on the 4 floors above. Entering then into the "U", there is a courtyard serving three blocks of flats. Block 1 is on the northern side, and there are 86 flats over six floors. Block 2 is the western end of the "U", running along the whole of Summer Leys Lane. There are 115 flats in this block, over 6 floors. The southern part of the "U" is Block 3 which contains 74 flats. Because there is a slight slope, there are 7 floors in this Block. It abuts a river/stream known as Tinkers Lean.

10. The Building is set on the corner of Queens Road and London Road just south of Nottingham City Centre. Its previous use was industrial. It was converted in 2004-5 to residential with two commercial units. The original building was traditional brick built with timber floors over 4 floors. On conversion, the roof was removed, and two additional light weight floors were added prior to replacement of the roof. Block 2 was also added as a new-build element. It is steel frame with concrete floors. Block 4 was substantially changed structurally, as a new steel frame was constructed within the envelope of the existing brick façade. Because it was not possible to install stairwells inside the converted building, new stairwells were added to service Blocks 1, 2 and 3, and affixed to the existing structure.

11. There are 19 flats with balconies with timber decking. Thirteen of these flats facing inwards to the courtyard on the top floor of the Building, this being the top floor of the two additional floors added during the conversion. The flats below these thirteen balconies also have balconies, their construction being in concrete. There is also a stack of six flats in Block 2 which have balconies with wooden decking on the external side of the elevation adjoining Summer Leys Lane, above a shutter door into a garage area at ground floor level.

12. The Building is protected with a monitored fire alarm with 5 monitoring panels, one in each block and the fifth being to the side of Block 2. The main panel is in Block 4. They are all interconnected and there is an emergency lighting system. Blocks 2 and 4 have full smoke shafts. There are between one and two dry risers per block. Two interlinked smoke alarms are installed in each flat, one in the hallway and one in the lounge, but alarm sounders are not, nor are heat detectors installed.

13. The flats comprise a mixture of studio, one bed and two bed apartments.

14. It is common ground that the Building exceeds 18m in height and that it is not clad in Aluminium Composite Material.

15. Mr Weightman was asked about the construction of the balconies. He told us that they were cantilevered off the main structure of the Building, were constructed of a metal frame with metal balustrades, with an inset wooden decking secured by detachable bolts. He had been advised that the bolts would need to be removed from the underside of the decking.

Law

16. Sections 18 to 30 of the Landlord & Tenant Act 1985 ("the Act") contain important statutory provisions relating to recovery of service charges in residential leases. Normally, payment of these charges is governed by the terms of the lease – i.e., the contract that has been entered into by the parties. The Act contains additional measures which generally give tenants additional protection in this specific landlord/tenant relationship.

17. Under Section 27A of the Act, the Tribunal has jurisdiction to decide whether a service charge is or would be payable and if it is or would be, the Tribunal may also decide:-

    - The person by whom it is or would be payable
    - The person to whom it is or would be payable
    - The amount, which is or would be payable
    - The date at or by which it is or would be payable; and
    - The manner in which it is or would be payable

18. Section 19(1) of the Act provides that:

> "Relevant costs shall be taken into account in determining the amount of the 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 and the carrying out of works, only if the services or works are of a reasonable standard:

and the amount payable shall be limited accordingly."

19. The construction of the lease is a matter of law, whilst the reasonableness of the service charge is a matter of fact. On the question of burden of proof, there is no presumption either way in deciding the reasonableness of a service charge. If the tenant gives evidence establishing a prima facie case for a challenge, then it will be for the landlord to meet those allegations and ultimately the court will reach its decisions on the strength of the arguments. Essentially the Tribunal will decide reasonableness on the evidence presented to it (*Yorkbrook Investments Ltd v Batten* [1985] 2EGLR100 / *Daejan Investments Ltd v Benson* [2011] EWCA Civ 38).

20. When interpreting a written contract, the Tribunal has to identify the parties' intention by reference to what a reasonable person having all the relevant background knowledge would understand the terms to mean. We have to focus on the meaning of the words in their context and in the light of the natural meaning of the clause; any other relevant provisions; the overall purpose of the clause and the lease; the facts and circumstances known by the parties at the time; and commercial common sense (*Arnold v Britton* [2015] UKSC 36).

21. In relation to the test of establishing whether a cost was reasonably incurred, in *Forcelux v Sweetman* [2001] 2 EGLR 173, the Lands Tribunal (as it then was) (Mr P R Francis FRICS) said:

> "39. ...The question I have to answer is not whether the expenditure for any particular service charge item was necessarily the cheapest available, but whether the charge that was made was reasonably incurred.
>
> 40. But to answer that question, there are, in my judgement, two distinctly separate matters I have to consider. Firstly, the evidence, and from that whether the landlord's actions were appropriate, and properly effected in accordance with the requirements of the lease, the RICS Code and the 1985 Act. Second, whether the amount charged was reasonable in the light of that evidence. The second point is particularly important as, if that did not have to be considered, it would be open to any landlord to plead justification for any particular figure, on the grounds that the steps it took justified the expense, without properly testing the market."

22. In *Veena v Cheong* [2003] 1 EGLR 175, the Lands Tribunal (Mr P H Clarke FRICS) said:

> "103. ...The question is not solely whether costs are 'reasonable' but whether they were 'reasonably incurred', that is to say

whether the action taken in incurring the costs and the amount of those costs were both reasonable."

23. The law on the requirement to consult, and a landlord's right to request dispensation from that requirement is contained in section 20 and 20ZA of the Act. Section 20 provides:

> Section 20 Limitation of service charges: consultation requirements
>
> (1) Where this section applies to any qualifying works …, 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) a leasehold valuation tribunal.
>
> The relevant contribution is the amount a tenant may be required to contribute under his lease (sub-section (2)).
>
> Sub-sections (6) and (7) of section 20 limit the tenants "relevant contribution" to an "appropriate amount", which is currently £250 (see SI 2003/1987, reg 6).

24. Section 20ZA provides (in so far as is relevant):

> Section 20ZA Consultation requirements: supplementary
>
> (1) Where an application is made to a leasehold valuation tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works …, the tribunal may make the determination if satisfied that it is reasonable to dispense with the requirements.

25. If dispensation from consultation is not granted, a landlord must comply with the Service Charges (Consultation Requirements) (England) Regulations 2003. Regulation 7 and the various schedules to the regulations set out the requirements. Part 2 of Schedule 4 applies to qualifying works for which public notice is not required, which would be the position for the types of works in issue in this case. Broadly, this schedule requires that notice of proposed works, describing them, setting out the reasons for them being required, and inviting observations and the names of people from whom the landlord should seek an estimate of cost, should be given to tenants. The landlord is under a duty to have regard to the tenant's observations. He must endeavour to obtain an estimate from any contractor suggested by the tenants. At least two estimates must be

obtained, one of which should be from a person wholly unconnected with the landlord, on which the tenants are entitled to make observations to which the landlord must have regard. When a contract is awarded by the landlord, notice must be given to the tenants with a statement of reasons for awarding that contract. The Tribunal should stress this is only a broad outline and is no substitute for a detailed consideration of the schedule.

26. The Supreme Court case of *Daejan Investments Ltd v Benson* [2013] UKSC 14; [2013] 1 WLR 854 (hereafter *Daejan*) sets out the current authoritative jurisprudence on section 20ZA. This case is binding on the Tribunal. *Daejan* requires the Tribunal to focus on the extent to which the leaseholders would be prejudiced if the landlord did not consult under the consultation regulations. It is for the landlord to satisfy the Tribunal that it is reasonable to dispense with the consultation requirements; it is for the leaseholders to establish that there is some relevant prejudice which they would or might suffer, and for the landlord then to rebut that case.

The Lease

27. The Tribunal has been provided with a sample lease and assumes that all leases use the same wording except in relation to the individual terms of each letting.

28. All leases are for a term of 125 years commencing on 1 January 2004.

29. The leases are tri-partite, being between the freeholder, a management company, and the individual lessee.

30. There are no covenants in the lease by the Management Company; all are made by, or for the benefit of the freeholder. There is a reference to an "Agreement for Management Lease" for the grant of a management lease. The freeholder's covenants in clause 5 of the lease are expressed to terminate after the freeholder has granted the Management Lease. Official copies of the freehold do not show that a management lease exists. The Tribunal therefore assumes (and the parties agreed this was likely to be the case) that no management lease was ever granted, and the lease can therefore be treated as if it is a straightforward lease between the freeholder and the lessees.

31. It is common ground that in or about 2009 a right to manage under the Commonhold and Leasehold Reform Act 2002 was acquired by the Applicant. Under section 96 of the Act, the Applicant has therefore acquired the management functions of the freeholder under the lease.

32. In the lease, the flowing defined terms are relevant to this decision:

> "1.2 "the Building" means the block of flats comprised in the Estate
>
> …

1.5 “the Common Parts” means the entrances roadways pedestrianways lighting common service media (whether within or outside the Estate) hard and soft landscaped areas parking areas forecourts halls stairs landings passageways lifts storage cupboards bins stores and other parts of the Reserved Property intended to be used and enjoyed in common by the occupiers of any two or more Flats in the Building

1.6 “the Estate” means the property described in the First Schedule

…

1.8 “the Flats” means the flats or other units of separate living accommodation forming part of the Building and “Flat” has a corresponding meaning and “the Other Flats” means the Flats excluding the Premises

…

1.13 “the Lessee’s Service Contribution” is [x%] (or such other sum as may be determined by the Lessor (acting reasonably) from time to time as being a fair and reasonable contribution) of the Net Service Charge Cost

…

1.16 “the Net Service Charge Cost” means the Total Service Charge Cost minus the Total Car Park Maintenance Charges

…

1.22 “the Reserved Property” means that part of the Building and the Estate not included in the Flats as described in Part Two of the Second Schedule

…

1.24 “the Total Service Charge Cost” means the costs charges and expenses … incurred by the Lessor in carrying out its obligations referred to or contained the Seventh Schedule…”

33. Clause 4 provides that the Lessee covenants to observe and perform the obligations set out in the Sixth Schedule. Clause 5 provides that the Lessor covenants to observe and perform its obligations set out in parts 1, 2 and 3 of the Seventh Schedule.

34. Part 1 of the Second Schedule describes the Building as:

> “The block of flats erected on and forming part of the Estate together with other parts structures gardens grounds areas ways or facilities (whether or not external to the said blocks) forming part of the Estate”

35. Part 2 of the Second Schedule further identifies the Reserved Property as:

> "The Building and the Estate excluding the Flats but including the main structural parts of the Building the roofs and loft space foundations and external parts thereof and the entrances hallways landings lifts and stairs giving access to the Flats or any of them or to any other part of the Building not included in the Flats and also the loadbearing walls cisterns tanks sewers drains pipes wires ducts conduits meters and apparatus not used solely for the purposes of one Flat and the floor and ceiling joists and slabs (but not the floor and ceiling boards or internal facings) and the boundary walls dividing the Building from adjoining property and (without limitation) any other parts of the Building and the Estate not included in the Flats"

36. The Third Schedule defines the Premises as:

> "The Flat shown edged red on the plan numbered 2 attached and known as Plot [] the Hicking Building London Road/Queens Road Nottingham including the floorboards and ceiling boards and all cisterns tanks sewers drains pipes wires ducts conduits meters and apparatus used solely for the purposes of the Premises and the windows and window frames doors and door frames and the internal facings of loadbearing and party structures and the whole of the other non-loadbearing structures within the Premises but excluding any part of the Reserved Property"

37. The Sixth Schedule contains the following covenant by the lessee:

> "1.2 The Lessee shall pay a proportion equal to the Lessee's Service Contribution of the Net Service Charge Cost"
>
> and
>
> "9 The Lessee shall do all such works as under any Act of Parliament or rule of law are directed or necessary to be done on or in respect of the Premises (whether by landlord tenant owner or occupier) and shall not do or permit to be done any act matter or thing on or in respect of the Premises which contravene the provisions of the Town and Country Planning Acts and the Building Regulations or any enactments amending or replacing them or any other statute or statutory instrument or other regulation of any local or public or statutory authority or undertaking and shall keep the Lessor indemnified against all claims demands and liabilities in respect thereof"

38. The Seventh Schedule contains the covenants by the Lessor with the Lessee, including the following provisions:

> “5. The Lessor shall keep the Reserved Property including the Common Parts and all fixtures and fittings therein and additions thereto in a good and tenantable state of repair and condition including the renewal and replacement of all worn and damaged parts …
>
> 7.1 The Lessor shall do or procure all such other acts or things as may be necessary for the proper preservation and maintenance of the Building and the Common Parts (including provision of a sinking fund) and of all common services thereto or therefore and for the proper management of the Building”

Facts

39. From the oral evidence and the written bundle of documents supplied to the Tribunal, we find the following facts.

40. The Building is managed by the Applicant’s Board. The composition of the Board has been fluid. At the time of the hearing there were four members. We heard evidence from one of the directors, Ms C Bristow, who confirmed that Stoneyard are engaged as their professional managing agent. Mr Rob Walton from Stoneyard had assisted the lessees at the Building in around 2009 to form the Applicant and it successfully acquired the right to manage the Building in about 2009. Stoneyard has been in place as the Applicant’s agent ever since. Until around 2017, Mr Simon Temple had been the employee from Stoneyard allocated to manage the Building. For the last 3- 4 years, Mr Brent Weightman had taken over that role.

41. Ms Bristow described the relationship between the Board and Stoneyard as a partnership. The Board was regularly consulted on management issues and Stoneyard was not authorised to spend sums over £5,000 without express Board approval.

42. Matters relating to fire safety had been discussed by the Board prior to the Grenfell fire, but after that event the Board has decided to commission a full fire safety review via an intrusive inspection. A firm recommended by Stoneyard called Atkinson Leah Ltd was commissioned to prepare this report. The report is dated 14 January 2018. The inspection took place during 3 days on 12, 13, and 15 December 2017.

43. External cladding was apparently not within the scope of the Atkinson Leah report. It does however refer to the cladding in paragraph 1.2.4 which says:

> “It is understood tests are being conducted on the external cladding panels to the new build sections. During the assessment a loose piece of insulation material used in part in the cladding in

what appeared to be as an edge sealing strip was removed and a simple test undertaken where a flame was offered up to the cladding material. The material was seen to support a flame and did not self-extinguish and continued to burn when the flame was removed.

The fire resistance of the external cladding material and its suitability to be established as part of independent tests by a third party (sic).

This falls outside the scope of the report but may well be a responsibility of the RTM CO and needs to be addressed in a timely manner."

44. Atkinson Leah's principal concern was expressed in paragraph 1.1, which stated:

"The fundamental flaw in the fire safety of the building is the poor standard of fire / smoke separation to the structure and concealed voids. This combined with the automatic detection only being in the common areas and not in the flats could present a set of circumstances where a fire has time to develop undetected in a flat and is then able to spread from the flat via service penetrations and poor separation to other concealed voids. …"

45. There is hardly any reference to balconies in the report. This may be explained by the inspection of individual flats being excluded from the scope of the report. There is a 21-page list of individual observations. There is one reference to balconies in this list (on page 143 of the bundle) as follows:

Location	Observation	Recommendation / Action required
Flat balconies	It was noted that some flats have barbecues on the balconies. These pose a fire hazard which may result in external fire spread	Tenants to be instructed to remove the barbecues. Police and ensure full compliance with the instruction.

46. As this case concerns the external fire risks, there is no need to say anything more about the report in this decision, save to say that it included a section on compliance with documentation requirements. These are listed by reference to the physical parts of the Building for which documentation should exist, such as lift test certificates, final exit doors,

fire doors, the fire alarm, emergency lighting etc. The report said that the documentation requirements were "failed" in every respect.

47. Stoneyard objected to the conclusions in the report regarding the documentation and sought amendments which were not forthcoming as they regarded the conclusion about documentation to be incorrect. Mr Weightman suggested that Atkinson Leah were seeking to extract themselves from the industry so had little incentive to do further work on the report. It does seem to be clear that Stoneyard were unwilling to allow widespread dissemination of the report; indeed, we were told that not even all the directors of the Applicant were shown a copy.

48. We find that after the issue of the Atkinson Leah report, the relationship between Stoneyard and Atkinson Leah broke down and as a consequence the Board did not continue to use the services of Atkinson Leah.

49. What Ms Bristow did tell us is that at around the early part of 2018 the Board, on the recommendation of Stoneyard, decided to engage the services of a Mr Mike Tuck from a firm called Richardson Hall. The Board understood that he was a fire expert. We have not been given any information about Mr Tuck's qualifications or experience or the nature of the professional services which Richardson Hall holds itself out as providing.

50. Ms Bristow told us that the reason Mr Tuck was engaged was because the Board felt it needed a project manager who could interpret a fire risk assessment and liaise with the local authority. Arising from the Atkinson Leah report, there was clearly an issue regarding internal fire stopping works and it may be this was the principal reason for the Board feeling that a project manager was required. Mr Tuck was given the task of preparing a strategic plan for fire protection. We have not been provided with a copy (the document at page 411 of the bundle does not appear to be such a plan), nor did we hear any evidence from Mr Tuck. Fortunately, Mr Tuck's involvement in the subject matter of the Applications under consideration in this decision appears to be minimal.

51. We were not told of the nature of the testing work on the external cladding panels referred to in paragraph 1.2.4 of the Atkinson Leah report. We were told by Ms Bristow that at some point a decision was made to engage a firm called Geoarc Ltd ("Geoarc") to give professional advice on the external cladding. Geoarc are a consultancy firm in the area of Building Control and Fire Safety Consultancy. The person the Applicant dealt with was Mr Richard Protheroe BSc (Hons), C.Build E MCABE, MIFireE. Ms Bristow was unsure who had recommended Geoarc – she assumed it was Mr Tuck.

52. The first report from Geoarc was received in September 2019. We were not provided with any chronology of events, nor any witness statements that gave a chronology, and we are therefore uncertain what happened

between January 2018 and September 2019 in relation to external fire safety issues.

53. The Geoarc report is dated 18 September 2019. Somewhat curiously, it refers to an intrusive survey undertaken on 20 September 2019 (i.e., after the date of the report – we assume the date of the survey should have been 18 Sept). The survey was of the façade, external walls, and cladding.

54. The report concluded that there are four types of cladding installed at the Building, being:

> Type A Mineral wool with Brick outer skin
> Type B Full fill Cavity Foam Insulation and Aluminium Outer skin
> Type C Full fill Cavity Mineral wool with Aluminium outer skin
> Type D Cavity, Retained Mineral wool & Aluminium skin

55. The report informed the Board that the cavity foam insulation used for the Type B cladding was unacceptable, but all three of the other types of cladding were classed as acceptable. The report also identified that cavity barriers had not been installed. Section 3.5 of the report identified that:

> "No installed cavity barriers were noted during the survey, combustible insulation was carried through the floor zones. Steel framing and lintels can act as adequate barriers, aluminium framing is not considered to be acceptable. Fully filling a cavity with mineral wool also prevents cavity fire spread and has been accepted in this role."

56. The report concluded that use of combustible insulation products within the cavity and failure to install fire barriers were both non-compliant with Building Regulations. Four options were given for rectification:

> A. Undertake removal of a larger sample panel and submit for testing in accordance with BS8414-2 2015 & A1 : 2017 Fire performance of External Cladding Systems. Test method for Non-Loadbearing External Cladding Systems Fixed to and supported by a Steel Frame.
> *Commentary – office test indicated the material would fail the test*
>
> Or
>
> B. A desktop analysis in accordance with BRE Report BR 135 – Performance of External Thermal Insulation for External Walls
> *Commentary – Recent Insurer concerns and Government Guidance are against such assessments. The survey suggests this would not be an acceptable course of action*
>
> Or

C. Remedial works to remove the combustible insulation and replace with a totally non-combustible product in the areas indicated

AND

D. Remedial works to install cavity barriers along the line of compartment walls and each floor separating occupancies where not fully filled by Option C above and where not forming a single compartment (e.g. stairs)
Commentary – Given the results of the survey and office tests we conclude this appears to be the most sensible

57. The reference in the above section of the report to an "office test" are references to the application of a match to a section of the insulation said to be behind the Type B facades. We were shown an email dated 18 September 2019 from Mr Protheroe to Mr Weightman attaching a photograph of a burning piece of insulation with a mobile phone stopwatch indicating a time of 1.22 – 1.24 seconds. The text above the photo reads:

> "Unfortunately the survey raised a few issues, as you will see in due course the aluminium skin and in places the wall build up was OK, but generally the cladding wall build up in other places wasn't. There is an option of sending the samples we collected for testing but I'm 99% sure they will fail, my office flame test was almost too difficult to do, the poly-isocryonate (Kingspan / Cellotex or similar rigid foam) insulation samples burnt so fast it was difficult for us to record.
>
> The information research has drawn a blank, the intrusive survey looks like the basis of the conclusions.
>
> I'll have the draft for your information shortly, contractor took some photos and I need to check with mine, should complete tomorrow, then subject to your comments and payment this will be the final report.
>
> Photo is the insulation once a flame has been applied, time in seconds."

58. The location of the parts of the Building with Type B cladding is described in the report as the new infilled glazed sections. The Tribunal did not inspect the Building and relies on a plan produced at pages 401 – 403 of the hearing bundle, showing the locations as six separate sections of the external walls at stairs 1, 2, 4, 5, 6 and 7. In the tender document for the works (see below – page 286), 104 sq. m of replacement cladding is said to be required.

59. Although the email of 18 September 2019 indicated the 18 September 2019 report was the final report, we have been provided with a second report from Geoarc dated 7 February 2020. It mentions that a further intrusive inspection took place on 3 February 2020. It is an expanded version of the 18 September 2019 report and there is little relevant difference between the two in respect of the external cladding. However, there are two changes to the September 2019 report in that:

    a. During the second intrusive survey, it was noted that in fact some cavity barriers were installed, as shown on page 227 in the bundle. The conclusion reached on page 206, from the first report, were changed; and

    b. A new section at 3.7 (page 231) is introduced relating to external timber balconies. There is a picture of the balcony stack adjoining Summer Leys Lane with the works “Timber Balconies are no longer permissible” printed underneath.

60. The second report’s conclusions differ slightly from those in the first report and are:

> A. Undertake removal of a larger sample panel and submit for testing in accordance with BS8414-2 2015 & A1 : 2017 Fire performance of External Cladding Systems. Test method for Non-Loadbearing External Cladding Systems Fixed to and supported by a Steel Frame.
> *Commentary – office test indicated the material would fail the test*
>
> Or
>
> ~~B. A desktop analysis in accordance with BRE Report BR 135 – Performance of External Thermal Insulation for External Walls~~
> *Commentary – Recent Government Guidance now bars this course of action*
>
> Or
>
> C. Remedial works to remove the combustible insulation and replace with a totally non-combustible product in the areas indicated
> *Commentary – Given the results of the survey and office tests we conclude this appears to be the most sensible*
> *The use of full fill non-combustible insulation e.g. Rockwool will provide adequate fire stopping at compartment walls and floors*
> *A Building Regulation Approval is required for the works following the September changes to the regulations*

AND

D. Remedial works to provide temporary enhanced fire performance to the timber balconies, through the use of intumescent treatment, with long term replacement programmed to remove combustible material from the external façade.
Commentary – This should be recorded in the Fire Risk Assessment

61. The decision by Geoarc to include the balconies in the second report is explained in more detail in an email provided to us dated 9 April 2020 from Mr Protheroe to Mr Weightman which includes the following paragraph:

> "The use of timber in balconies has also now been subject to an outright ban on buildings over 18m in height, we will require a schedule to be drawn up which includes replacement of timber decking with non-combustible material."

62. The email of 9 April does not give a source for the new position Geoarc took on the balconies. It makes reference elsewhere in the email to new guidance from the BRE on fire protection issues dated 1 April 2020, which may be the source, but no further explanation for this new advice was provided to the Tribunal in the bundle or at the hearing.

63. On 17 April 2020, Geoarc provided Stoneyard with a fee quotation to prepare a tender document for works to remove PIR insulation and reinstate the aluminium panels, (which is in essence the work defined in this decision as the Cladding Works) and to remove timber decking to the external balconies and replace with non-slip, non-combustible decking (the Balcony Works), obtain Building Regulation approval, arrange for quotes, supervise works, and provide an EWS1 for each block. That quote was accepted indicating that the Applicant had taken a decision that these were works it wished to contract for.

64. At this point it might be said that the Applicant should have considered its obligations to consult and issued a notice of intention, but this was not done. The explanation given was urgency and a failure to appreciate the total cost of the contract. Indeed, Ms Bristow indicated the Board hope that the cost would be in the region of £30,000 - £40,000 for the cladding.

65. On 10 August 2020, a tender document was provided by Geoarc for the works summarised above. This was forwarded to two contractors. A quote for £91,491.57 (total £114,364.46) was received from contractor A. This apportioned £17,333 plus VAT to the direct cost of the Cladding Works, and £38,216.83 to the direct cost of the Balcony Works. The balance was for preliminaries, overheads, profit, contingency, and miscellaneous expenditure. The quote from contractor B is for £93,976.70 plus VAT

(total £117,470.87). This contractor has allowed £43,372.88 for set up, supervision, access equipment etc, and has priced the materials and labour for the cladding at £12,530.16 and for the decking at £28,426.18. £3,499.48 has been allowed for replacement of PPC flashings / panels.

66. On 23 October 2020, Nottingham City Council granted planning permission for the Works.

67. Pending the outcome of these applications, no decision to place a contract for the Works has yet been placed. The Board is awaiting this decision and if successful is likely to place a contract with contractor A.

68. In his examination in chief, Mr Weightman was asked to explain his advice to the Board regarding recoverability of the cost of the Balcony Works under the lease. He informed us that in his view the balconies were part of the Reserved Property identified in the Second Schedule, as that schedule provided that everything that was not in the Premises was included in the Reserved Property, and balconies were not specifically referred to in the definition of Premises, hence they must be part of the Reserved Property.

69. Mr Weightman was also asked during his evidence about EWS1 forms for the Building. He confirmed that he understood each Block would require its own separate form. He confirmed that an EWS1 for Block 4 had already been issued as that Block was a good distance from Blocks 1 -3 and it did not have any cladding or balcony structures.

70. We should make reference to the evidence we heard relating to the issue of communication between the Board and the lessees of the Building, as this has been raised by some respondents. We should say that save in respect of one element of the issue of dispensation from consultation, this evidence has no bearing on our decision. It is mentioned only for completeness.

71. Ms Bristow told us that communication with lessees was via an email system managed by Stoneyard. They had used a proprietary system called "Blockman" which had a component allowing mass emailing, and it also allowed web-based access to documents, such as minutes of Board meetings, budgets etc. At some point (she was not able to specify), Stoneyard ceased to use Blockman and instead switched to "Propman". This also allowed emails, but the web-based access module has been removed. Ms Bristow acknowledged that she was not comfortable with the new system. She did not feel communications were working well, and the Board was now talking about acquiring a new system.

72. Ms Bristow also gave us evidence that the Board had dismissed one director recently and had refused to accept an application from a lessee to join the Board. Other directors had also resigned recently. We were also told that an application for grant funding for the cladding works had been made.

Submissions

73. Mr New has raised a number of challenges to the section 27A application. These can be summarised as:

    a. He criticises the Applicant's conduct around the Atkinson Leah report, in that no disclosure was made to his clients, the recommendation to change from a stay put policy (recommended by Atkinson Leah) has not been implemented, there was delay in obtaining a report on the cladding, and the report highlights significant failings in building management;

    b. There is a challenge to the evidence that cladding fill is unsafe;

    c. It is not accepted that the Geoarc suggestion that there is an outright ban on timber balconies is correct. Specifically, Mr New points out two paragraphs from the MHCLG document "Advice for Building Owners of Multi-storey, Multi-occupied Residential Buildings" issued in January 2020. He quotes paragraphs 7.3 and 7.7. The text of paragraph 7.3 is:

        7.3. The view of the Expert Panel is that the removal and replacement of any combustible material used in balcony construction is the clearest way to prevent external fire spread from balconies and therefore to meet the intention of building regulation requirements and this should occur as soon as practical.

        And the text of paragraph 7.7 is:

        7.7. Building owners should check that adequate appropriate measures are in place to manage the fire safety of external wall systems (in line with the principles set out in section 3 above). They should also ensure that any risks arising from balconies are considered as part of the fire risk assessment and information provided to residents.

    d. MHCLG produced a supplementary note to their January 2020 Guidance in November 2020. Mr New drew attention to paragraph 5 of this note which provides:

        5. The advice allows for professional judgement to be made regarding the safety of a building's external wall system. If some combustible materials have been used, replacement may not necessarily be required. This will depend on risks and mitigations present. That should be for professional judgement on a building-by building basis, taking into account the guidance in the advice

note, other relevant guidance, and recent experience from fires both in the UK and overseas.

e. Mr New's point is that none of these extracts talk of an outright ban on wooden decking on balconies. The advice from Geoarc in their email of 9 April 2020 was clearly wrong, and the Applicant should push back on incorrect advice. His submission was that it would not be reasonable to incur an expense based on professional advice if that advice was wrong;

f. Mr New suggested that the extent of the area of allegedly defective cladding was small. His estimate was less than 1% of the external surface area of the Building;

g. Mr Protheroe's professional qualifications to issue an EWS1 were questioned. The basis of this suggestion was that Mr New understood that an EWS1 certificate should have been issued even if the Building or the Block had failed. Under section B in the form, the assessor was meant to indicate whether the Building passed or failed, but a certificate should be issued in every instance;

h. It was not understood why Geoarc and/or Stoneyard and/or the Applicant had proposed a scheme that failed to adopt the Geoarc recommendation in their February 2020 report that the balcony decking be painted with intumescent fire-proof paint, rather than replaced.

74. Having identified these points, Mr New argued that the Board should not be entitled to simply rely on the advice of Stoneyard to justify that the incurring of the costs for the Works was reasonable. They needed to apply critical thinking to that advice. They should have spotted that the report was light on identification of the combustibility of the insulation. They were incorrectly advised about the "outright ban" on timber decking on balconies. Their professional agent should have known that, and it is not reasonable to incur a cost based on incorrect professional advice. They should have taken account of the small area of cladding involved.

75. In relation to the application for dispensation, Mr New agreed that the key issue was whether his clients would be prejudiced as set out in *Daejan*. He submitted that his clients would be prejudiced by the grant of dispensation as they would lose the opportunity to suggest alternative methods of resolving any fire issues, they would not be able to challenge the methodology by which the decision to adopt the Geoarc recommendation was taken (which they think is wrong), and the points raised by them in the objection to the section 27A application could not be aired.

76. In the event that the Tribunal were willing to grant dispensation, Mr New requested a condition to the dispensation to limit the professional fees of

Stoneyard on the grounds that they had failed to consult at all (indeed that they had resisted all reasonable requests for information) and their fee of 15% could not be justified.

77. It was also submitted by Mr New that the leases did not permit recovery of the costs of replacing the balconies. He drew attention to the definition of the Premises in the Third Schedule. That clause clarified that "floorboards" were included within the demise of each individual flat, and the external decking constituted floorboards. Furthermore, the plan on the leases which had external wooden decking on the balcony included the balcony area within the demise on the plan.

78. The argument is that the lease only permitted collection of service charge for expenditure the Applicant was allowed to incur under the Seventh Schedule. The service charge is only payable if it is for expenditure on the Reserved Property (para 5 of the Seventh Schedule) and the balcony decking is not part of the Reserved Property.

79. Mr New suggested that replacement of balcony decking could be recovered from individual lessees who had balconies under clause 9 of the Sixth Schedule, rather than from all lessees under the service charge.

80. Mr New's position on the liability under the lease to contribute towards the Cladding Works was that his clients did not dispute their contractual liability to pay such costs.

81. Mr Bryden responded to Mr New's submissions as follows.

82. He pointed out that the Works were urgent to ensure the Building was safe. The Board had taken a reasonable decision to proceed. The Tribunal should not seek to substitute its own decision. The Board was entitled to make a decision within the range of reasonable responses (*Regent Management v Jones* [2012] UKUT 369 (LC)).

83. In relation to the criticisms of the Board made by the lessees, Mr Bryden submitted that this issue was not relevant to the determination the Tribunal had to make.

84. The Tribunal was urged to take note of the fact that the Board consists of volunteer directors and it is wholly reasonable for them to place reliance upon Stoneyard. Mr Bryden submitted that there is no basis for finding that the Board is not properly overseeing the Building and its management; they have proper financial controls, regular meetings, and real concern that the Building is safe and properly managed.

85. Turning to the question of the interpretation of the lease, Mr Bryden submitted that the Tribunal should accept Mr Weightman's interpretation as outlined in the Facts section above. He was not able to advance that argument with a huge amount of vigour, as his skeleton argument had

accepted that the balconies fall within the demise of the individual flats. He was however obliged to follow the evidence and the Tribunal should consider whether Mr Weightmans suggestion was correct.

86. Mr Bryden however submitted that the cost of replacing the timber decking was recoverable under the service charge without recourse to paragraph 5 of the Seventh Schedule as it fell within the wording of paragraph 7.1 of the Seventh Schedule – it was expenditure that was necessary for the preservation and maintenance of the Building and the Common Parts.

87. It was therefore wholly reasonable for the Applicant to take a decision to incur the cost of the Works in accordance with the tenders it had received and the section 27A application should be granted.

88. So far as the dispensation application was concerned, Mr Bryden said the section 20 procedure would be time consuming and costly. Two competitive independent quotations had been obtained. It is highly likely that they are competitive given the number of properties that require remedial works on cladding. The quotes had been obtained against a detailed and a professionally produced tender document. It was unlikely that any lessee would have additional meaningful input into the contractor selection process.

89. A further practical issue concerning time was the need for EWS1 forms to be obtained as lessees were being prevented from selling their flats at the present time.

90. Mr Bryden resisted the requested condition to be imposed upon any dispensation granted. He said there was no basis whatsoever to deny a professional agent his fee for work property carried out. If the respondents objected so strongly, their remedy would be to apply for a section 27A review of that fee when it appeared in the Applicant's accounts.

91. In all the circumstances, Mr Bryden submitted that the dispensation request should be granted unconditionally.

92. This is a suitable point at which to mention that the Tribunal, being an expert Tribunal, brought to the attention of the parties a very recent document (March 2021) produced by the Royal Institution of Chartered Surveyors on the necessity for an EWS1 form. New guidance is due to come into effect form 5 April 2021. The guidance provides:

> For buildings over six storeys, an EWS1 form should be required where:
> • There is cladding or curtain wall glazing on the building or
> • there are balconies which stack vertically above each other and either both the balustrades and decking are constructed with combustible materials (e.g. timber) or the decking is constructed

with combustible materials and the balconies are directly linked by combustible material.

For buildings of five or six storeys, an EWS1 form should be required where:
• There is a significant amount of cladding on the building (for the purpose of this guidance, approximately one quarter of the whole elevation estimated from what is visible standing at ground level is a significant amount) or
• there are ACM, MCM or HPL panels on the building* or
• there are balconies which stack vertically above each other and either both the balustrades and decking are constructed with combustible materials (e.g. timber), or the decking is constructed with combustible materials and the balconies are directly linked by combustible materials.

93. The Tribunal indicated to the parties that, in so far as this guidance is relevant (and it only deals with the position where the requirement for an EWS1 is in issue; it does not give guidance on the desirability or otherwise of carrying out remedial works), the stack of six balconies adjoining Summer Leys Lane would bring the first part of this quoted guidance into play, as that part of the Building is seven storeys. The higher-level balconies within the courtyard, none of which were part of a stack of balconies with combustible cladding, would appear to engage the second part of the quoted guidance. The parties were invited to make any representations they wished on the possibility that the Tribunal might take this guidance into account in the decision. Neither did so.

94. Finally, in relation to submissions, we were addressed by Mr Brunskill who is a lessee at the Building. He made a passionate representation to us to the effect that the need to carry out internal fire protection works arose from poor supervision of the installation of new services by Stoneyard.

Discussion

95. Dealing firstly with the section 27A application proposal to replace the cladding, the Tribunal is pleased to note the recoverability of the cost under the lease is not in issue between the parties. The Tribunal has therefore not considered this point further (see *Birmingham City Council v Keddie* [2012] UKUT 323 (LC)).

96. We consider firstly whether the insulation was combustible. The Applicant's evidence for it being so is the email dated 18 September 2019 (see paragraph 57 above).

97. The evidence of the combustibility of this insulation material is far from ideal; the email was not provided in the bundle of documents, Mr Protheroe gave no evidence to the Tribunal, and so there is no direct evidence confirming where the piece of insulation was taken from, or

when the test was carried out. Nevertheless, there was no serious challenge to the factual accuracy of the email, and we consider that it should be taken at face value and we therefore find that, relying on the professional expertise of Mr Protheroe in so far as we can, there is reasonable evidence to confirm that the insulation behind Type B cladding is combustible. We have taken into account that Atkinson Leah also carried out an "office test" and reached the same conclusion.

98. The question is therefore whether it would be reasonable to incur the cost of the Cladding Works. We have not found this to be a difficult decision. Our view is that in the current climate it would be regarded as wholly unreasonable to take any other course. We have noted the issues raised by Mr New and we agree that the deficient area is a small percentage of the whole, though we cannot make a finding as to exactly what percentage. We do not think that is relevant. A hazard is a hazard and if it can be removed without huge cost, that must be seriously considered. We made a finding that even though the evidence was not ideal, the insulation behind the Type B cladding was combustible. The Board was professionally advised by a person who appears to have relevant qualifications. The cost quotes obtained were from independent contractors against a professionally prepared tender document.

99. The likely cost of the Cladding Works per flat is likely to be well below £250 each pro rata equally (though we appreciate the service charge contributions are not equal) for the cladding work alone. That would in our view be money extremely well spent to give reassurance that there are no cladding combustibility issues that remain at the Building, and accordingly it would be entirely reasonable to incur this cost.

100. We have much more difficulty with the timber decking. The decking is a removable part of the balcony. Whilst the main balcony construction is part of the Building, and is of non-combustible material, the decking, in our view, requires to be considered differently.

101. The first question is whether it can be recovered as part of the service charge anyway under the lease. If not, strictly we do not need to consider whether it would be reasonable to incur the cost of doing so; there would be no contractual method by which the lessees could be charged the cost, and so no liability to pay for that cost.

102. The Applicant suggests two routes by which the lease allows recovery of the cost of the Balcony Works under the leases.

    a. Under clause 5 of the Seventh Schedule which requires the Applicant to keep the Reserved Property in a good and tenantable state of repair and condition, or

b. Under clause 7.1 of the Seventh Schedule, as an act for the proper preservation and maintenance of the Building or Common Parts or whether it is necessary for the proper management of the Building.

103. Dealing with the first route, we do not agree that the timber decking is part of the Reserved Property. We have to interpret the definition of the Reserved Property set out in the Second Schedule against the definition of Premises in the Third Schedule. The Third Schedule clearly refers to the Premises including the floorboards. We cannot see any basis for arguing that the timber floor of the balcony is anything other than the "floorboards" of that part of the Premises. We note that the plans of the Premises apparently include the balcony within the red line identifying the extent of the Premises. We reject the approach Mr Weightman took to the interpretation of the lease and find that the timber balcony decking is part of the Premises and does not fall within the Reserved Property which the Applicant is obliged to keep in good and tenantable repair.

104. Turning now to Mr Bryden's second line of argument to the effect that paragraph 7.1 is a sufficient clause, we need to identify what is meant by the phrase "preserve and maintain". In *Assethold v Watts* [2014] UKUT 0537 (LC), the Deputy President of the Upper Tribunal said:

> 49. To my mind, "to maintain" and "to repair" each connote the doing of something to the subject matter of the covenant. To repair involves undertaking work to restore the subject to a former condition from which it has deteriorated. To maintain involves preserving a functional condition by acts of maintenance performed on or to the thing to be maintained.

105. In our view, the timber decking does not require to be maintained. We have not received any evidence that the decking is not in acceptable condition as decking or that it is non-functional in its current state. The reason the Applicant wishes to replace it is not because of its current condition. It is because it is allegedly no longer suitable material to be used in the construction of balconies. It is similar, we consider, to asbestos roofs or lead piping. These are no longer suitable for use, but that does not usually result in an obligation to replace them. Replacement would not preserve or maintain the decking. We do not consider that the decking works fall within clause 7.1 of the lease.

106. There could be a further argument to the effect that the decking needs to be replaced for the proper management of the Building. We would reject that argument. In our view that would stretch what is meant by the word "management" too far. Management involves administrative arrangements, communication, arranging for things to be done. It does not in our view refer to physical changes and additions to a building.

107. Commenting on Mr New's point that clause 9 of the Sixth Schedule was the proper route for collection of the cost of replacing the timber

balconies, we agree that if the Applicant is advised that there is a legally binding requirement upon a lessee to replace their timber decking, that clause may allow recovery if the Applicant were to do the works in default, but we expressly do not determine that in the circumstances of this case such a legally binding obligation exists. This is therefore a matter for the Applicant to take their own advice on.

108. On the question of recoverability of the cost of the Balcony Works under the leases, our conclusion is that such costs are not so recoverable.

109. If we are wrong on this point, we would have needed to consider whether it would be reasonable for the costs of the Balcony Works to be incurred. We agree that this is the Applicant's decision, and if it makes a decision within the range of reasonable decisions, the Tribunal should not interfere.

110. We think there is merit in Mr New's argument that the Applicant's Board relied too heavily on Geoarc when it was told there was an "outright ban" on timber decking on 9 April 2020.

111. We specifically take account of the following:

a. the fact that in its February 2020 report, Geoarc did not recommend replacement of the balcony decking, but rather recommended painting with intumescent paint;

b. that Atkinson Leah also indicated that there was no necessity to replace the timber decking;

c. there was no witness evidence before us giving us the source of and rationale for the change of advice on 9 April 2020;

d. as its professional managing agent, there is no evidence that Stoneyard attempted to investigate or clarify this new advice for the Applicant;

e. guidance referred to us at the hearing suggests a decision on the advisability of replacing balcony decking is a nuanced professional decision in the circumstances of each case, rather than timber decking being the subject of an "outright ban";

f. in the light of the new RICS advice, there are reasonable grounds to query whether the approach to risk from balconies is being further nuanced, particularly bearing in mind that the balconies in the internal courtyard are single balconies, not in a stack containing combustible materials, and they are at high level, so the danger of fire rising to floors above is substantially reduced. Applying the RICS guidance, it seems to this Tribunal that the existence of the balconies at the Building would not trigger a need for an EWS1;

g. the considerable impact upon the Applicant's processes arising from the inclusion of the Balcony Works in the proposed contract arising from the need to consult or seek dispensation.

112. We have concluded that, in the light of the considerations listed above, and the lack of being offered any rationale by Geoarc, we are not convinced that the change of advice from Geoarc in April 2020 stating that there was an outright ban on timber decking and that it therefore needed to be replaced, was soundly based.

113. We take the view that the Applicant's Board, acting reasonably, should have undertaken further investigations, and sought greater clarification on the **necessity** for the Balcony Works to be undertaken. They should have asked for the source of any guidance or regulation on which the advice was based, and they should have fully understood the reasoning behind the advice and considered any alternatives that might have been available to mitigate that risk. In our view, the case for carrying out the Balcony Works was not robust when the Applicant decided to go ahead with the Works in late 2020.

114. If the Board remains of the view, upon receipt of further advice which addresses these concerns, that it is essential to replace the timber decking on the balconies to make the Building safe, they will need to take further advice on the route by which this cost may be charged, bearing in mind our determination above that it cannot be charged to the service charge. It would be hoped that all parties would see the need to reach an agreement for the benefit of the whole Building, and we see considerable merit in a rather wider group of interested lessees becoming involved in this discussion.

115. This then brings us to the question of dispensation from consultation. In the light of our decision on recoverability of the cost of the Balcony Works, as we have determined that it would not be reasonable at this point to replace that decking, and as the cost is in any event not recoverable under the leases, we determine we should not consent to dispensation in relation to that element of the works. The dispensation application however remains relevant to the cost of the Cladding Works.

116. It is unlikely, in our view, that a contract for the Cladding Works alone, on the basis of the two quotes provided, would be above the threshold for consultation. Obviously, if the Applicant decides to carry out that work alone, new quotes would be needed. If the threshold is exceeded, we do not consider it would be in anyone's interests to come back to the Tribunal for further dispensation in relation to the Cladding Works. That would add yet more time and expense and we do not see how the respondents would be prejudiced. This case has allowed full airing of the issues around the proposal to carry out the Works. Whilst it is correct that the respondents would lose the opportunity to suggest alternative contractors, there has

been no suggestion during this case that any of them have preferred contractors who could be approached.

117. We therefore grant dispensation (if it turns out that consultation is required), in respect of the incurring of costs for the Cladding Works.

118. We cannot see any basis upon which it is reasonable to impose a condition that a professional firm, against which no findings of fault have been made, should be required to forego fees as a condition of dispensation. There is also no legal basis upon which we could impose that condition in any event. We could impose a condition that any fees charged by Stoneyard in relation to the works we have approved in this decision should not be passed on to service charge payers, but that would simply leave the Applicant in an irresolvable conundrum whereby they might be unable to fund works they considered essential. We are not willing to impose any condition upon dispensation.

119. We do not consider that it was part of our responsibility in this decision to adjudicate on the competence or otherwise of Stoneyard, as urged upon us by Mr Brunskill.

Decision

120. We determine that:

    a. If costs are incurred for replacement of the insulation behind the Type B cladding and remedial work to cavity barriers, as recommended in the Geoarc report dated 7 February 2020, then provided they are in proportion to the sums quoted in the two tenders received by the Applicant (after the cost of replacement or works on the timber decking to the balconies is stripped out), the Tribunal determines that such costs would be recoverable under section 27A of the Act via the service charge regime set out in the leases of the flats at the Building, and provided the work is carried out to a reasonable standard.

    b. If necessary, the Tribunal grants dispensation to the Applicant pursuant to section 20ZA(1) of the Act from the consultation requirements set out in section 20 of the Act in respect of the works at paragraph a above.

    c. It would not be reasonable for the Applicant to incur costs for the Balcony Works and then seek to charge those costs to service charge payers under the leases as:

        i. Those costs are not recoverable via the service charge under the leases of the flats at the Building, and

ii. In the event that the Tribunal is wrong on this point, such costs would not be reasonably incurred on the evidence presented to us, discussed above.

Appeal

121. Any appeal against this decision must be made to the Upper Tribunal (Lands Chamber). Prior to making such an appeal the party appealing must apply, in writing, to this Tribunal for permission to appeal within 28 days of the date of issue of this decision (or, if applicable, within 28 days of any decision on a review or application to set aside) identifying the decision to which the appeal relates, stating the grounds on which that party intends to rely in the appeal, and stating the result sought by the party making the application.

Judge C Goodall
Chair
First-tier Tribunal (Property Chamber)