IN THE CHELMSFORD MAGISTRATES' COURT

BETWEEN:

CHERRYDOWN MANAGEMENT LIMITED

Appellant

- and -

ESSEX COUNTY FIRE AND RESCUE SERVICE

Respondent

JUDGMENT

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1. The Appellant appeals against Enforcement Notice EN0128 (the Notice) dated 30 April 2021 issued by the Respondent. The Appellant seeks an order cancelling the Notice. The Respondent opposes the appeal and submits that the Notice should not be cancelled.

2. The Notice states that the Respondent was of the opinion that the Appellant had failed to comply with the requirements placed upon the Appellant by The Regulatory Reform (Fire Safety) Order 2005 (the Order). Article 8 of the Order states:

   The responsible person must—

   (a) take such general fire precautions as will ensure, so far as is reasonably practicable, the safety of any of his employees; and

   (b) in relation to relevant persons who are not his employees, take such general fire precautions as may reasonably be required in the circumstances of the case to ensure that the premises are safe.

By reference to Article 4(1) of the Order the Notice identifies the following actions General Fire Precautions as not having been taken by the Appellant:

> *(c) measures for securing that, at all material times, the means of escape can be safely and effectively used;*
>
> *…*
>
> *(e) measures in relation to the means for detecting fire on the premises and giving warning in case of fire on the premises; and*
>
> *(f) measures in relation to the arrangements for action to be taken in the event of fire on the premises, including—*
>
> > *(i) measures relating to the instruction and training of employees; and*
> >
> > *(ii) measures to mitigate the effects of the fire.*

3. Article 35 of the Order provides a right of appeal to the Magistrates Court to the recipient of an Enforcement Notice. Upon that right being exercised the court has the power to cancel or amend the notice as it in the circumstances thinks fit.

4. The Appellant has exercised its right of appeal under Article 35. It is accepted between the parties that the necessary procedural steps to exercise the right of appeal have been completed by the Appellant in accordance with the timescale/requirements of the Order and that the court can determine the appeal. It is accepted that in this case the Appellant is the responsible person for the purposes of the Order.

5. On 17 September 2021 I heard brief oral submissions regarding ground 2 of the Appellant's appeal. I reserved Judgment and provided a written Judgment dated 14 October 2021 rejecting the Appellant's submissions in respect of ground 2. On 8 November 2021 I heard oral evidence in this matter at a contested hearing. The Appellant was represented by Mr Scott-Joynt and the Respondent was represented by Ms Lambert. Both had provided skeleton arguments in advance for which I am grateful. A trial bundle containing witness statements and exhibits was available on 8 November. On that occasion there was insufficient time to hear oral closing submissions from counsel and it was agreed that counsel would provide written closing submissions thereafter. I am grateful to Mr Scott-Joynt and Ms Lambert for those submissions and for their assistance generally in this case in narrowing issues and filtering the material in a way which enabled me to consider this matter in an efficient manner.

Background

6. The Appellant is a residents management company for a block of residential dwellings in Basildon called Morello Quarter (the Property). It is not in dispute that whilst the Appellant is a limited company, it exists solely to manage the Property. It does not trade or generate profit in the conventional sense. It derives its income solely from the leaseholders of the Property and uses that income to maintain the Property for the benefit of the residents. Such an arrangement is common throughout the country in respect of leasehold residential properties.

7. The Respondent is the Fire and Rescue Service which has responsibility for the area in which the Property is located. Part of its role is to ensure the adequacy of the fire safety measures of buildings within its jurisdiction and it is empowered to issue Enforcement Notices to individuals and/or companies within its geographical jurisdiction to ensure fire safety.

8. The issuing of the Notice that is the subject of these proceedings arises out of the consequences of the tragedy of Grenfell in 2017 when 72 people died in a fire at a high-rise residential tower block. Although inquiry proceedings and

criminal investigations in relation to that tragedy and the dreadful loss of life are ongoing, there is no dispute that a significant factor in the cause of or rapid spread of fire at Grenfell was the cladding on the building and the inadequacy of the fire resistance/prevention/mitigation qualities of that cladding. Following Grenfell, reviews of other residential buildings have taken place nationwide to establish whether such buildings have cladding with similar fire safety inadequacies, and in the course of those enquires it has been determined that the cladding on part of the Property in this case is not adequate and presents a fire risk. The remedy for this is to remove the cladding, but this is not a step that can be taken quickly it seems due both to the expense of doing so (estimated to be £2.3 million in this case) and the number of buildings nationwide in a similar position which require cladding removal. Until the cladding is removed, other fire mitigation/prevention steps are deemed necessary in relation to such buildings.

9. In this case, a fire safety audit in respect of the property took place and in December 2020 the report of that audit revealed that the cladding was a fire risk. This fact was already known to the Appellant following a survey it had commissioned which reported in October 2020. The report recommended that a fire alarm system be put in place pending removal of the cladding. The previous advice that occupants should 'stay put' in the building in the event of a fire on the basis that the building had been constructed in such a way as to enable Fire and Rescue Service sufficient time to evacuate residents in the event of a fire was revised in light of the discovery of the dangerous cladding on the property. The new fire plan is that there be simultaneous evacuation of the building and to effect this, a new fire alarm system is required. It is accepted that such a system must be bespoke to the Property and it will therefore take time for such a system to be designed and installed. The quote for the cost of the fire alarm system is £206,000 or thereabouts.

10. Until the fire alarm is installed and with the switch to a simultaneous evacuation fire plan from a stay put plan, concern arises about how residents would be alerted to the existence of a fire in the property should it occur so that they could safely evacuate. The solution is a waking watch, which is essentially a regular

human patrol of the property by appropriately trained individuals who would be constantly monitoring to ensure that fire had not broken out and if it did the waking watch personnel could alert residents to evacuate. It is the Respondent's case that until the fire alarm is in place a waking watch should be implemented and given the risk to the Property in the absence of a fire alarm and with the presence of the dangerous cladding, the Respondent has determined that the waking watch should have been put in place quickly. To that end the notice was served on 30 April 2021 requiring the implementation of a waking watch by 31 May 2021.

11. The Appellant submits that whilst the Respondent's reasoning is understandable, in reality the implementation of the waking watch is not practical due to the considerable cost of such a measure by using a private contractor to provide the trained individuals needed to effect a waking watch. The cheaper option that residents volunteer to conduct the waking watch themselves is not a realistic option given the lack of willing volunteers and the number of volunteers that would be required.

12. Whilst the appeal is brought against the Respondent's Notice, it is appropriate to set out why the Respondent submits that requirements of the Notice are reasonable and therefore why is should not be cancelled or amended before considering the reasons given by the Appellant as to why the terms of the Notice are not reasonable in the circumstances.

13. The Respondent asserts that in light of the discovery of the dangerous cladding on the property the risk to human life through fire at the property is great. If steps are not put in place to mitigate/reduce those risks any occupant of the property is at risk. The Respondent asserts the following:

    a. It is not for the Responded to explain how the order should be complied with;
    b. Whilst the cost of a waking watch through using a private contractor to supply staff to carry it out is high, the Appellant has funds in its reserve/sinking fund (approximately £117,000) which can be used to pay towards those costs;

c. A notice under s20 Landlord and Tenant Act 1985 (s20 Notice) could/should be issued to the leaseholders to cover the cost of the waking watch;
d. In the alternative, the Appellant could directly employ staff to conduct the waking watch meaning the cost in comparison to using a private contractor would be less;
e. The residents could conduct the waking watch themselves for no cost in terms of wages and suitable training providers are available in the local area at modest cost to enable them to do so;
f. Alternatively, a combination private contractor/employed staff/volunteers could be used to reduce cost;
g. Government support schemes exist to provide some financial support to the Appellant but these were not taken up by the Appellant but could have been if the waking watch had been put in place as required;
h. The Appellant appears to have proceeded that there was a choice between having a waking watch and installing an alarm and so have opted for the latter when in reality it was not an either/or, both measures were required, with the waking watch being essential until the alarm was installed, at which point the waking watch would no longer be needed;
i. The Appellant has delayed in getting the alarm installed and the revised timescale of completion of installation of the alarm in approximately May 2022 is some 6 months or so on from the original scheduled completion date of December 2021 during which time the risk to residents due to the lack of a waking watch is significant;
j. The risk of fire remains and it is of concern that a fire was reported at the property in November 2021.

14. The Appellant asserts:

a. The terms of the lease do not permit use of the reserve/sinking fund for services such as the waking watch;
b. Even if the reserve fund could be used, it would be exhausted after only 9 weeks based on the quoted cost of £13k per week for a waking watch provided by a private contractor;

c. A s20 notice was not available as it did not fall within the definitions of works/services that a s20 notice could apply to. In any event, the issuing of such a notice would not generate the income to cover the cost of the waking watch. Many residents have not paid the costs required in response to the s20 notice to cover the cost of the alarm, if a further s20 was issued it simply would not be paid by many leaseholders and would not produce the funds to pay for the waking watch;
d. The Government support scheme for waking watch is only available if a waking watch is in place and as the Appellant cannot afford to implement a waking watch the Appellant cannot benefit from the scheme;
e. Even if a waking watch was put in place to enable an application to the scheme to be made, the likely delay in receiving funding would be long, given the experience of the Appellant in respect of their application to a similar scheme for help in meeting the cost of cladding removal;
f. Even if such an application was made, it does not cover the cost of the waking watch itself, rather it covers the cost of the alarm;
g. In reality, there is only a limited amount of money and a hard decision has to be made and the Appellant has decided that the fire alarm system is preferable and the money that is available or can be raised is better spent on that than a waking watch;
h. Employing staff directly to conduct a waking watch is in reality not viable. It has been considered previously by the Appellant in relation to a caretaker and it transpired that the other costs of employment mean it is not necessarily a cheaper option and/or practical option;
i. Expecting the residents themselves to volunteer to conduct the waking watch is not realistic. Some residents are old, some have family commitments, some have work commitments and the reality is that a sufficient number of volunteers to cover every shift of a waking watch could not be found.

Evidence

15. For the Appellant I heard oral evidence from Ms Grunfield, from the Appellant's managing agents and from Ms Viccars, a Director of the Appellant and a

resident in the Property. For the Respondent I heard evidence from Mr Dixson, Fire Safety Inspection Officer and Mr Nash, Station Officer.

16. This is not a case where there is a conflict over the factual matrix of events or where the integrity or truthfulness of witness evidence has been challenged or where it is necessary for me to make findings of fact on specific events in order to determine the appeal.

17. The Appellant accepts that the motivation for the issuing of the Notice is the genuine concerns of the Respondent in light of the information the Respondent now has regarding the efficacy of the cladding in terms of fire prevention/mitigation/resistance, coupled with the statutory duty the Respondent has for ensuring fire safety in buildings within the geographical area it has responsibility for.

18. The Respondent accepts that the Appellant is in a unenviable situation of having to deal with funding the cost of replacement of cladding and fire mitigation/prevention measures in a situation that was not of the making of the Appellant or any of the residents and where the Appellants had been informed at the time the residents purchased properties in the Property that the cladding was safe and met safety regulations.

19. There is no dispute between the parties regarding the findings of the survey from October 2020 or the audit in December 2020 and that fire prevention/mitigation measures are appropriate.

Discussion

20. The first point I must determine is whether the requirements set out in the Notice should be viewed objectively, or subjectively, taking into account the circumstances of the Appellant and in particular the financial cost.

21. I am satisfied that the requirements should be viewed subjectively given the wording of the Order. The reference to so far as is reasonably practicable must include in my determination what could have been practicable for the recipient

of the notice, not simply what was possible because it could be achieved regardless of the cost. The reference to being reasonable in the circumstances of the case clearly imports consideration of the particular circumstances of the case in question to be considered. There is a difference between Article 8(1)(a) – so far as is reasonably practicable and Article 8(1)(b) – as may reasonably be required in the circumstances of the case. However, in this case I consider that the difference between those two standards is insignificant given the circumstances of this case.

22. There is no challenge by the Respondent to the Appellants' assertion that the terms of the lease prevent use of the reserve/sinking fund to meet part or all of the cost of the waking watch. It is correct that if the lease stipulates that the fund can only be used for certain purposes it would be a misfeasance by the Directors to permit use of it for other purposes. Even were that not the case, there is no dispute that the funds would have been exhausted in 9 weeks and therefore by mid July 2021 a waking watch funded solely by that fund would have had to cease.

23. In relation to the assertion that the Appellant could have employed staff directly to carry out the waking watch, in reality I do not consider this is feasible. The number of staff required would have been significant. It is clear that a large number of personnel would be required. The cost of recruitment, wages, national insurance contributions, pension, adequate cover for holiday/sickness would it seems to be still be considerable and not something that could have been achieved in 31 day timescale afforded to the Appellant by the Notice. I do not consider that it was a realistic option for the Appellant to employ staff directly. It was not a viable alternative.

24. Neither do I consider that the option of leaseholders/residents forming a volunteer taskforce to conduct the waking watch was feasible, particularly within the timescale of 31 days. Whilst I accept the evidence that local training providers who could provide the necessary training in waking watch procedures exist and that the costs of training may be modest in comparison to the cost of a private contractor providing a waking watch service, it does not detract from the real practicalities of having a sufficient number of staff/volunteers available

for every shift, every day until the alarm was installed. To be a true waking watch it would need to be an effective waking watch in terms of the effectiveness of the staff. It was accepted by the Respondents witnesses that the task of a waking watch is not necessarily an easy one. It would require a degree of stamina and good health. It is not the sort of thing that could be done properly by resident offering a few hours here and there and if a volunteer or volunteers withdrew their offer of services it would render the waking watch ineffective and there would be nothing the Appellant could do to compel volunteers to carry out the waking watch. It is not a realistic way of the waking watch being implemented.

25. It follows that if neither a directly employed workforce nor a volunteer taskforce was appropriate as standalone options it is not a realistic option to have a hybrid of the two options as this would not overcome the difficulties I have identified with either option individually.

26. There is no dispute that an application to the waking watch relief fund was an option available to the Appellant if a waking watch was in place, but to get to the stage of being in a position to avail itself of that fund the Appellant had to have a means to begin the waking watch.

27. I am satisfied that raising funds from leaseholders directly, whether through the s20 procedure or otherwise was available to the Appellant. I accept the evidence that there was an unwillingness on the part of leaseholders to meet the cost of a s20 notice/other statutory demand for payment, but such an unwillingness cannot in my view be justification for not following that procedure/issuing a demand. It would render necessary procedures such as enforcement notices redundant in cases such as this if the potential recipient of a s20 notice/statutory demand had the power to indicate an unwillingness to pay and this was used as a reason not to issue a notice. I do not doubt that the issuing of a notice would be met with anger and frustration by many if not all recipients, but nonetheless it is the procedure in place to raise funds for services such as a waking watch. It should have been used as it may have raised some funds. If it did not, the issuing of a s20 notice or a demand for payment would have opened up the opportunity to bring proceedings to recover

the money from the leaseholders, some of who may have funds to pay. It is what should have happened. I do not accept that this was not an option open to the Appellant due to the nature of the service it was to be used for. It is a statutory procedure for raising funds from leaseholders with a right of appeal for an aggrieved recipient of a statutory demand to a tribunal and any recipient of such a notice could have exercised that right

28. Having found this, it is necessary to consider the s20 procedure in terms of the timescale of the notice. The s20 procedure is a statutory procedure with various stages to be completed before the issuing of a s20 notice and a demand for payment. Such a demand would also have to give a period of time to pay. It is clear that the issuing of the notice on 30 April 2021 with a requirement to comply by 31 May 2021 would not have given enough time for the s20 procedure to have been completed and for statutory demands to be made to the leaseholders and an appropriate period of time for them to pay to have elapsed within that 31 day period. As such it would not have been possible for the Appellant to have complied with the notice even if a s20 had been issued when the Notice was received. In that regard therefore I find it cannot be said to be reasonable. Given that the Appellant had a time period of 31 days to comply it was not reasonably practicable for the Appellant to comply neither was it reasonable in the circumstances of the case. The s20/statutory demand procedure was the only realistic option the Appellant had to raise the necessary funds to meet the cost of the waking watch. The s20 procedure cannot be abridged or shortened. Failure to follow the correct procedure would limit the Appellants ability to recover funds from each leaseholder to £250.00 per leaseholder. The Appellant therefore would have had to follow the s20 procedure and timescale and the 31 day timescale in the Notice did not give the Appellant adequate opportunity to comply with the procedure. In those circumstances it cannot be said to be reasonable.

29. It is correct to observe that the Appellant did not issue a s20 notice in respect of the waking watch costs and has not done so since. Nonetheless, what I must consider was whether the terms of the Notice were reasonable when it was issued, and for the reasons given the timescale was not. If a s20 Notice had

been issued upon receipt of the Notice there would have been insufficient time for the procedure to have been completed before the expiry of the 31 May 2021 deadline. In that regard the fact that the Appellant did not and has not issued a s20 Notice makes no difference because the Appellant could never have complied with the s20 regime and the timescale in the Notice.

30. It is correct that whilst the Notice was issued on 30 April 2021, the Appellant was aware of the recommendation for a waking watch since October 2020, and was aware of the views of the Respondent's representative since December 2020 and did not take steps to implement a waking watch at any time before the issuing of the Notice. However I am satisfied that, the clock for starting the s20 procedure for the waking watch did not begin ticking until the Notice was issued on 30 April 2021 as that is when the Appellant would have been aware of the consequences of not complying with the Notice including potential criminal sanction. As I have found, the timescale of 31 days for compliance was in conflict with the statutory requirements of the s20 procedure and therefore not capable of being complied with. The failure of the Appellant to have issued a s20 Notice regarding the waking watch at any time since the Notice was issued does not undo the fact that the Appellant could never have complied with the Notice in the 31 day timescale.

31. If the Appellant was not given adequate time from the issuing of the Notice to follow the s20 procedure in order to raise the funds, the existence of the Government support scheme and the Appellants failure to avail itself of that is irrelevant. It is agreed that a pre-requisite of applying to the scheme was that a waking watch was in place. For a waking watch to be in place the Directors would have to know it could be funded and without going through the s20 procedure they could not have done so. As has been observed, the deadline in the Notice was such that the s20 procedure could not have been concluded to meet that deadline and as such the Appellant could not have paid for a waking watch and therefore the support scheme could not have been utilised.

32. There is force in the argument that the Appellant has made a choice to fund the alarm system and not a waking watch when in reality this was not an either/or

option. However, that does not detract from the short timescale which could never have been complied with.

33. It is correct that the Respondent was seeking to engage with the Appellant through correspondence with the Appellant's managing agent to establish what steps the Appellant had taken in response to the concerns raised by the survey and the audit and well in advance of the issue of the Notice in April 2021. There is no reason why the Respondent should have had detailed knowledge of the financial position of the Appellant, or why the Respondent should have had to make detailed enquiries of the financial situation before determining the terms of the Notice. Nonetheless, it is correct that the Respondent would have been aware that the cost of the waking watch through using a private contractor would have been significant (in this case the estimate was £13k per week) and that that cost would have to be funded in some way. Realistically and as I have found, that way was through the s20 procedure/statutory demand route so that the leaseholders were obliged to pay. The cost of the precaution sought was not a cost that the Appellant could have reasonably been expected to have accounted for in terms of its annual budget set before the findings of the survey/audit were known as general expenditure as unexpected costs. Were the costs of the precautions required more modest that may have been the case. But given the knowledge that the costs of the waking watch were considerable it would have been clear that the only realistic way to fund it was from the leaseholders and this would require the relevant statutory procedure to be followed. Whilst the Respondent's understandable concern was the welfare/safety of the residents/users of the Property and its statutory function to ensure safety and whilst the issuing of a notice and the need for prompt action to be taken, given the consequences of breaching an Enforcement Notice the recipient had to have the opportunity to be able to comply and the timescale in the Notice in this case did not afford that opportunity.

34. Having determined that the terms of the Notice were not reasonable due to the inadequate timescale for compliance provided, I must determine whether to cancel the Notice or amend it as I think fit. I consider that I should amend the existing Notice in line with the timescale set for the s20 procedure regarding the

fire alarm and to take effect from today. Therefore, the waking watch must be in place within 6 months from today.

Costs

35. I do not consider that I should make an order for costs against the Respondent. The underlying motive and rationale for the issuing of the Notice was for public protection and such public bodies ought not to be deterred from carrying out their statutory function for fear of being penalised in costs if their decision is successfully challenged, particularly when the motive/rationale has not been criticised by the Court. I make no order for costs.

DJ(MC) KING

14 December 2021