- There have been two Lands Chamber cases this year on waking watch costs incurred pre the Building Safety Act 2022.
- In *Assethold v Adam*, the FtT (Property Chamber) was wrong to decide costs were not reasonably incurred as they had had the benefit of hindsight, and did not consider the reasonableness of incurrence at the time of the landlord's decision to incur them.
- In *Radcliffe Investment Properties v Meeson*, the landlord's failure to carry out a statutorily required fire risk assessment on time meant that the waking watch costs were not reasonably incurred. Had the fire risk assessment been carried out, the advice that the building was at a risk so that a waking watch was necessary would not have been given. That suggests an ability to look back in time.
- Are these two decisions hard to reconcile?

Waking watches on reasonably incurred costs

Fire risk and cladding continue to affect landlords and leaseholders outside the Building Safety Act 2022. The pre-June 2022 costs of waking watch has troubled the Lands Chamber twice this year. The reasoning exposes a tension in what should be taken into account in determining whether costs were reasonably incurred. The first case suggests orthodoxy: the position as at the date of the decision to incur costs is what matters. The second suggests that the landlord cannot reasonably incur costs which would not be needed if it had complied earlier with its statutory duties, which suggests an ability to look back in time rather than a focus on the landlord's decision-making process.

The first case is *Assethold v Adam* [2022] UKUT 282 (LC) in which the landlord's appeal succeeded. The FtT had concluded that the costs of a waking watch were not reasonably incurred, and hence not recoverable because of the limit in s19 of the Landlord and Tenant Act 1985. The landlord had instituted the watch because of a report that there was an "intolerable" risk from fire. There had however been previous recent reports that suggested the risk was low, including by the same firm, though the inspections differed. The landlord commissioned yet a further report which said the risk was low, and the waking watch was thus ended. The FtT concluded that the landlord's decision was not rational (as required as part of the test for reasonable incurrence) because the report that a watch was necessary was flawed. Judge Cooke disagreed. Faced with a report saying that the risk was intolerable, instituting a waking watch

was objectively a reasonable thing to do. Hindsight did not prevent that conclusion. What mattered was the circumstances and information at the time of incurring the cost.

In *Radcliffe Investment Properties v Meeson* [2023] UKUT 209 (LC), the landlord's waking watch costs were avoidable. The waking watch had been instituted when a leak into the fire alarm controls had led a fire officer to raise concerns about fire safety on structural grounds. The landlord had not carried out a fire risk assessment post occupation of the building, contrary to the Regulatory Reform (Fire Safety) Order 2005. An assessment looking at the issues once carried out satisfied the officer's concerns sufficiently to remove the need for the waking watch. Thus the watch was a result of a failure by the landlord to carry out its statutory duty. It followed that the landlord could not recover the costs of the waking watch through the service charge. The lease allowed costs to be recovered only if reasonably and properly incurred. Section19 of the Landlord and Tenant Act 1985 required them to be reasonably incurred.

It is a little unclear whether the Deputy President's decision was that the costs were not recoverable contractually or by the statutory limitation though he said that the reason the costs were incurred was relevant to whether they were reasonably incurred, and that the FtT was entitled to find them unreasonable. Previous case law on s19 on historical defects has suggested that one considers the issue when the need to incur the costs arises, and since the defect needs remedy at that stage, the cause of the defect, and the increase in cost, is not relevant to reasonableness. That is the approach in *Assethold v Adam* too. Martin Rodger KC in the *Meeson* case suggests a refinement to that, with an ability to look back in time. The distinction is a little hard to pin down. It may be easier to conclude that the costs in this case were not properly incurred because incurred due to landlord fault.

Cecily Crampin and Camilla Chorfi