FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case reference	**:**	**BIR/00FY/LSC/2020/0008**
Property	**:**	**The Hicking Building, Queens Road, Nottingham NG2 3BX**
Applicants	**:**	**The leaseholders listed in the Appendix**
Representative	**:**	**Mr A New**
Respondents	**:**	**The Hicking Building RTM Company Ltd (1) Abacus Land 4 Ltd (2)**
Representative	**:**	**Mr C Bryden (Counsel) instructed by Brady's Solicitors (for the First Respondent)**
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** **Application for an order under section 20C of the Landlord and Tenant Act 1985 and for an order under paragraph 5A of Schedule 11 of the Commonhold and Leasehold Reform Act 2002**
Tribunal members	**:**	**Judge C Goodall** **Mr R P Cammidge FRICS** **Mr A McMurdo MCIEH**
Date and place of hearing	**:**	**26 July 2021 by Remote Video Platform**
Date of decision	**:**	**14 September 2021**

DECISION

Background

1. This application concerns the service charge levied to the Applicants as long lessees of the Hicking Building, Queens Road, Nottingham NG2 3BX ("the Property"). On 15 April 2021, the Tribunal issued a decision ("the First Decision") relating to proposed external fire protection works to the Property in which the First Respondent in this application ("the Respondent") had sought approval for expenditure and dispensation from consultation. That decision was issued under references BIR/00FY/LDC/2020/0018 and BIR/00FY/LDC/2020/0007. The Second Respondent is the freeholder and it has not participated in this application.

2. This application is made by the Applicants who between them own 39 of the 329 apartments at the Property. It also concerns fire protection works at the Property. The Applicants' concern relates to the cost of internal works required to improve fire protection compartmentation in the corridors, stairwells and risers.

3. In small part, the issues in this application were considered during the two day hearing that led to the First Decision. However, in order to make this determination, the Tribunal issued further directions, dated 31 March 2021, on this application, at the end of the first hearing.

4. The 31 March 2021 Directions included a Direction that the Respondent:

> "… disclose all correspondence (whether in written or electronic form), all invoices, all accounts, all contracts, valuation certificates, and all other relevant documents relating to the carrying out of any of the Works in 2020 which are intended to be collected via the 2020 service charge accounts so as to identify the actual expenditure on the Works in that year…"

5. The Works were defined as:

> "… expenditure … on internal works to reduce the fire risk at the Building that were identified as necessary in a report dated 14 January 2018 from Atkinson Leah Ltd …"

6. The Tribunal convened for a further one day hearing (via Cloud Video Platform) on 26 July 2021. Closing submissions were provided in writing some 14 days later. The Applicants were represented by Mr A New who is not legally qualified but who has experience of property management. The Respondent was represented by Mr C Bryden of counsel.

7. This is the Decision on the application for a determination of the payability of a service charge for the works identified in paragraph 2 above, with the Tribunal's reasons for its decision.

The Building

8. 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.

9. 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.

10. 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.

11. The corridor length across all blocks and all floors has been measured as 1.8425km. There are nine stairwells spread through the blocks.

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

Law

13. 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.

14. 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

15. 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."

16. 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).

17. 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."

18. 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." Yes

19. In *The London Borough of Hounslow v Waaler* [2017] EWCA Civ 45, the Court of Appeal was considering whether the cost of replacing windows by Hounslow (an improvement) was reasonable where there was also an option of repair. The repair option (replacement of hinges) was substantially less than the cost of replacing the windows. The Court said that in applying the statutory test under section 19 to Hounslow's decision, it was necessary to go further than just consider whether the decision-making process was reasonable; the outcome of that process also needed to be considered (paragraph 37) as did the legal and factual context (at least in consideration of expenditure on improvements) (paragraph 42). The lessees, in that case, were not required to pay the higher costs of improving the windows; just the costs of repair.

The Lease

20. 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.

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

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

23. 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.

24. 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 Respondent. Under section 96 of the Act, it has therefore acquired the management functions of the freeholder under the lease.

25. In the lease, the following 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..."

26. 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.

27. 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"

28. 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"

29. 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"

30. 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"

31. 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"

The issues in this case

32. In a statement of case sent to the Tribunal in June 2021, the Applicants confirmed that their challenge was to the cost incurred and to be incurred in relation to fire stopping works in the internal corridors of the Building ("the Corridor Works"). They did not wish to pursue a challenge they had initially made to the appropriateness of carrying out the Corridor Works without also carrying out works to individual flats, nor did they wish to pursue any challenges to the need for consultation in respect of the Corridor Works. This application is therefore limited to consideration of the contracting methodology and the consequential charges levied for the Corridor Works.

33. The Applicants have raised an additional issue relating to whether the costs of the Corridor Works should be charged to lessees, rather than being recovered from contractors who they say failed to carry out works to a proper standard, resulting in the need for remedial work.

Facts

34. We heard evidence from six witnesses at the second hearing, being Mr Nigel Brunskill and David Thomas (two of the Applicants), Mr Brent Weightman, the managing agent's representative, Mr Mike Tuck, the Respondent's fire safely adviser, Mr Kevin Johansson, chair of the Respondent's Board, and from Ms Clare Bristow, a director of the Respondent. From the oral evidence given at the two hearings, and the written bundle of documents supplied to the Tribunal, we find the following facts.

35. The Property is managed by the Respondent's Board, who have appointed a firm called Stoneyard (formerly Walton & Allen) as their professional managing agent. The Respondent has had an association with this agent since around 2009 when Mr Rob Walton from Stoneyard had assisted the lessees at the Property to form the Respondent and to acquire the right to manage the Property. Stoneyard has been in place as the Respondent's agent ever since. Until around 2017, Mr Simon Temporal (wrongly named as Mr Temple in the First Decision) was the person from Stoneyard who had day to day responsibility for the relationship. He left Stoneyard at that point and for the last 3- 4 years, Mr Brent Weightman had taken over that role.

36. 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.

37. 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.

38. Atkinson Leah's principal concern was expressed in paragraph 1.1 of their report, 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. …"

39. Elucidating, the report continued:

> "1.2.2 **Service penetrations from flat to flat and from flat to common areas**
>
> There are numerous examples of service penetrations from the common areas into the flats being poorly finished and likely not to be to the requisite standard. It is recommended to open up and establish the standard of separation provided between the flats and common areas and also between the flats.
>
> 1.2.3 **Separation within concealed voids**
>
> Only a very limited inspection of the concealed voids and principally those above suspended ceilings was undertaken.
>
> It is essential there is adequate fire stopping of the concealed voids including those in the roof. This is in order to help prevent / limit the spread of fire/smoke undetected in the structure
>
> Given the poor standard of separation seen it is considered highly probable there will be a deficiencies in the separation within concealed voids and it is therefore recommended to open up voids and establish the adequacy of separation."

40. The inadequacy of the fire stopping in the concealed voids above the suspended ceilings is accepted by both parties and is therefore not an issue

on which the Tribunal needs to reach a determination. Various reasons for the defects have been suggested. They may have arisen from poor workmanship on the part of the main contractor when converting the Property, or (and this appears to be the Applicants preferred view) they may have arisen when an upgraded fire alarm system or fibre broadband services were installed. For reasons which are given later, the Tribunal does not consider this to be a matter for this determination and we do not comment on it further.

41. 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.

42. 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. Mr Tuck is a Member of the Chartered Institute of Building (MCIOB), which he achieved in 2010. Prior to obtaining that qualification he had worked in the building industry for 10 years. He told us he has worked extensively on building projects in the Nottingham area. He holds no specialist qualifications in fire protection issues but he does come across the issue extensively in the course of his work.

43. 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.

44. At a director's meeting held on 14 June 2018, Mr Weightman and Mr Tuck presented proposals to upgrade fire protection at the Property. The priority was works in the basement and car park of the Property. Various works were carried out using appropriate contractors, supervised by Mr Tuck during the period from early August 2018 up to around the summer of 2019. These works were known as Phases 1 – 3 of Mr Tuck's plan. There is no challenge to the necessity for these works or the reasonableness of the expenditure incurred on them.

45. In the middle of 2019, the Respondent's attention turned to the next phase of fire protection works – Phase 4. This was work to the corridors to improve fire stopping and create fire-proof compartments in order to limit the spread of fire.

46. In an email to Mr Weightman dated 8 July 2019, Mr Tuck said:

> "At the moment we don't have enough information to price the fire stopping in the corridors across all blocks. The smaller contractors are unable to provide a price and want to complete the works on the basis of a time charge. The larger contractors have declined to price without further information. Given the

> volume and complexity of the work my plan is to tender the package and open it up to a wider audience. In addition to the final issue plans we will need to provide a performance specification and measure for the works. …"

47. Mr Tuck clearly wished at this point to provide more information to proposed contractors in order for them to price the Corridor Works in the form of some sort of specification. Indeed, he updated Mr Weightman on 2 August 2019 to the effect that he would be on site on Tuesday 6 August to "begin the measure".

48. However, at some point, probably in November 2019, he changed his mind about being able to provide a specification for the works. Instead, he wished to receive contractors proposals on the basis of the contractor being able to view the site to understand the nature of the works required, and on the basis of some plans giving dimensions of the corridors on which works were required. In his evidence he told us that six contractors came to view the job. In his statement he says:

> "The works to the corridors and lift lobbies proved extremely difficult to price. Towards the end of 2019 a number of local specialists were approached to price the works but none were able to provide a lump sum tender. Most declined the works and GRJ Contracting Ltd were only able to provide a day rate price. This information was communicated to Brent Weightman."

49. Mr Tuck was unable to recall the day rate price suggested by GRJ Contracting Ltd, as was Mr Weightman. It is unclear whether the Respondent's directors were informed of the price, but neither of the two directors who gave evidence to us could recall the day rate quoted. Mr Tuck said he was not attracted to a day rate basis for pricing the Corridor Works as he was looking for contractors to take more risk. A day rate basis was too open ended and might be thought of as giving the contractor a licence to print money.

50. The Board's position in or around November 2019 is best summarised by Ms Bristow in her second statement, in which she says:

> "33. Without completing a full survey of the building to create the scope of works it was difficult to find competitive quotes. It was clear that the work was needed, and we could have had a full building survey completed to create a specification but given the time it was taking to specify and get tenders for the cladding works it felt as though this would create delay and add costs that could be better spent on actually making the building safer.
>
> 34. It was agreed to ask Stoneyard resources to complete a known length of corridor to use to provide an estimate for the whole building to help inform the directors decision-making. We do not usually use Stoneyard resources to complete work on the building as this creates too many conflicts of interest. On this occasion it

was agreed, as they had resources available, and we were struggling to find a way to progress the work. …"

51. It is appropriate to interrupt the narrative briefly to set out what, if any, impact these considerations had upon the service charge budget for 2020. It appears that £55,000 was included in the 2020 budget for fire safety works. Phases 1 – 3 were ongoing during 2019, as was consideration of works on external cladding. We have seen a copy of the letter to lessees about the 2020 budget prepared by Stoneyard, It contains no reference to the Corridor Works being undertaken (or at least commencing) in 2020.

52. Mr Tuck's efforts to find a contractor who would be willing to contract to carry out the Corridor Works at a price that had been market tested were therefore unsuccessful, but the Board decided instead to pursue the direct engagement of Stoneyard to do remedial works to a sample corridor in order to provide an estimate for the whole building. At the time, they felt pressured by the statutory authorities to be seen to be making progress in fire protection works at the Property. The Tribunal has not been provided with a copy of any document confirming the terms on which Stoneyard were to carry out the works to the sample corridor, despite the March 2021 Directions.

53. The idea was that the Stoneyard operatives would carry out all the fire stopping works they identified as necessary in the ground floor corridor of Block 1 ("the Sample Corridor"), measured by Mr Tuck as 73 metres. That work was undertaken between January and March 2020, and it must therefore have been agreed in December 2019 / January 2020. The time that work took would be recorded, and the cost of labour and materials used would be calculated, in order to produce a cost net of VAT per linear metre of corridor. In effect, the formula was:

$$X + (Y \times Z) \div A = \text{Cost per metre}$$

where

X is the cost of materials used on the whole corridor,
Y is the daily cost of one operative (including on costs, profit etc)
Z is the number of days it took for a single operative to complete the sample corridor, and
A is the length of the corridor

54. As stated, work on the Sample Corridor took place between January and March 2020. At some point (we do not have the date of the document), an analysis of the Sample Corridor costs was prepared by Stoneyard. The figures were:

a. Cost of materials - £545.00
b. Y is £384 (hourly rate £48 x 8 hours a day)
c. Z is 33.75
d. A is 73 metres

so the result was £185 per linear metre.

55. Mr Weightman explained that the daily rate had been provided by Stoneyard's estimator, a Mr Graham Stevenson. He did not attempt to explain the basis upon which Mr Stevenson had selected the figure of £48 per hour.

56. There is no evidence which suggests the linear metre rate was the subject of any negotiations by the Board with Stoneyard. There is no evidence that the Board researched an appropriate day rate for the labour cost. As we have already identified, they did not ask Mr Tuck to become involved in approving the linear metre rate. Both Mr Tuck and Mr Johanson were asked at the hearing what they thought of the daily rate charged for the sample corridor. Both replied that they thought the rate was "at the top end".

57. So far as control of speed (and quality) of work was concerned, Mr Weightman said he visited the site very regularly to check the work to the sample corridor. There were no independent checks.

58. The total invoiced for the Sample Corridor was £14,769.46.

59. There is little or no material available to the Tribunal to indicate what happened with regard to the Corridor Works in April. On 5 May 2020, Mr Weightman emailed the person at Nottingham City Council who he was in discussions with concerning statutory compliance with fire protection issues. He said "we have provided the client with a price for fire stopping and await their instructions".

60. After the hearing, we directed the Respondent to provide a copy of the document referred to in that email. We have been provided with a document, attached to an email dated 29 May 2020, which sets out prices for further corridor works. We have been told this document was originally dated 18 March 2020, but as a working document, it went through a number of iterations. The document is headed "fire risk assessment works to corridors". All corridors are separately identified, grouped into blocks, with length given in linear metres. A price is shown as £185 per linear metre. The Sample Corridor is excluded, as the work had already been completed. For the remaining corridors, the total price for the Corridor Works is shown as £350,062.50 (including fees for Mr Tuck), plus VAT. The total is therefore £420,075.00.

61. The back page of the document sets out eleven "notes". Notes 6 and 7 are:

> "6 The rates have been taken from the indicative costs which we have already submitted and this was based on the sample corridor where the works were carried out. This includes a small 5% contingency figure.
>
> 7 Please note that these rates/costs could change depending on what is found in the subsequent corridors. Therefore the costs could go up as

well as down depending on the materials and labour that's required to complete the FRA works to a satisfactory level."

62. This document was attached to an email dated 29 May 2020 from Mr Weightman to Mr Johanson and Ms Bristow. After discussing the proposed works and their funding, Mr Weightman continued:

"**W&A / Stoneyard Proposal**

Our lettings business has a vested interest in the building with 130 managed apartments. With this in mind, W&A, along with yourselves, are keen to get these issues resolved.

With this in mind, W&A / Stoneyard are willing to carry out the works within 6 – 12 months and collect the funds over the next 2.5 years. Under this proposal, we would invoice £100k per half year for the next 5 half year periods.

Our offer of credit may be reconsidered / withdrawn if the control of the board where (sic) to shift. If we were faced with a potentially hostile board, we would feel uneasy about credit provided.

If we were to proceed, we would agree terms formally and issue contracts etc.

…"

63. We have no minutes of any director's meetings between 10 July 2019 and 6 October 2020. We have no record, in the statements provided by the witnesses for the Respondent or the documentation annexed to them, of the board's formal response to this email. Despite the March 2021 Directions (see paragraphs 4 and 5 of this Decision), we have not been supplied with any contract documentation between the Respondent and Stoneyard for undertaking the Corridor Works. We do however find that, whatever the response was, and whatever was put in place regarding formal contracts, the Board decided to proceed with further works to the corridors in July 2020. Without being given any contract documentation, we have assumed that the work was undertaken broadly on the basis of the document referred to in paragraph 60. We do not know which corridors were to be remediated under the arrangement, but we do know that in 2020, works were completed to the fifth floor corridors in Blocks 1 – 4 and to the ground floor corridor in Block 1 (that being the Sample Corridor).

64. It is at this point that Mr Tuck comes back into this narrative concerning the Corridor Works. He had been involved in the Phase 1 – 3 works in early 2020, but as identified above, not the Corridor (Phase 4) Works. His role was to be to check the work that Stoneyard were to undertake as approved by the Board. But he had no role in approving the rate per linear metre. He was simply to check that the work had been done to the measured length of corridor for which Stoneyard submitted an invoice.

65. Over the course of August to November 2020, Stoneyard completed some Corridor Works and rendered invoices accordingly. The invoices which were challenged by the Applicants were:

Table 1 – disputed invoices

Date	Invoice number (page in bundle)	Description	Linear metres	Sum claimed (net)	Sum claimed (incl VAT)
31 Jan 20	10103 (178)	Fire stopping - labour & materials		3,723.73	4,468.48
28 Feb 20	10299 (176)	Fire stopping - labour		4,687.10	5,624.52
10 March 20	10369 (175)	Fire stopping - labour & materials		3,787.70	4,545.24
31 March 20	10547 (174)	Fees re fire stopping	73	109.35	131.22
31 August 20	11556 (190)	Fire stopping works	73.98	13,686.30	16,423.56
31 August 20	11752 (191)	Extra works	18.02	3,333.70	4,004.44
31 August 20	11571 (192)	Fire stopping works	28	5,180.00	6,216.00
30 Sept 20	11831 (184)	Fire stopping works	37	6,845.00	8,214.00
30 Sept 20	11829 (185)	Fire stopping works	80	14,800.00	17,760.00
30 Sept 20	11830 (186)	Fire stopping works	17.5	3,237.50	3,885.00
30 Nov 20	12349 (181)	Extras	18	3,330.00	3,996.00
Totals			345.50	62,720.38	75,264.46

66. Corridor lengths had been measured in column 2 of Mr Tuck's analysis on page 67 of the hearing bundle. The works that resulted in the above invoices were works to the ground floor corridor in Block 1, and the Fifth Floor corridors in Blocks 1, 2, 3, and 4. The measured lengths of those corridors are, according to the schedule on page 67 of the bundle:

Table 2 – corridor lengths

Corridor	Metres
Block 1 – ground floor	73
Block 1 – 5th floor	73.98
Block 2 – 5th floor	95
Block 3 – 5th floor	70
Block 4 – 5th floor	18
Total	329.98

67. The work to the Sample Corridor was invoiced between January and March 2020. These invoices are the first four shown in table 1. One composite figure is given for the length of that corridor across all four invoices, taken from Stoneyard's assessment of the costs of their work on the Sample Corridor.

68. At the hearing, Mr Weightman told us that the Respondent has continued to carry out works to the corridors in 2021. He said that the 3rd and 4th floors in Block 1 had now been completed. We were not provided with any contracts or invoices or valuations. Work in 2021 is outside the scope of this application.

69. At the hearing, the Respondent provided a quote from a Derby based company appearing to offer passive fire protection installation, to carry out works to the ground floor corridor of Block 3 for £10,800.00. We assume VAT would be added. The ground floor corridor of Block 3 is measured (from Mr Tuck's schedule) as 71 linear metres, so the rate per linear metre from this quote is £152.11.

70. As referred to above, Mr Tuck has attended the Property regularly from August 2020 to inspect the works and approve expenditure. Reports were provided dated 17 September 2020, and 17 November 2020. In his reports, Mr Tuck has approved invoices for the Corridor Works at the rate of £185 per linear metre. He has also approved expenditure on extra works. His valuation methodology is to allow extra linear metres, even though the extra works are not specifically related to additional corridor lengths. His additional allowances are:

Table 3 – Mr Tuck's approved extras

Allowance for	Extra metres	Value (£) net	Value incl VAT	Invoice page
Block 1 – 5th floor Replacement bulkheads above 6no fire rated doors	18.02	3,333.70	4,000.44	191
Block 2 - 5th floor Floor is 90 metres and original claim only for 80 metres	10	1,850.00	2,312.50	181
Block 2 – 5th floor Work in service risers	5	925.00	1.156.25	181
Block 4 – 5th floor Extra work in service risers – both 2.5 metres and 3 metres are referred to	3	555.00	693.75	181

The Applicants' case

71. In essence, Mr New's position is that the costs charged in the disputed invoices were unreasonably incurred due to the manner in which the Corridor Works were pursued, and the lack of diligence by the Respondent. The decision to engage Stoneyard to undertake the Corridor

Works was outside the range of reasonable responses on the part of the Respondent.

72. The first criticism Mr New makes of the Respondent is that they have not displayed appropriate diligence in scrutinising the advice and recommendations they have received from Stoneyard. He points out their failure to read the original fire risk assessment (see paragraph 47 of the Original Decision), and Mr Johanson's admission that the Board's primary focus was on the external cladding works rather than the Corridor Works. He says there were no appropriate controls on the costs or the works that Stoneyard were instructed to complete.

73. Regarding the Corridor Works themselves, Mr New argues that the Respondent should have obtained a survey of the work required and gone out to the market to obtain competitive quotes. Failure to do so exposed the Respondent to over reliance upon Stoneyard as the only contractor available.

74. Turning to the costings of the Corridor Works, Mr New drew attention to the report he had provided from a Mr Ryley who works for Millersdale Project Ltd in which that company had advised that labour cost should be based on £170 per day for one man (£21.25 per hour for an 8 hour day). Mr Ryley had surveyed seven corridors. His assessment for a sample corridor of 50m was that it would take 20 days to carry out required works. Materials would be in the region of £642.50. Labour cost plus materials was therefore £4,042.50, or £80.85 per metre. On the basis of this advice, Mr New's case was that the sum charged by Stoneyard was, in his view, excessive. He contended for a rate of between the £80.85 estimate from Millersdale and the £152.11 rate from Compartment Fire.

75. Mr New did not call Mr Ryley to give evidence, nor were his qualifications or experience given in the report. No evidence was provided to show what experience Millersdale had of building work.

76. Mr New urged the Tribunal to set a rate for the Corridor Works still remaining to be done in future years.

77. Finally, Mr New made reference to his view that the Respondent should seek payment of the costs of the Corridor Works from previous contractors rather than charging the service charge payers.

The Respondent's case

78. Mr Bryden reminded the Tribunal of the principles to be derived from *Forcelux* and from *Waaler*, to the effect that if a course of action has been pursued which leads to a reasonable outcome, the costs of pursuing that course of action will have been reasonably incurred. The Tribunal should not impose its own decision; it should look at whether the actions of the Respondent were within a range of reasonable responses.

79. He said it was the case that there had been no effective challenge to the fact that no other contractors could be found for the Corridor Works other than Stoneyard. It was therefore reasonable for the Respondent to incur the cost of the Sample Corridor works so that a guideline rate for future works could be set. The involvement of Mr Tuck provided comfort that the invoices were appropriately incurred, and the work was of a reasonable standard.

80. Mr Bryden accepted that in the light of the quotation that had been obtained from Compartment Fire, it would be unreasonable for the Respondent now to proceed with Stoneyard for future works without exploring the lower cost option, but it is not necessarily the case that the cheaper option is the best option and that could only be assessed in the circumstances following further exploration of cost.

81. Mr Bryden resisted the suggestion that a rate for future years be set by the Tribunal, as that should firstly depend on the Respondent's assessment of the benefits and detriments of engaging any future contractor. He urged that the application be dismissed.

Discussion

82. The issue the Tribunal has to decide in this application is what sum has been reasonably incurred by the Respondent on the Corridor Works in 2020 which it may then charge lessees of the Property as a service charge. The Tribunal understands that no service charge for 2020 has yet been demanded from the Applicants. This application relates to actual expenditure in 2020, rather than approval of a budgeted allowance for the Corridor Works. Applicants more normally await a service charge demand before challenging service charge expenditure. The Tribunal does not consider this prevents us from making a determination on the issue we have been asked to address. Our determination will crystalize the amount the Respondent may include in the service charge accounts for 2020 for the Corridor Works.

83. We agree with Mr Bryden's submissions regarding the test that we have to apply. It is not for us to substitute our own decision; it is for us to assess whether the Respondent has made a reasonable decision, or has made a decision that has led to a reasonable outcome.

84. However, in our view there have been significant flaws in the Respondent's decision-making process that has led to it paying too much for the Corridor Works in 2020. Our view is that it did not make a reasonable decision, nor did the Respondent's decision lead to a reasonable outcome, when it engaged Stoneyard to carry out works either to the Sample Corridor, or to the further works carried out between August and November 2020.

85. We go back to the production of the first fire risk assessment in January 2018 by Atkinson Leah (see the Original Decision). That has little relevance to the issue we have to consider in this application, but the fact

that some of the directors of the Respondent (on their own admission) failed to read that report sounds alarm bells. A director of a company (even a volunteer) has to understand the decisions he or she is taking.

86. There is no issue in this case about the necessity for the Corridor Works to be undertaken, nor is there any challenge to the quality of the works that have been carried out in 2020. It is the procurement of those works that is in issue.

87. In our view, a reasonable board would have been alive to the need to control costs for a project with a potential value of in the region of £500,000. The variables that needed to be controlled were (a) labour cost, (b) time taken to carry out works if the payment related to time spent, and (c) quality of work. The normal method of controlling the costs is to obtain competitive quotations from the market on the basis of a clear specification against which all tenderers quote on an equal basis.

88. We were not persuaded by the evidence we heard from Mr Tuck that it was impossible to obtain quotes. What he struggled with was persuading contractors to quote without a specification. We were also not persuaded that it was impossible to prepare a specification. Indeed, Ms Bristow acknowledged that this was possible in paragraph 33 of her statement. In our view, the Board and its advisers should have realised in around November 2019 that it had a responsibility to control the costs of the Corridor Works and should not have given up obtaining competitive quotes at that point (whether with or without a specification), because without proper cost control measures for this contract, they were always at risk of paying more than a reasonable market rate. The evidence is that they have indeed been able to obtain a quote from Compartment Fire. Nobody has tried to persuade us that this company would not have quoted in late 2019 or early 2020.

89. The evidence we had was that one contractor (GRJ Contracting Ltd) did visit site and provide a day rate for the work, which could possibly have been a foundation for negotiations. We entirely accept the dangers of contracting for a £0.5m contract on a day rate basis, but at least that contractor had ventured a figure. We must express astonishment that nobody can remember that figure. Mr Weightman was certainly told the figure. He must have had in the back of his mind, when offering the Stoneyard proposal in around May 2020 that his firm's day rate was £384 per day (£48 per hour for an 8 hour day). As adviser to the Respondent, had he been aware that a competitor could offer a lower day rate, he most certainly should have told his client. Had he been aware that the GRJ Contracting day rate was higher than this, he would have informed the Respondent that his quote was based on a lower day rate than the one contractor who had indicated a rate, to give comfort to his client that his quote was competitive. The suggestion that this potentially important piece of information had escaped his mind is, in our view, not credible.

90. Whatever the difficulties the board was facing in late 2019 regarding contracting for the Corridor Works, in our view they were not live to the

disadvantages they were exposing themselves to by following their preferred route of contracting with Stoneyard, which was both their adviser and their contractor. Stoneyard had a conflict of interest. We have seen no evidence of any attempts by the board to ensure those conflicts were appropriately managed. The failure to obtain competitive quotations was compounded by the further error of contracting with their own adviser without taking steps to manage the conflicts of interest this created.

91. The first and most obvious step they could have taken was to obtain independent professional advice on the Stoneyard contract. Rather than asking Mr Tuck to provide that advice, at this point Mr Tuck seems to have bowed out from providing advice.

92. The second thing they would have done is enter into appropriate negotiations with Stoneyard regarding their proposal. The board appears to have simply accepted Mr Weightman's labour rate of £48 per hour. For reasons that we give below, in our view that rate is too high. It should have been challenged. It should also have been obvious to the board that the formula Stoneyard proposed to use to fix a linear metre rate was itself subject to the same disadvantage of effectively using an open ended day rate as the quote from GRJ Contracting had been, as there were no controls (apart from the supervision of Mr Weightman – who could not have been independent) on the actual time the work on the Sample Corridor took.

93. Finally, the board could and should have entered into a written contract for the Corridor Works. A written contract had been foreshadowed by Mr Weightman himself when he made his proposal in May 2020. If there was one, it should have been disclosed to the Tribunal as a result of our Directions. A board, acting reasonably, and finding itself in the position of the Respondents board in May 2020, would not have allowed Stoneyard to undertake the Corridor Works without a written contract.

94. In summary, the Tribunal's view is that a reasonable RTM company / landlord would not have contracted for the Corridor Works without testing the market thoroughly, if necessary by obtaining a professionally prepared specification of works. It would not have allowed itself to enter into an arrangement with an adviser which had a conflict of interest, even if that adviser was offering competitive terms, without proper independent advice, negotiation, and scrutiny of the terms, and it would have ensured that the terms of the arrangement were properly documented.

95. The Tribunal's conclusion is that the Corridor Works costs have not been reasonably incurred for the reasons outlined thus far.

96. It is obvious that the Corridor Works have been carried out and our task now is to assess what a reasonable sum would be for those works.

97. An estimate has been provided for one corridor from Compartment Fire Limited. The quotation is for the ground floor corridor of Block 3, which is measured as 71 metres. The quote is £10,800 net, which means that the linear metre rate is £152.11 per metre net. All materials are included.

98. Alternative methods of determining an appropriate rate, relying on the experience and expertise of the Tribunal, are

    a. to take the market labour cost of a skilled operative, which we assess at £20 per hour, add on-costs on for national insurance, general insurances, welfare costs, access, and equipment costs (say £10.50 in total), and profit at 20% (say £6.10). This assessment suggests that an hourly rate could be in the region of £36.60.

    b. to utilise available data on the internet to establish the cost of dry lining (which requires a similar skill set to the works under consideration). Many websites are available which will give average costs and timescales for dry-lining projects, including a break-down of those costs into materials and labour cost. Our own research has indicated that labour cost is in the region of £37.50 an hour. It is accepted that this is a broad-brush approach, but it is based on information in the marketplace and is a helpful indicator to the tribunal.

99. The Applicants have provided us with a report from Millersdale Projects Ltd, which suggests a daily rate of £170.00. Assuming a day is 8 hours, the hourly rate is thus £21.25. The report did not establish the credentials of either the author or the company, and we are unable to give it much weight. The hourly rate seems to us to be too low if proper attention is given to the on-cost that any commercial contractor would need to add. Having said that, it would be unwise to dismiss the Millersdale report entirely. Subject to being assured of their competence and resourcing, this company may well be able to provide a competitive alternative for the Respondent to consider.

100. Taking all the above information into account, the Tribunal assesses that:

    a. Given the room for variability and market conditions, a reasonable hourly rate for an appropriately competent tradesman to carry out the remedial work is no more than £40 per hour;

    b. Applying an hourly rate of around £40 per hour, a fair and reasonable linear rate for the Corridor Works undertaken by Stoneyard in 2020 is £155.00 per linear metre. This is slightly above the Compartment Fire Ltd rate because of uncertainties around due diligence enquiries into Compartment Fire Ltd, their resources and quality control processes. It is not a given that just because they provided a quote for one corridor, they would have been the right company to undertake a £0.5m project.

101. Having determined a linear metre rate, our next task is to identify the length of corridor to which this rate should be applied. There is no real dispute about the corridor lengths of those corridors in which work has been completed, which we showed in Table 2 above, and which total 329.98 metres.

102. Using the rate of £155 per linear metre, we assess the reasonable cost of these works as £51,146.90 net.

103. Comparison with Table 1 at paragraph 65 above shows that we have only allowed 329.98 metres against the claimed metreage of 345.50 in Table 1. The difference is 15.52 metres. This difference comes about because in invoices 12349 (p181) and 11752 (page 191), Mr Tuck allowed additional metres to reflect what he thought was extra work undertaken by Stoneyard. He accepted that he rolled up what he regarded as the value of the extra work into additional metres which he then certified. Thus the extra metres were not strictly additional linear metres; they were his assessment of the value of the extra work expressed as if that work had been extra metres.

104. In our view, it is not reasonable for the Respondent to incur a charge for the extra works. Entitlement to charge for extra work is of course an issue that should have been covered in any contract for the works. The evidence we have is that the contract was not in writing. The Respondent has not told us the terms. Mr Weightman's evidence was that Stoneyard would carry out works on the Sample Corridor to fix a price per linear metre for the rest of the works. Our view is that the price was indeed fixed, or alternatively the directors, acting reasonably, would have negotiated a fixed price. We do not consider therefore that payment for additions above and beyond the linear metres of corridor worked on were reasonably incurred.

105. We have given some thought to the weight we should apply to the terms of Mr Weightman's proposal referred to in paragraph 62 above. On one reading, extras could have been charged legitimately under paragraph 7 of those terms. Our difficulty is in knowing whether these were the terms that applied to the contract. Mr Weightman's email suggested they were not. Also, no reference has been made to the contingency of 5% referred to in paragraph 6. Unless matters have arisen of which we are unaware, there is a case for suggesting that the Respondent, if it contracted on the basis of these terms, might request a refund. The position is so uncertain that we took the view that we should not disturb our initial view to the effect that there was, or should have been, a fixed price.

106. Our determination is that the service charge for 2020 for the Property can include a charge of £51,146.90 net, being a sum reasonably incurred for the Corridor Works. Any greater sum is not reasonably incurred and therefore would not be payable.

107. We have been asked to confirm the rate for which any future corridor works should be charged. We decline to do so. Irrespective of the

contractual arrangements between the Respondent and Stoneyard, on the basis of their counsel's own submission, the Respondent needs to go back to the drawing board and investigate alternative quotations. The board should possibly also review the whole Phase 4 proposal. It should take proper advice on consultation, as although the Applicants decided not to pursue that point in relation to the Corridor Works for 2020, the point may be pursued in the future. It is not for this Tribunal to fix a rate for future work, not least because any rate we fix might be too high in the light of what can be achieved in the market, and we cannot be aware of market conditions, either positive or negative, at some point in the future.

108. Whatever the Respondent decides, it should of course make proper allowance for the likely costs in its budget. Either party has the opportunity to ask the Tribunal to determine whether a service charge based on the budget is payable, or alternatively, the Applicants may challenge the actual expenditure in future years if they are not persuaded that the actual sums were reasonably incurred.

109. Finally, we need to deal with Mr New's argument concerning recovery of the cost of the Corridor Works from third parties rather than the service charge payers.

110. It is incontrovertible that if the Respondent could have claimed the cost of the Corridor Works from a third party, to claim them instead from the service charge payers is unreasonable (see for instance paragraphs 8 and 9 in the judgement of HHJ Rich in *Continental Property Ventures Inc v White* [2006] 1 E.G.L.R. 85).

111. The question for us is whether the Respondent could in fact have claimed those costs. It is incumbent upon the Applicants to establish at least a prima facie case that a third-party claim exists. No such case was established. At the very least, the Tribunal would have needed to be told the party against whom the claim should be made, identify whether the claim would be in contract, tort, or under statute (and if so which) and why the Respondent was entitled to pursue a remedy, identify the document which would govern the claim, explain the reason why the claim might not be subject to limitation of time, and identify the breach for which a remedy would be pursued.

112. In the absence of this information, it is impossible for the Tribunal to conclude that there was any prospect of a claim against a third party, and we so determine. This does not mean that we have concluded there is no prospect of a claim; just that we have no basis for deciding there is.

Costs and fees

113. The Applicants have applied for orders under section 20C of the Act and under paragraph 5A of the Commonhold and Leasehold Reform Act 2002 Schedule 11.

114. The Tribunal will determine those applications on the basis of written representations, to allow the parties to reflect the outcome of this application in their representations. The Tribunal directs that both parties may submit written representations within 14 days of the date of this decision to the Tribunal (electronic version and three hard copies please) with a copy being supplied to the other party.

Appeal

115. 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)

Appendix – List of Applicants

Saxon Urban (Five) Ltd
Mr John Trehy
Ms Kiran John
Mr Marco Pino
Mr Sailesh Chauhan
Mr Justin Heath
Mr Javier Rodriguez Plaza
Ms Sue Griffin
Dr Mohammed Amjed Khan
Mr Tony Ball and Mrs Toni Ball
Mr David Thomas