FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**CHI/29UD/LSC/2021/0051**
Property	:	**Ingress Park, London Road, Greenhithe, Kent, DA9 9FR**
Applicant	:	**First Port Property Services Limited**
Representative	:	**J B Leitch Limited**
Respondent	:	**The Lessees**
Representative	:	
Type of Application	:	**For the determination of the reasonableness of and the liability to pay a service charge**
Tribunal Members	:	**Judge Tildesley OBE** **Mr D Banfield FRICS**
Date and venue of Hearing	:	**Havant Justice Centre, Elmleigh Road, Havant PO9 2AL** **12 January 2022**
Date of Decision	:	**7 March 2022**

DECISION

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Decisions of the Tribunal

(1) The Tribunal determines that a service charge would be payable under paragraph 4 of Part B and paragraph 10 of Part G of the Sixth Schedule to the lease for the works to the balcony floors and supporting structures as described in the specification exhibited at [143] at Darbyshire House, Oarsman House, Clarinda House and Bessborough House if they were carried out.

(2) The Tribunal determines that it is reasonable for the Applicant to incur costs in carrying out the works on the balcony floors and supporting structures of Darbyshire House, Oarsman House, Clarinda House and Bessborough House.

(3) The Tribunal, therefore, determines in accordance with section 27A(3) of the 1985 Act that if costs were incurred in carrying out the works on the balcony floors and supporting structures of Darbyshire House, Oarsman House, Clarinda House and Bessborough House a service charge would be payable by the Lessees of those four properties to the Manager.

(4) The Tribunal has before it an application from Hyde Housing for an Order under section 20C of the 1985 Act. The Tribunal invites Hyde Housing to make submissions in writing in support of its Application to be filed and served on the Applicant's solicitors by 25 March 2022. The Applicant has a right of reply to be filed and served by 8 April 2022. The Tribunal will then make its decision on the papers by 29 April 2022.

The Application

1. This is an Application under Section 27A landlord and Tenant Act 1985 to determine service charges in relation to the costs of major works for the service charge year 2021/22. The properties to which the application refers are all located on the Ingress Park development and known as:

   1-43 Bessborough House (7 floors and 43 apartments)
   1-77 Clarinda House (8 floors and 76 apartments)
   78-153 Derbyshire House (8 floors and 76 apartments)
   2-31 Oarsman House (6 floors and 30 apartments)
   1-14 Grove House South (3 floors and 17 apartments)
   15-31 Grove House North (4 floors and 14 apartments)

2. The proposed major works to the properties concerned the replacement of the floors and supporting structures to the balconies on

the above properties which were said to pose a fire risk to the health and safety of the occupiers.

3. Ingress Park is a flagship development comprising 43 blocks of flats in 103 acres of ground. Crest Nicholson (South East) Limited constructed the 43 blocks which are all managed by the Applicant.

4. Crest Nicholson as Landlord granted the leases for the flats in return for a premium. Crest Nicholson has subsequently transferred its freehold interest in the properties which are the subject of this Application to Littleblade Investment Properties Limited of Berkeley House, 304 Regents Park Road, London, England, N3 2JX (Clarinda and Bessborough) and Brigante Properties Limited which shares the same address as Littleblade (Oarsman, Darbyshire and Grove House).

5. The Applicant previously known as Peveral OM Limited is named as the Manager in the leases and is required to undertake responsibility for the supply of the services to the Estate for which the Manager can recover its costs from Lessees through a service charge.

6. In January 2020 the Government issued 'Advice for Building Owners of Multi-storey, Multi-occupied Residential Buildings' on the measures building owners should take to review cladding systems to assess and assure their fire safety, and the potential risk to residents of external fire spread.

7. The Royal Institution of Chartered Surveyors (RICS), The Building Societies Association (BSA), and UK Finance have agreed a new industry-wide valuation process which will help people buy and sell homes and re-mortgage in buildings above 1 8 metres (six storeys). This involves a fire safety assessment of the external wall constructions and any external attachments (such as balconies) to be conducted by a suitably qualified and competent professional, delivering assurance for lenders, valuers, residents, buyers and sellers. Only one assessment would be needed for each building and this would be valid for five years. The assessment is reflected in the EWS1s form.

8. Around September 2020 the Applicant commissioned Tri Fire Limited to undertake an external façade review of and the production of an EWS1 form for each block of flats on the Ingress Park Estate. The Tribunal understands Tri Fire identified six blocks on the Estate which required remedial action in respect of fire safety and it is those six blocks which are the subject of the Application.

9. On 24 June 2021 the Applicant applied to the Tribunal to determine service charges in respect of the proposed fire safety works on the six properties. On the same day the Tribunal directed the leaseholders to complete a proforma indicating whether they agreed or disagreed with Application and whether they required an oral hearing. The Tribunal is

aware that 86 leaseholders replied with 60 supporting the Application, and 26 opposing it. Five leaseholders requested an oral hearing.

10. The Application was eventually heard on the 12 January 2022 at Havant Justice Centre. The parties joined the hearing by video using the Common Video Platform. Mr James Fieldsend of Counsel represented the Applicant. Ms Katie Edwards and Ms Katie Orr of JB Leitch, instructing solicitors, were also in attendance together with Mr Tugwell, Development Manager of FirstPort Property Services Limited who had made a witness statement [534-540] and gave evidence at the hearing. Mr Jamie Jennar of FirstPort Property Services was also present.

11. Two leaseholders attended the hearing: Dr Sarah Turp of 127 Darbyshire House and Mr Joseph Hodgkiss of 77 Clarinda House. Dr Turp cross-examined Mr Tugwell and made representations at the hearing. The Tribunal also took account of the written representations of those leaseholders who objected to the Application and were not present at the hearing.

12. The Applicant supplied a hearing bundle. References to the documents in the bundle are in [ ]. Mr Fieldsend prepared a skeleton argument.

Amendments to the Application .

13. On 23 November 2021 the Applicant applied to the Tribunal for the leaseholders of Grove House North and South to be removed as Respondents to the proceedings on the basis that remedial works were no longer required to the balconies at their properties. The Applicant explained that Crest Nicholson the original developer of the properties had conducted a cavity wall and construction investigation at Grove House North and South. The outcome of the investigation was that the cavity wall structure had been constructed correctly and as a result there was no requirement to improve the surface floor of the balconies at these two properties. A new EWSI had been issued for the properties with a B1 rating which meant that the fire risk was sufficiently low that no remedial works were required. The Tribunal consented to the Application to remove the leaseholders of Grove House North and South as Respondents.

14. The Applicant originally asked the Tribunal to determine three issues:

    a) Whether the costs of the proposed works are to be taken into account in determining the amount of a service charge?

    b) Whether it is reasonable to incur costs in the carrying out of the proposed works?

c) Whether A's estimate of the costs of the works is a reasonable amount?

15. At the hearing Mr Fieldsend narrowed the issues for consideration by the Tribunal. Mr Fieldsend explained that the Applicant no longer wished the Tribunal to determine the reasonableness of the estimated costs. Mr Fieldsend said the estimated costings for the proposed works were based on a tendering exercise that was carried out in relation to the specification for Clarinda House. The tendered cost from AAST Ltd was provided in May 2021 [175]. Mr Fieldsend said that the Applicant having regard to the passage of time since (1) the tendering exercise and (2) the making of this application (June 2021) considered there to be a real possibility that costings would have changed by the time the works were carried out. Accordingly, the Applicant would carry out a compliant statutory consultation exercise in relation to the proposed works, which would identify a more up-to-date estimate of what was a reasonable cost.

16. Mr Fieldsend phrased the questions to be answered by the Tribunal in the context of its jurisdiction under section 27A(3) of the 1985 Act, namely to determine whether, if costs were incurred for services, repairs and maintenance, improvements a service charge would be payable by the leaseholders.

17. Mr Fieldsend submitted that in order for the Tribunal to make a determination under 27A(3) of the 1985 Act it would be required to answer in the affirmative the following two questions:

I. Looking at the specification of works would a service charge be payable under the terms of the respective lease for those works if they were carried out?

II. Would it be reasonable for the Applicant to incur costs in carrying out the works as specified having regard to the EWSI and the Tri Fire Report?

Question 1: Would a Service Charge be Payable under the terms of the lease for the proposed works?

The submissions

18. The Tribunal finds that the proposed works to the balconies comprised (1) the removal of existing combustible decking boards and framework beams and (2) their replacement with new A-class aluminium decking board and support framework beam, having a Reaction to Fire classification according to BS EN 13501-1. The detailed specification for the works was set out at [143]. Photographs of the existing balconies of the four remaining properties were exhibited at [541] and [542]. The

Tribunal noted that the photographs showed the underside of the balconies which had various metal supports upon which there were wooden joists which in turn supported the wooden decking boards.

19. The Tribunal now turns to the provisions of the leases for the properties which are materially in common form and a specimen lease was exhibited at [41]. The lease term is 999 years.

20. Under clause 3.2 and paragraph 2 of Part 1 of the Eighth Schedule the Lessee covenants with the Manager to pay a service charge, referred to as "the Lessee's Proportion". That expression is defined in the Seventh Schedule and varies according to the type of service charge expenditure.

21. The service charge expenses are set out in the Sixth Schedule. That Schedule is divided into lettered Parts. The amount of service charge payable depends upon the Part under which costs are incurred. The purpose of the lettering A-F is to differentiate between costs that are incurred on different parts of the Development: (A) Public Open Spaces; (B) Block; (C) Garage Block; (D) Lift; (E) Accessway; and (F) Undercroft Parking Block. Part G identifies a range of matters on which costs may be incurred. The Part G costs apply across the different parts of the Development.

22. The relevant Parts for this Application are Part B and Part G. For costs incurred under Part B, each lessee's service charge contribution to the cost (referred to as the Part B Proportion) is a fixed proportion. Under the sample lease, the Lessee's contribution is fixed at 1.7262 per cent. Where costs that fall under Part G are relative to matters mentioned under Part B, then the amount of the Lessee's service charge is determined with reference to the Part B Proportion. The Tribunal has no jurisdiction to vary the fixed contribution under the lease because it is treated as an agreement between the Manager and the Lessee for the purpose of section 27A(4) of the 1985 Act.

23. Under paragraph 4 of Part B the Manager can recover the costs of keeping the Maintained Property in the Block in good and substantial repair order and condition.

24. The definition of Maintained Property is found in the Second Schedule. Paragraph 3 of the Second Schedule defines the Maintained Property as

> "All the structural parts of the Buildings including the roofs gutters rainwater pipes foundations floor support structures and walls bounding individual dwellings therein and all external parts of the Building including all windows frames and all external decorative parts ancillary therefore".

25. The Applicant contended that as the balconies were external parts of the building they fell within the definition of the Maintained Property.

The Applicant submitted that as the proposed works involved the replacement of the decking boards and the wooden support frame they came within the terms of its repairing covenant to keep the Maintained Property in the Block in good and substantial repair for which it could recover the costs of the repair from the lessees. Finally the Applicant argued that whilst the balconies remained a fire risk the Maintained Property could not be said to be in good and substantial order and condition. In this regard the Applicant relied on the dicta in *Credit Suisse v Beegas Nominees Ltd* (1995) 69 P. & C.R. 177, p.203 that the requirement to keep in good and substantial order and condition goes beyond carrying out repairs strictly so called.

26. Several Respondents contended that the proposed works were the responsibility of individual lessees because floor surfaces of the balcony are within the definition of Property (the Demise). They relied on the Lessees' repairing covenant at paragraph 9 of part 1 of the Eighth schedule which is

> "to repair and keep the Property and all Service Installations serving the same (but excluding such parts of the Property as are included in the Maintained Property), and every part thereof and all landlord's fixtures and fittings therein and all additions thereto in good and substantial repair order and condition at all times during the Term including the renewal and replacement forthwith of all worn and damaged parts".

27. The Third Schedule defines the Property as "All that flat and the floor surfaces only of the balcony or patio".

28. The Applicant also relied on two categories of expenses under Part G to justify the recovery of the costs of the proposed works through the service charge. The first category concerns paragraph 10 which provides for

> "Complying with the requirements and directions of any competent authority and with the provisions of all statutes, and all regulations orders and byelaws made thereunder relating to the Estate and the Public Open Space insofar as such compliance is not the responsibility of the owner of any of the dwellings".

29. It is the Applicant's case that the proposed works are necessary in order to comply with its obligations under the Regulatory Reform (Fire Safety) Order 1985. For the purposes of that Order the Applicant argued that it is the responsible person within the meaning of Article 3B1 for each block. Accordingly, as responsible person it has a duty under Article 8 (1)(b) to take such general fire precautions as may reasonably be required to ensure that each Block is safe. Under Article 4 general fire precautions include taking measures to reduce the risk of fire and the risk of the spread of fire, which would cover the proposed

works by removing the fire risk posed by the wooden structure of the balconies.

30. Additionally, the Applicant has a duty under Article 12 to eliminate or reduce so far as reasonably practicable a dangerous substance and a "dangerous substance" includes a substance that owing to its properties and the way it is present at the premises creates a risk (Article 2). The Applicant argued that the combustible wood in the balconies constituted a "dangerous substance" within the meaning of the Order.

31. The second category of expenses relied upon by the Applicant was paragraph 14 of Part G which in effect is a sweeping up clause, namely:

> "All other expenses (if any) incurred by the Manager and the Management in and about the maintenance and proper and convenient management and running of the Estate and the Public Open Space including in particular but without prejudice to the generality of the foregoing any expenses incurred in rectifying or making good any inherent structural defect in any part of parts of the Maintained property".

32. The Applicant contended that if it was not entitled to recover the costs of the proposed works through the service charge under paragraph 4 of Part B and or paragraph 10 of Part G of the Sixth Schedule, the costs would fall within the provision of the sweeping up clause. The Applicant submitted that the proposed works were necessary in the interests of fire safety, and in those circumstances, the costs of the works would be incurred in and about the maintenance and proper and convenient management and running of the Block, being part of the Estate as defined in The First Schedule and the interpretation clause of the lease.

33. Dr Turp pointed out that the Applicant had changed its position in respect of whom was liable for the works to the balcony. Dr Turp, however, agreed with the Applicant's current construction of the lease that it was the Manager's responsibility to carry out the balcony works. Dr Turp's challenge to the Applicant's case was that on a proper construction of the lease the lessees were not responsible for the costs of those works. Essentially Dr Turp argued that the nature of the works did not fall within the scope of Paragraph 4 of Part B because they did not involve a repair. According to Dr Turp, the correct characterisation of the works was the replacement of a structurally sound balcony floor because of a change in the regulatory requirements, and that in those circumstances the Manager/Freeholder carried the risk of paying for the works without a financial contribution from the lessees.

34. Dr Turp further argued that the Applicant was not entitled to rely on the sweeping up clause in paragraph 14 of Part G because the expenses incurred under Part G had to relate back to the Manager's responsibilities in the preceding parts. In short Dr Turp's proposition

was that if the costs were not recoverable under the preceding Parts A to F of the Sixth schedule, paragraph 14 of Part G would not be engaged.

35. Dr Turp contended that the relevant changes in the regulatory requirements were not captured by paragraph 10 of Part G and did not impose a liability on leaseholders to pay for the works. Dr Turp referred to the Government announcement on 10 January 2022 which said that the developers of the buildings affected would pay for the costs of the fire safety remedial works and not the leaseholders. Dr Turp said that where the change in the regulatory requirements imposed a specific liability on the freeholder, it was outside the provisions of Paragraph 10.

Consideration

36. The Tribunal is deciding what are the respective liabilities of the Manager and the Lessees for the proposed works under the terms of the leases.

37. The developer, Crest Nicholson, is no longer a party to the lease having transferred its interest in the leases in respect of the four properties to Littleblade Investment Properties Limited and Brigante Properties Limited. Crest Nicholson may have a third party liability to carry out and fund specific fire safety works to the properties but that is not relevant to the question of determining the obligations under the lease.

38. The Tribunal observes that there are four parties to the lease, the Landlord, the Tenant (the Lessee), the Manager and the Management Company. Under the lease the Landlord has divested its responsibility for managing the Estate to the Manager, and its responsibility for managing the Public Open Space to the Management Company. The Applicant is the named Manager in the lease and it operates as a commercial entity with no tenant involvement. The Landlord has granted a Management Lease to the Manager comprising all the common parts of the Estate.

39. Under clause 3.2 of the lease the Lessee covenants with the Manager to observe and perform the obligations on the part of the Lessee set out in Parts One and Two of the Eighth Schedule. Paragraph 2 of Part One of the Eighth Schedule specifies that the Lessee covenants to pay to the Manager the Lessee's Proportion at the times and in the manner herein provided.

40. Under clause 5 of the lease the Manager in consideration of the covenants on the part of the Lessee covenants with the Lessee to observe and perform the obligations on the part of the Manager set out in the Tenth Schedule. Paragraph 1 of the Tenth Schedule specifies that the Manager covenants to carry out the works and do the acts and

things set out in the Sixth Schedule save for all matters relating to the management of the Public Open Space as appropriate to each type of dwelling.

41. The Tribunal construes the effect of the Lessee's and the Manager's respective covenants is to create a synergy between them such that an obligation is only imposed upon the Manager if it can recover the costs of meeting that obligation from the Lessee. Thus in respect of the proposed works the terms of the lease envisage two situations either it is a Manager's obligation in which case the Manager is entitled to recover the costs of the works from the Lessees or it is a Lessee's responsibility in which case the individual Lessee pays for the works to his/her balconies. The Tribunal is satisfied that the lease does not permit the possibility of the Manager carrying out the proposed works at its own cost without recourse to the Lessees.

42. The Tribunal turns next to whether the proposed works are a Manager's obligation or a Lessee's obligation under the lease. Although Dr Turp agreed with the Applicant that it was a Manager's obligation, several Lessees who had submitted written representations including Mr Hodkiss maintained this was a Lessee's obligation. The Tribunal observes that Applicant had changed its position on this matter. When the matter first arose the Applicant told the Lessees that the replacement of the balcony floor was part of the Lessee's obligations. The Applicant, however, changed its mind before these proceedings were taken, and have adopted a consistent line throughout these proceedings that the proposed works are the Manager's obligation under the lease.

43. The relevant parts in the lease for determining this question are paragraph 3 of the Second Schedule which defines the Maintained Property, and the Third Schedule which defines the Property. The Tribunal sets out the definitions at paragraphs 24 and 27 above. The Manager's obligations relate to the Maintained Property, whilst the Lessee's obligations apply to the Property.

44. The proposed works involve replacing the wooden floor and joists of the balcony with an aluminium tray and flooring which would sit in the metal structure jutting out and attached to the external wall of the building. The Manager's obligations apply to all the structural parts and all external parts of the Building. The Lessee's obligations are limited to non-structural parts of the Flat and the floor surface only of the balcony or patio. Although "balcony" is not expressly mentioned in the definition of Maintained Property, the Tribunal is satisfied that it falls within the description of "external parts" of the building. The Tribunal finds that the proposed works go beyond the floor surface of the balconies and involve replacing the supporting structure, the joists, for the decking. The Tribunal, therefore, decides that the entirety of the

works to the balcony floor and structure are a Manager's obligation and not a Lessee's obligation under the lease.

45. The next question is whether the proposed works fall within one of the Manager's obligations under the Sixth Schedule. The Applicant's principal case was that its repairing obligations under paragraph 4 of Part B captured the proposed works. Dr Turp argued to the contrary stating that the repairing covenant had not been engaged in this instance because the floors were not in disrepair and had complied with the Building Regulations prevailing at the time of their construction.

46. Mr Fieldsend drew the Tribunal's attention to the judgment of Mr Justice Lindsay in *Credit Suisse v Beegas Nominees Ltd* [1994] Ch.D 69 P & CR 177 and in particular the following passages at [203] and [205]:

> "Moreover, and again having regard to that phrase in the proviso, I see the words *"otherwise* keep in good and tenantable condition" as having a potential going beyond repairs strictly so-called (by which I mean works of a kind which would fall within a covenant merely "to repair")"
>
> "Next, if the meaning I have attributed to "good and tenantable condition" is right, then the required condition in which the premises are to be kept and into which they are to be put falls to be judged not (if they differ) by reference to the actual state of the building as at the date of the demise but rather to what at that time were the requirements as to condition of the hypothetical reasonably-minded tenant of the class likely to take that building".

47. The Manager's obligations under paragraph 4 of Part B are "..... and keeping all parts of the Maintained Property in good and substantial repair order and condition and renewing and replacing all worn or damaged parts. The Tribunal accepts that when construing a lease it must focus on the terms of the specific lease before it, and that decisions of other Courts and Tribunals on the construction of particular words in a contract are likely to be of limited value. In this case, the Tribunal, however, finds the references relied upon by Mr Fieldsend helpful in its interpretation of the Manager's repairing obligation.

48. The Tribunal observes that this is a Modern lease where the obligations of the parties are clearly defined and are intended to encompass most eventualities. Turning to the wording of paragraph 4 of Part B the Tribunal finds that it is not restricted to keeping the Maintained property in good and substantial repair. It includes renewal as well as replacing worn out parts. Further the Tribunal considers that the words "order" and "condition" are distinct from the "word" repair, and to adopt the construction in "*Credit Suisse*" they signify that the

Manager's Obligation extend beyond repairs strictly so called. Assuming for the purpose of this analysis that the timber floor and structure of the balcony floor are combustible material which does not comply with fire safety regulations the Tribunal is satisfied that this would not comply with keeping the property in good and substantial order and condition even though it may be argued that it is not in disrepair in the sense of deterioration of original structure. The Tribunal also considers that when evaluating whether the Maintained Property is in good order and condition it is not fixed to the circumstances at the date of the grant of the lease. Thus the fact that the timber decking and supports complied with Building Regulations at the time of construction did not preclude the Manager's repairing obligations if the circumstances change to render the balconies non-compliant with subsequent changes to the Regulations. The Tribunal, therefore, finds that the proposed works to the balcony floors are captured by the Manager's repairing obligations under paragraph 4 of Part B.

49. The Tribunal is satisfied that the Manager is also obliged under paragraph 10 of Part G to carry out these works in order to meet its legal responsibilities under the Regulatory Reform (Fire Safety) Order 2005. Paragraph 10 requires the Manager to comply with statutes, regulations, and orders. The leaseholders including Dr Turp and Mr Hodkiss did not challenge that the Applicant is the Responsible Person under the 2005 Order for ensuring fire safety of the Block. The Tribunal does not consider that the Government's announcement on the 12 January 2022 that Developers should foot the bill for fire safety measures affected the Manager's obligations under the lease. The fact remains that the Manager has a legal duty to take such general fire precautions as may be reasonably required to ensure the Blocks are safe. In carrying out that duty the Manager is entitled to recover its costs of implementing the various measures from the Lessees. The issue of whether the Developer should pay those costs goes to the question of the reasonableness of the costs and not to whether the Manager has an obligation under the lease.

50. The nature of the Manager's obligation under paragraph 10 of Part G is ambulatory in that the Manager is required to comply with the legal requirements in place from time to time. Thus as in this case where there has been a change in the Regulations dealing with fire safety the Manager has to observe any such changes in the legal and regulatory landscape in order to meet its obligations under paragraph 10.

51. The Applicant also relied on the sweeping up clause in paragraph 14 of Part G to authorise the works. The Tribunal adopts a restrictive construction of paragraph 14 on the basis that if the parties had intended for significant costs to be recoverable they would have mentioned it expressly rather than leaving it to be caught by the sweeping up clause. The Tribunal has decided that the Manager's obligations under both paragraph 4 of Part B and paragraph 10 of Part

G authorise the works to the balcony floors and support and in those circumstances it is not necessary for the Applicant to resort to paragraph 14 in order to justify the carrying out of the works under the lease.

52. Finally some leaseholders in their written submissions argued that the apportionment of the proposed costs for the balconies should be based on the size of the Flats. The Tribunal explained at paragraph 22 that the Lessee's contribution is fixed at 1.7262 per cent for works done under Part B of the Sixth Schedule and that it has no jurisdiction to vary the fixed contribution under the lease because it is treated as an agreement between the Manager and the Lessee for the purpose of section 27A(4) of the 1985 Act.

53. The Tribunal, therefore, decides that a service charge would be payable under paragraph 4 of Part B and paragraph 10 of Part G of the Sixth Schedule to the lease for the works to the balcony floors and structure as described in the specification exhibited at [143] if they were carried out?

Question Two: Would it be reasonable for the Applicant to incur costs in carrying out the works?

54. The Applicant's case was that the presence of a combustible material (timber) in balconies which were horizontally stacked on the building exterior posed an unacceptable fire risk and that the proposed works to the balconies were essential in order to protect the health and safety of the leaseholders. In this regard the Applicant maintained that it was acting reasonably and in accordance with the terms of the leases.

55. In support of its submission the Applicants supplied copies of EWS1 forms for each of the four properties dated 1 October 2020 and 2 October 2020 produced by Tri Fire Ltd ("Tri Fire") [96-110].

56. The EWS1 forms attributed A3 ratings to Bessborough House and Clarinda House which confirmed that there may be potential costs of remedial works to attachments of said blocks. B2 ratings were attributed to Darbyshire House and Oarsman House which confirmed that the adequate standard of safety was not achieved and that both remedial and interim measures were required. Note 9 to the form gave balconies as an example of external attachments).

57. The Applicant also supplied a copy of the Tri Fire Report dated 15 October 2020 [124]. The Applicant commissioned Tri Fire to undertake an external façade review of the properties on Ingress Park and to produce an EWSI form for each property. Tri Fire visited Ingress Park on 16 September 2020.

58. The Report was confined to Darbyshire House, Oarsman House, Grove House North and Grove House South because there were also problems with the insulated render system which had a fire classification of C meaning it was combustible. This issue did not form part of this Application. The Tribunal understands that the Applicant has secured funding from the Building Safety Fund to address the costs of the remediation works required to remove the existing insulated render system at Darbyshire House and Oarsman House.

59. Following the publication of Tri Fire report, Crest Nicholson, the developer conducted intrusive investigations on the four properties because they were still under the 10 year guarantee period. Crest Nicholson found that there were construction errors with the cavity walls at Darbyshire House and Oarsman House where the fire barriers had not been installed correctly. Crest Nicholson, however, found no construction errors in the cavity walls at Grove House North and South and because they were under 18 metres the fire risk associated with the wooden balcony floors was downgraded resulting in a B1 rating on the EWSI form.

60. The Report identified that there were also fire risks with the balconies at the four properties. The Report stated that (1) The balconies had exposed timber decking and were vertically aligned; (2) Untreated timber generally has a fire classification of D meaning it was combustible with a contribution to flashover (3) Due to the presence of combustible insulation within the render system there was a risk of rapid external fire spread which was added to by the exposed timber decking. The Report recommended that the timber decking to the balconies should be replaced with materials achieving Euroclass A2 or better. The Report also recommended that no interim measures such as waking watch were required because of the other fire safety systems in the properties and the availability of means of escape.

61. Mr Tugwell confirmed in his witness statement that the A3 ratings for Bessborough House and Clarinda House, were because the balconies to those properties comprised similar (if not identical) timber materials and arranged in the same way (horizontal stacking) to the balconies assessed within the Tri Fire Report.

62. Mr Tugwell said in evidence that he had accompanied the fire engineer on his inspection of Bessborough House and Clarinda House. Mr Tugwell informed the Tribunal that the engineer told him that it was the height of these buildings over 18 metres which made the fire risk associated with the horizontal stacking of wooden balconies unacceptable. Mr Tugwell understood that the relevance of the 18 metre threshold was that fire fighting became much more difficult once this height was reached. Mr Tugwell advised that Crest Nicholson did not take any responsibility for the balconies because when they were constructed they conformed to current building regulations. Finally Mr

Tugwell stated that Kent Fire and Rescue Service had recently inspected the Estate and had agreed with the steps taken by the Applicant in respect of fire and safety of the properties.

63. Mr Tugwell in answer to questions from the Tribunal explained that the Applicant had changed its mind on whether the balcony floors fell within the Manager's repairing responsibilities. Originally the Applicant considered that the balcony floor was an individual lessee's responsibility but decided that the inclusion of the wooden joists made the balcony floor part of the structure of the building and, therefore, within the Manager's repairing covenant.

64. Mr Tugwell accepted that the hearing bundle contained no documentation from the original fire engineer, Mr Kiziak, accepting the new B1 rating for Grove House North and South, and no evidence from Mr Kiziak confirming that the remedial works for Bessborough House and Clarinda House related specifically to the balconies. Mr Tugwell, however, pointed out that the only attachments to these buildings were the balconies. Mr Tugwell also said that his evidence in relation to these buildings was based on conversations with the fire engineer.

65. Dr Turp submitted that the works were not necessary because the lessees would receive no benefit from the works in terms of an improved rating in the EWS1. Dr Turp considered that Mr Tugwell had agreed with her question that if the cavity wall repairs were carried out on Darbyshire House the outcome would be a B1 rating which was the best that could be achieved and would be unaffected by the works to the balcony floors and structure. Dr Turp argued that the lessees would be paying for works which produced no improvement in the EWS1 rating, and, therefore, the works were unnecessary. The Tribunal allowed Mr Tugwell to clarify his answer which was that in order for Darbyshire House to receive a B1 rating it would be necessary to complete the works both on the cavity wall defects and on the balcony floors and supports. Dr Turp then referred to Grove House where the fire engineer for Crest Nicholson had given a B1 rating despite no works being done on the balconies because there were no construction errors with the cavity wall protection. Mr Tugwell insisted that the difference between Grove House and the four other properties was the height and the 18 metre threshold. In response Dr Turp pointed out that there was no statement from the engineer and no documentary evidence to substantiate the relevance of the 18 metre threshold, and in consequence Dr Turp maintained her position that the works were unnecessary.

Consideration

66. The Tribunal finds the following facts:

1) The Applicant had approached Crest Nicholson, the developer, to enquire whether it would fund the works to the balcony floor and support structure. Crest Nicholson refused to accept liability for the works because the balconies were constructed in accordance with the Building Regulations prevalent at the time of build.

2) The Tribunal is satisfied on the expert evidence of a fire engineer that the balconies at Darbyshire House and Oarsman House represented a significant fire risk which required remedial works. The fire engineer in his report dated 15 October 2020 identified the exposed timber decking and the vertical alignment of the balconies as significant factors which would contribute to the risk of rapid external fire spread. The Lessees adduced no contrary expert evidence.

3) The Tribunal finds that the A3 ratings for the EWS1s on Clarinda House and Bessborough House related to the potential costs of remedial works to balconies. The Tribunal accepted Mr Tugwell's evidence that balconies were the only attachments to the properties and that the fire risks presented by the balconies on these two properties were the same as at Darbyshire House and Oarsman House. The Tribunal noted that the Applicant had not supplied expert evidence dealing directly with the fire risks of the balconies on Clarinda House and Bessborough House. The Tribunal, however, had before it photographs of the balconies on these two properties which identified the same risk factors associated with the balconies on Darbyshire House and Oarsman House. The Tribunal took account of the fact that Clarinda House and Bessborough House were above 18 metres in height the same as Darbyshire House and Oarsman. Finally the Tribunal found Mr Tugwell a credible witness despite its reservations about the absence of direct evidence from the fire engineer corroborating Mr Tugwell's testimony.

4) The Tribunal did not place weight on the dispute between Dr Turp and Mr Tugwell about the effect of carrying out the cavity wall repairs on the EWS1 rating for Darbyshire House. The Tribunal accepts Mr Tugwell's clarification that a B1 rating would only be achieved for Darbyshire House if the works were done to both the cavity walls and balconies. The Tribunal adds that Mr Tugwell's recollection was supported by the EWS1's ratings of A3 for Clarinda House and Bessborough House which were based solely on the fire risks presented by the balconies. There were no issues with the cavity wall construction for these properties.

5) The Tribunal considered the revised EWS1 B1 ratings for Grove House North and South did not change its findings on the fire

risks presented by the balcony floors and supporting structures on Darbyshire House, Oarsman House, Clarinda House and Bessborough House. The Tribunal took into account the facts that (1) the fire engineer had not altered his EWS1 ratings on these four properties after being presented with the revised EWS1 ratings for Grove House North and South; (2) the Tribunal accepted Mr Tugwell's evidence that the distinguishing feature of the four properties from Grove House North and South was their height of 18 metres; and 3) the Tribunal accepted Mr Tugwell's evidence that the significance of the 18 metre threshold, namely, it was the height at which fire firefighting became more difficult. The Tribunal also noted that the MHCLG Consolidated Guidance [130] and the RICS EWSI Form [132] attached to the Tri-Star report made specific reference to the 18 metre height threshold from which the Tribunal inferred that buildings of 18 metres and higher carried greater fire risks than buildings below that height.

67. The Tribunal concludes from the above findings that (1) the proposed works to the balcony floors and structure of Darbyshire House, Oarsman House, Clarinda House and Bessborough House are necessary to ensure that the fire risks to the properties are reduced to acceptable levels and (2) the proposed works are necessary to ensure that the Manager discharges its legal responsibilities under Regulatory Reform (Fire Safety) Order 2005 and its obligations under the lease.

68. The Tribunal, therefore, decides that it is reasonable for the Applicant to incur costs in carrying out the works on the balcony floors and supporting structures of Darbyshire House, Oarsman House, Clarinda House and Bessborough House.

Decision

69. The Tribunal in reaching its decision had regard to the representations both written and oral from the leaseholders. The Tribunal observes that of the 86 leaseholders who replied 60 (3 from Grove House North and South) supported the Application whilst 26 (5 from Grove House North and South) opposed it. The fact that the leaseholders who supported the Application were in the majority gave comfort to the Tribunal's determination in favour of the Applicant.

70. The Tribunal was asked not to make a decision on the reasonableness of the proposed costs which explains why the Tribunal has not addressed leaseholder's concerns about the costs. This may form the subject of another Application before the Tribunal.

71. The Tribunal, therefore, determines in accordance with section 27A(3) of the 1985 Act that if costs were incurred for in carrying out the works on the balcony floors and supporting structures of Darbyshire House, Oarsman House, Clarinda House and Bessborough House a service

charge would be payable by the Lessees of those four properties to the Manager.

Section 20 C

72. The Tribunal has before it an application from Hyde Housing for an Order under section 20C of the 1985 Act. The Tribunal invites Hyde Housing to make submissions in writing in support of its Application to be filed and served on the Applicant's solicitors by 25 March 2022. The Applicant has a right of reply to be filed and served by 8 April 2022. The Tribunal will then make its decision on the papers by 29 April 2022.

RIGHTS OF APPEAL

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making application by email to rpsouthern@justice.gov.uk.

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

3. If the person wishing to appeal does not comply with the 28 day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.