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HM Courts and Tribunals Service
Leasehold Valuation Tribunal

Case No. CHI/00ML/LSC/2012/0140

DECISION OF THE LEASEHOLD VALUATION TRIBUNAL
SECTION 27A(3) and SECTION 20C of the LANDLORD AND TENANT ACT 1985

Property: Kingsmere, London Road, Brighton BN1 6UY

Applicants: Anstone Properties Limited (landlord)
(Parsons Son & Basley, managing agents)

Respondents: Lessees of flats at Kingsmere (tenants)

Appearances: For the Applicants:
Ms T Healy, property manager

For the Respondents:
Mr J Deacon (flat 12a) & Mr A Moxhay (flat 20)

Other lessees attending as observers:
Mr F Dyson (flat 8), Mr Farzaneh (flat 30), Mrs C Heald
(flat 34), Mr P Lloyd (flat 56), Mr P Pearson (flat 98),
Mr Pharoah (flat 32), Mr & Mrs Woodhams (flat 46),
Mr Wright (flat 118).

Date of Application: 3 October 2012

Directions: 10 October 2012

Hearing: 13 February 2013

Decision: 13 March 2013

Members of the Leasehold Valuation Tribunal

Ms J A Talbot MA
Mr A O Mackay FRICS
Ms T Wong

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Property: Kingsmere, London Road, Brighton BN1 6UY

Application

1. This was an Application made by Anstone Properties Ltd on 3 October 2012 under s27A of the Landlord and Tenant Act 1985 (treated as made under s27A(3)) for a determination on the payability of service charges to be incurred in connection with proposed works to the lift in blocks C and D.
2. Directions were issued for the parties to provide written statements of case with documents in support. Both parties complied with the Directions.

Jurisdiction

3. The Tribunal has power to decide on all aspects of liability to pay service charges and can interpret the lease where necessary to resolve disputes or uncertainties. The Tribunal can decide under Section 27A(3) of the 1985 Act whether, if costs were incurred for specified items, a service charge would be payable, and if so, the person by whom, to whom, how much and when it would be payable. A service charge is only payable insofar as it is reasonably incurred, or the works to which it relates are of a reasonable standard. The Tribunal therefore also determines the reasonableness of the charges.

Lease

4. The Tribunal had a copy of the lease of Flat 2 on the ground floor of the block C. The lease is dated 12 July 1978 and is for a term expiring on 24 June 2073 at a ground rent of £35 per year until 24 June 1999 and rising thereafter.
5. The provisions relating to the calculation and payment of the service charge are to be found at clause 5 of the lease. The tenant's proportion of the annual maintenance cost is calculated in proportion to the aggregate of the ground rents. A payment on account is payable on 24 June and 25 December, with any balance payable after the end of the accounting year.
6. Under clause 5(c)(viii) the service charge can include a payment towards a reserve fund. Under clause 5(x), the landlord must "*use its best endeavours to maintain the annual maintenance cost at the lowest reasonable figure consistent with the due performance and observance of its obligations herein*" but this is qualified by the provision that "*the lessee shall not be entitled to challenge any annual maintenance account nor to object to any item of expenditure therein on the ground that the materials work or service in question might have been provided or performed at a lower cost*".
7. Clause 6 requires the landlord, amongst other things, to "*maintain repair cleanse repaint redecorate and renew*" the main structure and "*the passages lifts staircases landings entrances and all other parts of the building ... used by the lessee in common with the other lessees or occupiers of the buildings*".

Inspection

8. The members of the Tribunal inspected the property before the hearing, accompanied by lessees Mr Deacon and Mr Moxhay, and Ms Healy, property manager from Parsons Son & Basley (PSB). Our inspection was limited to a view of the public ways, the machine rooms and the lifts in blocks C & D which are the subject of this application. By way of comparison we were also shown the lift and machine room in Block E, where the lift had been repaired in 2001.
9. Kingsmere is an estate-type development of 6 blocks of flats. Each block is arranged over ground and three upper floors, comprising in all 120 flats, including a resident caretaker's flat, with 64 garages and additional parking spaces. Each block has a passenger lift service to all floors.
10. Kingsmere is approached off Preston Road and lies about 2km north of Brighton city centre. Kingsmere was developed some 40 years ago when the original lifts were installed by Otis in or about 1974. The site occupies relatively steep sloping ground rising up from Preston Road, and the individual blocks take account of the site topography. The elevations are of load bearing cavity brickwork with flat roofs.
11. We saw a warning notice, placed by the managing agents, in the entrance hall to blocks C and D next to the lifts which stated: "Lifts stop suddenly and may not land level with the floor of the block you travel to". When using the lifts, we noticed a pronounced judder. On stopping at each floor, the lift car failed to line up with the adjoining floor levels, causing a potential trip hazard. In block E, the lift operated smoothly and was level on stopping at each floor.
12. At Mr Deacon's request, we looked in the lift machine rooms in blocks C and D, by climbing ladders accessed from half doors located on the opposite side of the staircase to the top floor lobbies. In Block E a more usual connecting staircase is in place. The machine rooms were clean and tidy. The lift controls could be seen along with electrical wiring and lighting.

Hearing

13. A hearing took place in Brighton on 13 February 2013. It was attended by Mr Deacon and Mr Moxhay for the respondent lessees, and Ms Healy for the applicant landlords. Also in attendance, as observers, were several Kingsmere lessees, some of whom were owner-occupiers and some of whom had sub-let their flats.
14. The dispute concerned the proposed modernisation of the lifts in blocks C and D. The issues were: (1) whether the statutory consultation process under s20 of the 1985 Act had been properly followed by the landlord; and (2) the nature and extent of the proposed works, the cost, choice of contractor, and PSB's fees.
15. In brief, Ms Healy contended that the statutory consultation had been correctly followed, and that the scope of works proposed in the specification of December 2011 by Lift Consultancy Services, which included replacement of key parts, was necessary and reasonable. Otis was the preferred contractor, following an expert tender analysis, at a cost of £79,950 exclusive of VAT (£95,940 inclusive of VAT). PSB professional fees were 10% of the net contract sum plus VAT.

16. The lessees' case, in summary, was that the statutory consultation was deficient, and the landlord's specification was too wide. Only limited repair was necessary, at a lower cost, followed by structured routine maintenance.

Statutory Consultation under s.20 of the 1985 Act

17. The lifts in blocks C & D were original to the Kingsmere development in or around 1974, and had developed faults, namely, juddering on movement and mis-alignment on stopping at landings, causing a trip hazard. The lifts had become unreliable and required many call-out visits under the maintenance contract with Otis. The local authority, Brighton & Hove City Council, became involved following complaints from lessees. In correspondence (letter dated 15.12.2012) the council expressed the view that there may be a potential hazard under the Housing Act 2004 and that renovation works would not be unreasonable as the lifts were nearing the end of their useful life.
18. During 2009 and 2010, discussions took place between the previous managing agents, Countrywide, and the Kingsmere Residents Association (which is not a recognised tenants' association) but no action was taken at that stage. PSB took over management in 2010
19. In 2011, PSB instructed lift specialists Lift Consultancy Services (LCS) to inspect and report. LCS provided a draft report in July 2011 and a specification for modernisation of the lifts in December 2011. Paragraph 1.5 set out an Abstract of Works with bullet-point summary headings, recommending replacement of key mechanisms, re-wiring and upgrading of electrics and refurbishment of the cars.
20. PSB served Notice of Intention to carry out qualifying works dated 3 October 2011. It was headed "Commonhold and Leasehold Reform Act 2002 sections 151 and 20ZA". The work to be carried out was described as "renovation of the lift [*sic*] in Block C and D Kingsmere" and the reason for the works was "to ensure that the property is maintained in accordance with the Freehold [*sic*] obligations under the terms of the lease". Written observations were invited by 4 November 2011. The covering letter to all lessees stated that a detailed specification would be prepared and sent out to tender, and that PSB would "apply a fee of 12.5% of the overall costs for the serving of the notices ... and monitoring and administration of the project".
21. No formal written response was received from individual lessees or the Residents Association. Discussions and meetings took place over the following year between PSB and members of the Association. In May 2012 The Association instructed local firm Sussex Lift Company (SLC) (aka Sussex Lifts Ltd), to inspect and provide a quotation, but this was not based on the LCS specification. PSB went ahead with the full tender process and obtained estimates from three contractors – Otis, Southern Counties Lift Services, and SLS, followed by a tender appraisal from LCS.
22. Otis was PSB's preferred contractor. At that stage, the Otis total quotation cost was £106,306 and the others were lower. Following representations from the Association, PSB negotiated a reduction from all the contractors and agreed to reduce its management fees to 10%.

23. PSB served the second stage notice, headed "Statement of Estimates", on 7 September 2012. This stated at paragraph 2: "a formal Specification of Works has been prepared and a copy is available at the offices of [PSB] upon request". This did not mention copies of the estimates, but paragraph 2 of the end Notes stated:- "where a notice specifies a place and hours for inspection (a) the place and the hours so specified must be reasonable, and (b) copies of the estimates must be available for inspection, free of charge at that place and during those hours". Observations were invited "within 30 days" by 12 October 2012.
24. In the Notice, PSB stated that three tenders had been returned: Otis @ £79,950, Sussex Lifts Limited @ £75,360, and Southern Counties Lift Services @ £75,360 (the reduced prices all excluding VAT). Again based on the tender appraisal, PSB recommended acceptance of the Otis quotation, which was in total £95,940 including VAT, plus PSB fees of "10% of the net contract sum which equates to £9,594".
25. Following a further meeting, at which the Association indicated it did not accept the Otis quotation, PSB sent a letter dated 15 October 2012 setting out its reasons for preferring the Otis quotation.
26. PSB served a "Notice of Reasons for Awarding a Contract to Carry Out Works" dated 19 October 2012 repeating the reasons set out in the letter to lessees. In default of agreement, with several lessees indicating they would limit their service charge contribution to £250 in respect of the lift modernisation costs, PSB stated they would apply to the LVT. Ms Healy confirmed at the hearing that there was sufficient money in the reserve fund to cover the full cost of the works.
27. PSB's case was that the Notices complied with the statutory consultation requirements. The lessees contended that the delay in serving the initial notice was sufficient to invalidate the proposals made by PSB.

Decision and Reasons in relation to statutory consultation

28. The tribunal noted several defects in the statutory consultation procedure. First, the Notice of Intention was incorrectly headed. The procedure is governed by s20 of the 1985 Act as amended. Section 151 of the 2002 Act simply substitutes a new s20. The detailed notice requirements are set out in the Service Charges (Consultations Requirements) (England) Regulations 2003 [SI 2003 No. 1987]. Section 20ZA sets out supplementary requirements, including reference to the regulations, and the Tribunal's power to dispense with the requirements.
29. The works are "qualifying works for which public notice is not required" so are governed by Part 2 of Schedule 4 to the Regulations. Under paragraph 8(2)(a), the Notice of Intention is required to "describe, in general terms, the works proposed to be carried out", and at (b) to "state the landlord's reasons for considering it necessary to carry out the proposed works". In this respect, the Notice served by PSB was very brief, referring only to "renovation" of the lifts. The reasons given did not specifically explain or summarise the problems with the lifts, but referred only in general (and imprecise) terms to the landlord's obligations under the lease. This gave the impression of a "one size fits all" statement, suggesting a lack of thought and care in preparation of the Notice.

30. That said, in the Tribunal's view, the term "renovation" was wide enough to encompass either repair or renewal of the lifts, and any argument to the contrary was purely semantic. The reasons given, though general and non-specific, were not incorrect. The incorrect heading was a technicality. The lessees were not likely to be misled. The problems with the lifts were well known, ongoing, and previously discussed between PSB and the Association. Taking an overall view, the Tribunal concluded that the Notice of Intention, though flawed, was not defective.
31. Similarly, the second stage Notice, headed "Statement of Estimates", (referred to in the regulations as the "paragraph (b) statement"), was flawed but not defective. As well as setting out the amount, it should "make all the estimates obtained by the landlord available for inspection" (para.11(5)(c) of Part 2 to Schedule 4). The "Statement of Estimates" served refers to the specification of works being available, but not the estimates. However, the end Notes do state that "copies of the estimates must be available for inspection free of charge". Therefore, taken as a whole, and in context, the Tribunal found that this Notice complied with the regulations.
32. The third "Notice of Reasons" was arguably unnecessary, because the regulations only require this to be served once "a contract for the carrying out of qualifying works has been entered into" within 21 days (paragraph 13). In this case, the contract has not yet been entered into, the application to the LVT being made prior to that. However, this does not invalidate the whole s20 consultation process. The reasons given in the Notice and in the subsequent letter to lessees appeared to the Tribunal to be sound (see below, para.35).
33. Therefore, for all the reasons given above, the Tribunal decided, on balance, that although the statutory consultation procedure contained some errors, overall these were not fatal and the s20 Notices were not invalid.

Nature and Scope of the Proposed Works & PSB fees

34. As noted above, the Abstract of Works in the LCS specification summarised the proposed works in 12 bullet-point headings. This included the replacement of some key parts, in brief: new controllers to provide starting, slowing and floor leveling; new floor selecting systems; new machine units; new hoisting ropes; new car door operators, push buttons and digital position indicators. In addition, refurbishment of car interiors, electrical rewiring and upgrading to current standards, and compliance with health & safety requirements. The LCS "lift report" noted that the lifts "have exceeded their predicted service life by many years and are now in a very poor condition". Therefore the modernisation specification was to include "replacement of the machine units due to their age, noted internal wear and that the gear units had been subject of a hazard notice by Otis".
35. PSB relied on the expert advice of LCS. Ms Healy re-emphasised the arguments given in the Notice of Reasons and subsequent letter to lessees, which were in summary: (1) Otis had installed the lifts and maintained them since installation, ensuring continuity (2) there was no client history with Sussex Lifts or trading history (3) neither Sussex Counties Lifts nor Sussex Lifts offered a comprehensive maintenance package (4) Otis agreed to reduce the lift maintenance contract following modernisation of Block C & D. Although the Otis quote was 5% higher, this was balanced against the current maintenance contract cost which was absorbed in

the contract cost, thus reducing the difference. The letter concluded: "given the marginal cost difference using Otis and the benefits of retaining their services across the site, we remain committed to our view that they are the best firm to carry out the proposed modernisation work".

36. Mr Deacon and Mr Moxhay argued, in summary, that PSB's recommended specification and quotation was unnecessary and over-priced and that a safe level of repair and maintenance could be achieved by using SLC. Initially, they obtained a quotation from SLC dated 23 May 2012. This was not based on the LCS specification but on a site visit. The work was referred to as "modernisation" including "refurbishment", "electrical" and "health & safety". The "refurbishment" works included supply and fitting of several key elements including control panel, cables & shaft wiring, switches, tape head kit, car top control, car operating panel and LED display, emergency telephone unit, guide shoes and door sensor edges. "Electrical" works included supply & fitting of a new mains isolator, consumer unit and machine room lighting. The contract price was £26,865 per lift excluding VAT. This totalled £64,476 including VAT @ 20%.
37. They further relied on a later report obtained by the Association from Dunbar Boardman lift consultants (DB) dated 13 November 2012 (after the service of the Notice of Intention). This did not refer to the LCS specification or the SLC quote and did not provide a comparative specification. DB's stated brief was to "give outline proposals for refurbishment works, which will improve or enhance the lift in the short, medium and long-term future usage". In the executive summary overview, DB described the lifts as "of an age where reliability will continue to deteriorate and replacement parts will become difficult to obtain". It noted that the lift was currently maintained by Otis and "were found to be in reasonable condition considering their age and obsolescence of the key components". This did not support Mr Moxhay's contention that the lifts had been poorly maintained.
38. On future life expectancy, the DB report concluded: "in view of the equipment's age, the obsolescence element and inherent design concerns, shortfalls with regard to Health & Safety compliance, the lifts will be expected to undergo a full modernisation and/or consideration of full replacement".
39. DB did not make recommendations but set out three summary options: "short-term investment", "long term investment – modernisation" and "long-term investment – full replacement with a lift of machine roomless design". The short term option was improvement works with refurbishment of existing Otis drive machine, replacing the control panel, re-wiring but retaining remaining equipment. The "modernisation" option referred to replacement of key elements including the hoisting machine, controller, lift car door mechanism, and lift car safety mechanism. Other items would be improved – control signalisation equipment, landing entrance call stations and indicator facilities. The lift car interiors would be refurbished.
40. The third option, complete replacement with a roomless design, was only in relation to possible development of a penthouse floor. The lessees were concerned about this, as it might render the current lift works redundant. However, at the hearing Ms Healy confirmed that this was not proposed in respect of blocks C and D and there was no planning application pending for those blocks. As this was purely speculative, the Tribunal did not take this into consideration when reaching its decision.

41. DB also gave "budget costs" for the three options. The short-term budget cost was £16,000 excluding VAT per lift. For long-term modernization the budget cost was £50,000 excluding VAT per lift. Health and Safety budget cost was £8,000 per lift.
42. Finally, Mr Deacon and Mr Moxhay's preferred contractor, SLC, tendered for the LCS specification in the sum of £75,360 excluding VAT (£90,432 including VAT) as in the Notice of Estimates, see paragraph 24 above.
43. Turning to PSB's fees, Ms Healy explained that the proposed 10% was apportioned as to 4% for PSB's costs of administration and s20 consultation, and 6% as to LCS's duties for the initial report, specification, tender appraisal and supervision of the contract works. Mr Deacon contended that a percentage fee was not in line with industry standard and that the maximum reasonable sum would be £7 per flat.

Decision and Reasons: nature and scope of proposed works & PSB fees

44. The Tribunal carefully considered all the evidence and representations. It found that the evidence submitted by the Respondents did not directly compare with that of PSB. The initial SLC quotation was not based on the LCS specification, and the later DB report simply gave options for future use, based on a limited brief. That said, on closer examination, both the LCS and DB reports found that the lifts in block C & D were in poor and potentially dangerous condition, with obsolete parts, and had outlasted their life expectancy. To this extent, there was no fundamental conflict of evidence about the nature and extent of the required works.
45. Mr Deacon and Mr Moxhay could not adequately explain why they preferred the short-term investment option, without replacement of key elements, or how long this would last before more comprehensive replacement works would be needed.
46. The LCS Abstract of works, the initial SLC quotation of May 2012, and the DB modernisation long-term investment option, were in essence comparable, as they all included replacement of key elements of the lift mechanisms. Looking at the proposed costs, the Tribunal noted that the budget cost of the DB modernisation option was £50,000 per lift plus £8,000 per lift for health & safety requirements. This equated to £116,000 exclusive of VAT (£139,200 in total), which compared unfavourably with PSB's actual quotations, based on the LCS specification, of £95,940 including VAT (Otis) and £90,432 (SLC) including VAT.
47. The Tribunal broadly accepted PSB's reasons for preferring and recommending the Otis quotation of £95,940, as set out in paragraph 24 above. The works set out in the specification were necessary, reasonable, and in line with both the expert reports and the views expressed by the local authority. The Tribunal further noted LCS's comments in the tender appraisal on the shortcomings of SLC: it did not comply with the specification terms & conditions, was a small local company without depth of support, and did not belong to the recognised professional association, The Lift and Escalator Industry Association. These were valid concerns.
48. In these circumstances, the Tribunal concluded that the Otis quotation, even though 5% higher than the SLC quotation, represented good value for money in the best long-term interests of the block and good estate management.

49. With regard to management fees, the Tribunal accepted that 10% of the net contract price, apportioned 6% to LCS and 4% to PSB was not unreasonable. Whilst the RICS Code recommended an annual fee for routine management duties, it was acceptable for extra charges to be levied outside those duties in respect of major works as a percentage of the contract cost. These costs were therefore allowed.

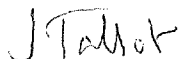
Section 20C application

50. At the hearing, Mr Deacon and Mr Moxhay made an application under s20C of the 1985 Act. Taking into account the determination above, the Tribunal considered that the Respondents had not succeeded on the substantive dispute over the cost, scope and nature of the proposed works, management fees, or the s20 consultation. It therefore declined to make the order sought.

Determination

51. The Tribunal determined, under s27A(3) of the 1895 Act, that the proposed lift modernisation works would be reasonable, and that the proposed total cost of £95,940 in accordance with the quotation by Otis would be reasonably incurred.

Dated 13 March 2013



**Ms J A Talbot
Chairman**