FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00BK/LSC/2020/0135**
HMCTS code (paper, video, audio)	**:**	**CVPREMOTE**
Property	**:**	**25-28 North Audley Street London W1k 6WB**
Applicant	**:**	**25/28 North Audley Street Management Ltd**
Representative	**:**	**Ms Rebecca Ackerley (Counsel)**
Respondent	**:**	**Various Leaseholders**
Representative	**:**	**Mr Ian Rees Phillips (Counsel)**
Type of application	**:**	**For the determination of the liability to pay service charges under section 27A of the Landlord and Tenant Act 1985**
Tribunal members	**:**	**Mr Duncan Jagger MRICS** **Mrs Hamilton Farey**
Venue	**:**	**By Video Conference**
Date of decision	**:**	**27 October 2020**

DECISION

Covid-19 pandemic: description of hearing

This has been a remote video] hearing which has been consented to by the parties. The form of remote hearing was coded as CVPREMOTE - use for that is held entirely on the Ministry of Justice Cloud Video Platform with all participants joining from outside the court. A face-to-face hearing was not held because it was not possible due to the Covid -19 pandemic restrictions and regulations and because the parties agreed the issues could be determined in a remote hearing. The documents that I was referred to are in a bundle of 328 pages, the contents of which I have noted. In addition, Counsel for the applicant submitted a skeleton argument together with a number of authorities. A second witness statement on behalf of Sarah Belsham which included an updated lift report dated 30 August 2020 by Ilecs. A copy of the lease for flat IA in the basement where the lift machine and control panel is located and finally a copy of the original report prepared by in 2007. Counsel for the respondents confirmed they had no objections to submission of the various documents.

Decisions of the tribunal

(1) Having heard evidence and submissions from the parties and considered all the documentation provided including the various authorities the tribunal determines that the sum of £251,360.08 is payable by the Respondents in respect of the service charges for the year 2020 as set out in page 234 of the bundle.

The application

1. By an application dated 18 June 2020 the Applicants seeks a determination pursuant to s.27A of the Landlord and Tenant Act 1985 ("the 1985 Act") as to the payability and reasonableness if payable of service charges in the sum of £251,360.08 for replacement lift works in number 26 North Audley Street

2. The reasons for the Tribunals decision are set out below.

The hearing

3. The Applicant was represented by Ms Rebecca Ackerley at the hearing and the Respondent was represented by Mr Ian Rees Phillips.

4. As set out above immediately prior to the hearing the applicant handed in further documents. which were accepted by the Tribunal.

The background to the application

5. The property **25/28 North Audley Street London W1K 6WB** which is the subject of this application is a five storey Victorian building with basement and commercial premises on the ground floor. The building has 3 separate entrances for the eighteen self contained flats. Number 25 contains three flats served by a replacement lift. Number 26 contains eleven flats which was served by a lift which is the subject of hearing and number 28 contains 4 flats which do not have a lift.

6. The tribunal did not inspect the property as it considered the documentation and information before it in the trial bundle enabled the tribunal to proceed with this determination and also because of the restrictions and regulations arising out of the Covid 19 pandemic

7. The Respondents hold long leases of the property which requires the landlord to provide services and the tenant to contribute towards their costs by way of a variable service charge. The specific provisions of the lease and will be referred to below, where appropriate.

8. The tribunal issued directions on the 23 June which identified the issue to be considered by the tribunal at the hearing A lease for Flat 3 25 North Audley Street was copied into the bundle before the tribunal and this was considered for the purposes of their decision.

9. The applicant has already undertaken a consultation under section 20 of the 1985 Act and tendered for the works. The tender process confirmed the cost of the works would be £251,360.08.

The issues

10. At the start of the hearing the parties identified the relevant issues for determination as follows: Whether the lease makes provision for the contributions towards the cost of replacement of the existing lift within the common parts of the premises (number 26) and if so, whether the costof replacement is reasonable and payable in accordance with the May 2020 demand for on-account service charge.

11. The Respondents raise three matters:

(1)The lift does not serve No 25 North Audley Street and therefore they should not contribute.

(2)The leaseholders are not liable to pay for the works towards the cost of a new lift because Listed Building consent is required which may impose addition conditions for the works.

(3)The construction and interpretation of the lease in under dispute.

Service charge item & amount claimed

The applicant has claimed the sum of £251,360.08 in connection with the replacement of a. bespoke lift in order to bring it in line with current standards of health and safety.

Evidence and Submission

(2)

12. The Applicant were represented by Ms Ackerley of Counsel at the hearing and the Respondent was represented by Mr Rees Phillips. The tribunal heard evidence from Ms S Belsham of Blenheims Estate and Asset Management Ltd for the applicant The following also attended : Mr Smith an observer, Mr V Hara a respondent, Ms King, a Director of the Residents Management Company and Ms Edwards.of JB Leich.

13. Immediately prior to the hearing Ms Ackerley provided a skeleton argument to the tribunal together with a number of authorities.

The Lease

14. Broadly speaking, the parties have agreed the relevant parts of the lease in so in so far as these proceedings are concerned are as follows:

Clause 1(b) The building means the building which the flat forms part known as 25,26,27 and 28 Audley Street in the London Borough of the City of Westminster

(c) 'The Block' means the land comprised in the Titles Registered Absolute at H M Land Registry under Title Numbers NGL 426114 and NGL 426115 known as 25, 26, 27 and 28 North Audley Street aforesaid shown edged blue on the plan numbered 1

(d) 'Common Parts' means the foundations main structure roof and otherwise those parts of the block not comprised in the Underlease or any other Underlease of apart of the Block granted or to be granted as aforesaid.

(f) 'The Service Obligations ' means the obligations undertaken by the Company to provide the services as hereinafter specified in Clause 5.

(g)'The Service Charge' means the cost of the service charge as may be incurred under Clause 5 (a) to Clause 5(1) (inclusive) and Clauses 5 (n) to 5(p) inclusive.

(i) 'Category B Expenditure' means the proportion of the service charge as may be incurred under Clause 5(m)

(j) 'The Tenants Contribution ' means 10.52% of Category A Expendi- ture and 7.143% of Category B Expenditure'

'The Company covenants with the Tenant (provided the Tenant makes the payments in Clause 4(a) and as a separate covenant with the Landlord that the Company will:

(b) Keep the Common Parts and the Service Conduits (other than those exclusively serving the flat in the block in repair and rebuild or replace any parts that require to be rebuilt or replaced.

(i) Provide and maintain all equipment and tools necessary for the fulfilment of the Service Obligations and for the security and safety of the Block and its occupiers

(m) Keep the lifts situate within the Building in repair and replace any parts thereof that require to be replaced and maintain insurance against risks of breakdown and third party claims in respect of the lifts and lift equipment and mechanism in such amounts and upon such terms as the Company shall think fit and comply with the terms of any agreement or arrangements relating to the lifts in the building.

(o) Pay and discharge such other costs that may be necessary to maintain the block as good class premises and to carry out any other matters which may be deemed advisable in the discretion of the Company or the Landlord for the good running administration and maintenance of the Block.

Clause 4 'The Tenant covenants with the Company and as separate covenants with the Landlord and with each of the other tenants in the Block as follows:

(ii) On the due dates to pay to the Company such sums on account of the Tenant's Contribution as the Company or its agent may reasonably consider sufficient (together with the contribution paid or payable by the other tenants and by the Landlord under Clause 6(c) to meet the Service Charge for the period next due date.

The Lift

15. The Witness Statement of Sarah Belsham and the Applicants Statement of Case set out a detailed history of the lift. In brief, the main framework of the existing lift is some 83 years old and was installed when the building was converted to provide the residential accommodation. The lift has suffered from frequent breakdowns and has been out of service for three years. During the past 10 years the applicant commissioned a number of reports prepared by lift companies namely Crown Lifts dated 12 February 2013 two reports from Allianz dated 27 May 2015 and 5 May 2016. There were two further reports prepared by ILECS the most recent being 30 August 2018. Each of these reports formed part of the bundle of documents and each was considered in detail by the Tribunal and in fact during the proceedings. Mr Rees Phillips made a very detailed cross examination of Sarah Belsham where he ran through each of the reports in a very comprehensive manner. In this most recent report prepared by ILECS the author Paul Newton considers in paragraph three the option of modernisation versus a replacement. The conclusion reached was that "*The replacement option would address all of the above issues and in the longer term be more cost effective as servicing, maintenance and repair would be to industry standard components in todays market place. Also, the new lift would have to be CE marked thus compliant with the lift regulations and current standards.*

Section 20 Consultation

16. Based upon this report ILECS prepared a Pre-Construction Information and Specification and Tender for Lift Works dated 29th April 2019 which was also the date of the Notice of Intention sent the leaseholders. ILECS provided the Specification and Tender information to five specialist companies, four of which returned and completed the tender schedule and provided quotes which were then subject to a tender analysis dated 2 July 2019.Following this process D & C Lifts were chosen and the total cost of the proposed works was £290,832.70 inclusive of fees and VAT. On the 28th November 2019 a Notice and Statement of Estimates in relation to the proposed qualifying works was sent to each of the leaseholders.by Blenheims Estate and Property Management Ltd. No objections or issues to the proposed works were raised by the various leaseholders.

The lift does not service Flats 2 and 3 , 25 North Audley Street where the Respondents demise are situate

17. Ms Ackerley sets out in her Skeleton Argument that there are specific contractural provisions set out in the lease to contribute towards the maintenance of the lift, namely ; clauses 5(b) (m) and (o) The lack of use by these Respondents does not alter their covenants within the leases to contribute towards the service charge in respect of the premises. Just because the Respondents do not use the lift does not alter their covenants within the leases to contribute towards the service charge in respect of the premises.Ms Ackerley also provided copies of a decision in **Solarbeta Management Co Ltd v Akindele (2014) UKUT 415 (LC)** to the Tribunal and it was confirmed that the Respondent was sent a copy. This case involved a lift not used by the tenant and located in a different block to the tenant and whereby The Upper Tribunal found it was irrelevant that the tenant had no benefit as they were contractually bound to contribute under the terms of the lease. Ms Ackerley specifically took the Tribunal to paragraph 19 of this case. It is Ms Ackerley's further submission that the Respondents have historically contributed to the cost of repair and maintenance of this lift within the service charge without issue. Mr Rees Phillips relied on the definition of the Common Parts whereby there are three separate points of access which do not link up with each other, there are two quite separate lifts and therefore should be considered a separate buildings. There are no tangental benefits to the Respondents as it is one set of leaseholders as against another. He submitted that when read together Clauses 5(m) and 5(b) are unclear and open to ambiguity Finally, as regards the situation of the machine room within Flat 1a is not the fault of the residents in No25. The Tribunal were not persuaded by Mr Rees Phillips arguments. The leases are clear. Clause 5(m) states "Keep the **lifts** situate within the Building in repair and replace any thereof that require to be replaced" Clause 1 (b) clearly describes The Building of which the flat forms part known as **25,26,27 and 28 North Audley Street.** For these reasons, the Tribunal determines that the Respondents are contractually bound to contribute towards the cost of the lift.

The Leaseholders are not liable to pay for the works towards the cost of a new lift as an application for Listed Building Consent has not been made.

18.

Ms Belsham confirmed to the Tribunal that a pre-application for advice on general acceptability for Listed Building consent was initially submitted to Westminster City Council on the 1 July 2020 and a formal application was made on the 27th September 2020. It was envisaged that there would be a consolation period of some 10 weeks and based upon discussions with the Council a decision will be forthcoming at the end the year. Ms Belsham also confirmed the successful tenderer will hold the contract price until the planning matter is resolved. Mr Rees Phillips accepted this time line but he contended that firstly the application may be refused and therefore this will exacerbate the already lengthy timescale. In the alternate, if consent is granted, such consent may be subject to planning conditions which could have implications on costs which will necessitate a new tender process. Overall, it is claimed that the Consultation and subsequent service charge demands should not have been commenced until the exact costings are known. Mr Rees Phillips further seeks to argue that that the leaseholders are only liable to contribute to the amount the applicant '*may reasonably consider sufficient to meet the service charge for the period next due date.*'

The two dates being September and March. It is alleged that it would not be possible for such charges to be reasonably incurred within the due dates as obtaining the Listed Building consent will take a considerable time. The Applicants argue Clause 4(a) (ii) is an "on account" service charge clause which the Applicant estimates will be incurred during that service charge year in addition to expenditure that will incurred in the foreseeable future".Therefore, is is entirely reasonable for the Applicant to include reasonable sums for the replacement of the lift, such sums require payment by leaseholders prior to the commencement ,given the significant expenditure involved and the fact that the Applicant is. Residents Management Company and therefore its Directors are also leaseholders of the apartments within the building with limited funds. The Applicant states that in any event Clause 4(a) (iv) allows an on-account service charge throughout the service charge year if the service charge funds held are not sufficient to meet the anticipated expenditure. The Tribunal considers the planning process has been undertaken in a timely fashion and it is fully expected that a decision will be forthcoming by Westminster City Council towards the end of the year.Should any planning conditions have an effect on the tender price a further analysis can be undertaken in order to provide a final cost. The Tribunal agrees with the Applicant that construction of the lease entitles the Landlord to demand on-account service charges for the forthcoming year.

The construction and interpretation of the lease is disputed and are the works reasonable - Repair v Replacement.

19.

The Applicant relies upon clause 5(m) of the lease "*Keep the lifts situate within the building in repair and replace any parts thereof that require to be replaced*...Ms Ackerley provided the Tribunal with two authorities in this matter, namely ***Proudfoot v Hart (1886-90) All ER Rep 782*** and ***Postel Properties Ltd v Boots the Chemist Ltd (1996) EGLR60.*** It is contended that an obligation to repair includes an obligation to put in repair.The two reports prepared by ILECS discuss the issue of modernisation versus replacement and rely on an email dated 1 October 2020 from Paul Newton which sets out his opinion in connection with this option.In conclusion, it is not disputed by the parties that the lifts works are necessary. The only mater in dispute here is whether a repair of the singular parts would provide a properly functioning lift which complies with current health and safety regulations. ILECS confirm that it would be possible for a modernised lift to be fully compliant with modern standards and a replacement option would address all the issues raised and in the long term would be the most cost effective. It is claimed the **Postel** case fully supported this argument.In the alternative the Applicant relies upon Clause 5(b) which should be read in the context of the lease as a whole and therefore reference should be made also to Clause 13(c) which states "*The paragraph headings are inserted for convenience and shall not affect interpretation* " and the lifts would fall within the definition of common parts. The Respondent dispute any reliance that can be placed upon Clause 5(b) as the sub-heading to the covenant states "*REPAIR (EXCLUDING LIFTS"* and clearly cannot relate to the lifts. Further, the residents of No 28 do not receive a service charge for lifts. It is further contented that Clause 5 (0) is a "sweeping up" clause which is too wide and not specific.

Therefore, it can only be Clause 5(m). Where the Respondent now differs from the Applicant is that the interpretation of this clause does not provide for rebuilding/entire replacement, only *"replace any parts"* Both parties referred the Tribunal to the case of **The London Borough of Hounslow v Waaler** which considered the approach a Landlord must take when determining the cost of improvement works passed through the service charge were reasonably incurred.In this case the Upper Tribunal held that particular consideration should have been given to the view of the leaseholders, whether the works could have been done more cheaply and the financial circumstances of the leaseholders.The Tribunal determines that the cost of " *repair and replace any parts thereof that require to be replaced " falls within* Clause 5(m) of the lease and the Respondents will each contribute 7.143% in accordance with the provisions of the lease. Further, based upon the expert reports prepared by ILECS the best option available to the Applicant is to replace the lift which was installed in 1935 and is currently defective and has not been in use for three years. This is a Grade II Listed building located within prime central London and the broad means of the lessees has been taken into account. It is noted that when the Section 20 consultation process was undertaken by the Applicants, no objections whatsoever were received in connection with the choice of contractor or final tender price. Otherwise, the Respondents have provided the Tribunal with any alternative costings to show that the proposed works are excessive or unreasonable in amount

Name: Duncan Jagger **Date:** 27 October 2020

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber), then a written application for permission must be made to the First-tier Tribunal at the regional office which has been dealing with the case.

The application for permission to appeal must arrive at the regional office within 28 days after the tribunal sends written reasons for the decision to the person making the application.

If the application is not made within the 28-day time limit, such application must include a request for an extension of time and the reason for not complying with the 28-day time limit; the tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed, despite not being within the time limit.

The application for permission to appeal must identify the decision of the tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal and state the result the party making the application is seeking.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).