FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00BE/LSC/2020/0296** **CVP:REMOTE**
Property	:	**Various blocks on the Dulwich Estate**
Applicant	:	**The Incorporated Trustees of the Dulwich Estate**
Representative	:	**Mr Tim Hammond**
Respondents	:	**Leaseholders of the various blocks**
Representative	:	**In person**
Type of Application	:	**s.27A Landlord and Tenant Act 1985**
Tribunal Members	:	**Judge Jim Shepherd** **Duncan Jagger FRICS** **Lucy West**
Date of Decision	:	**29 March 2021**

This has been a remote hearing which has been consented to by the parties. The form of remote hearing was coded as CVPREMOTE - use for a hearing 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 all issues could be determined in a remote hearing. The documents that were referred to are in two bundles, the contents of which we have recorded and which were accessible by all the parties. Therefore, the tribunal had before it an electronic/digital trial bundle of documents prepared by the parties, in accordance with previous directions.

Introduction

1. This application concerns six blocks of flats in London SE19 on an estate owned by the Incorporated Trustees of the Dulwich Estate ("The Applicants"). The blocks concerned are Drake Court, Glenhurst Court, Knowle Court, Lowood Court, Marlowe Court and Raleigh Court. The applications seek a determination in relation to the payability and reasonableness of proposed works in refurbishing lifts in each of the blocks.

2. The Respondents are the leaseholders of the blocks just mentioned. Drake Court contains 37 flats, Glenhurst Court 36 flats, Knowle Court 33 flats, Lowood Court 34 flats, Marlowe Court 38 flats and Raleigh Court 40 flats. Separate applications, all identical in content, were brought in relation to each of the blocks.

3. The Applicants were represented by Tim Hammond of Counsel. He relied on witness evidence from Adrian Brace and Simon Hoare, the Applicants' employees and expert evidence from Karl Vesma and Chris Chambers who are lift engineers. The Respondents represented themselves. In passing the Tribunal wishes to express its gratitude to the practical way in which both parties put forward their case. Stewart Owen, Frank Kunna and Lawrence Downes produced skeleton arguments.

4. The Tribunal also received written responses from a number of lessees including Frank Kunna of Drake Court, Friter Winten of Glenhurst Court, Daniel Holman, Lawrence Downes, Ian Bonner and Sophie Holden of Lowood Court, Stuart Owen and Claire Pollard of Marlowe Court ,Matt Hastings, Rachel Holt and Arif Udin of Raleigh Court. In addition Robert Rhodes attended the hearing and made representations. He is the new lessee at 21 Knoll Court .

5. The Tribunal heard the evidence over 2 days on the 11th and 12th of February 2021.

The application

6. The Applicants seek a determination from the Tribunal as to the payability and reasonableness of service charges relating to the refurbishment of lifts in the various blocks on the estate. The flats in each of the blocks are held on long leases. The leases are in a similar form all be it that there are some variations depending on whether they have been extended. Eight of the blocks contain a passenger lift. The lifts are similar models produced by the same lift manufacturer called Express Lift Co limited. All of the lifts were installed in about 1960. The Applicants wish to refurbish the lifts in order to ensure that they work for a further period of time.

7. There was evidence from the Applicants that there had been a history of breakdowns, people getting trapped in the lifts, a major failure at Lowood Court and a fire at Grenville Court. At the hearing the Tribunal were told that the lifts at Glenhurst Court and Raleigh Court were out of service. It was submitted by the Applicants that the lifts were regularly out of service for months whilst possible short term patch fixes were investigated. The Tribunal accepts that the evidence points to the fact that the lifts were generally in a deteriorating condition and that they were not reliable to the extent that they had been out of order for long periods of time in some cases. Whilst some of the lifts were more reliable overall there was a pattern of deterioration.

8. There are two further blocks on the estate called Grenville Court and Frobisher Court. They also contain flats held on long leases similar to the leases in question and they also had passenger lifts of a similar vintage and design. Following agreement between the Applicants and the lessees of Grenville Court the passenger lift at that block was refurbished in 2020 and the works were funded through the service charges. Similarly following agreement between the Applicant and the lessees of Frobisher Court works were carried out to substantially refurbish the passenger lift in that block in January 2021 and those works were also funded via the service charge. It is

the intention of the present works to mirror those that have been undertaken at Grenville Court and Frobisher Court.

9. The Applicants are a charity and the maintenance of the estate is self - funding. They seek clarity in relation to the payability and reasonableness of the service charges before the refurbishment projects begin on the various blocks. The Applicants submit that the lifts are not in good condition, unclean and not in complete repair such that the costs of remedy would fall to be recovered through the service charge mechanism in the lease. They also submit that it would be reasonable to undertake the works and incur the cost.

The lease provisions

10. The leases for each of the blocks contain a covenant by the lessee:

    from time to time during the said term pay to the lessors a fair and rateable proportion of the cost and expense of … keeping the passenger lift… in the building… clean in good condition lighted painted and in complete repair.

11. It is the Applicants' case that *passenger lift* incorporates both the carriage and the motor, rails etc i.e. all operational parts. The Respondents challenged this construction. Mr Owen and Mr Kunna suggested that the term *passenger lift* only deals with the lift car itself and not the mechanism or motor etc. The Tribunal considers that it would be absurd for the lease to be limited in this way. The parties must have intended that the whole of the lift including the operating parts was included within the term *passenger lift* otherwise the responsibility for the maintenance of these parts would be unresolved.

12. As for the term *in good condition* the Applicants submit and the Tribunal accepts that this term is more extensive than an obligation to simply keep in repair. Similarly the term in *complete repair* is of a higher standard that just *repair*.

T*he expert evidence*

13. The only expert evidence was produced by the Applicants. The Respondents had not sought to instruct their own expert in relation to the maintenance of the lifts. The Applicants relied on 2 reports one produced by Karl Vesma who recommended complete replacement of the lifts and the other produced by Mr Vesma's colleague Chris Chambers who recommended substantial refurbishment of the lifts. The Applicants chose to rely principally on Mr Chambers' evidence. There was some debate during the hearing as to the meaning of *substantial refurbishment* and whether it in fact constituted an improvement and not a repair. The Tribunal is of the view that there is a distinction between replacement of the lifts in their entirety and the substantial refurbishment of the lifts where many of the parts may be replaced but some key constituent elements remain – in this case the Guiderails, the Counterweight etc.

14. Karl Vesma of the Gerald Honey Partnership produced reports on the 3rd of August 2019 relating to six of the blocks. The reports are extremely detailed. They state that the lifts were of a conventional electric traction lift design whereby a lift car and a counterbalance weight are driven by traction kind machines controlled via single speed AC Motors suspended from 4 off steel wire wrote suspension systems. The general construction of the supporting frame was of conventional design. The lift cars are located within a steel frame constructed from steel angle, channel and flat plate and are of a conventional design. He concluded that the lifts should be replaced with up – to - date models.

15. Chris Chambers is the Company Director of Mr Vesma's firm, Gerald Honey Partnership. In his report dated 14th January 2021, he analysed in great detail the condition of the lifts individually. In summary he found that the lifts were worn, in disrepair and have surpassed their expected service. He found that their workings had been overtaken by technological advancements which had resulted in the equipment not conforming to current code standards and lacking in safety functionality. In conclusion he found that the lifts were

deficient in a number of modern - day safety devices which reduced the risk of injury to persons either working on or travelling within the lifts. He commented that most of the components installed are no longer manufactured and should be deemed obsolete. Although engineering companies could be commissioned to produce replacement parts this could be extremely costly and time consuming. He was of the view that undertaking the completion of the maintenance defects alone would not be sufficient to keep the lifts in safe operation. He did not consider that it was appropriate to continue to repair the lifts on an ad hoc basis because this was unviable due to costs and lack of reliability and safety. He was of the opinion that the lifts should either be substantially refurbished or replaced in their entirety. He stated that the refurbishment of a lift requires three components to be retained before it is deemed a full replacement which would then require the installation to be fully code compliant. He said that it would be feasible to retain the lift car guard rails, guide rails and counterweight frame albeit they would require some attention and adjustment. All other components would be replaced. Careful design and planning would he predicted enable a reliable lift service of up to 20 to 25 years before requiring major works. To achieve this kind of longevity it would not be practical to consider the installation of standard commodity package lifts without modification. He provided approximate budget costs comparing refurbishment costs with full replacement costs. The refurbishment cost would be less than the replacement cost.

16. Accordingly, the recommendation of the Applicants is that contained within the report of Chris Chambers namely that the lifts should be refurbished retaining three major components the lift car guide rails, the counterweight guide rails and the counterweight frame and weights.

The evidence of fact

Applicants

17. Prior to the start of the hearing the Applicants limited the scope of the application to a determination as to the first, second and third questions in their application namely whether the lifts are unclean, not in good condition, not lighted, not painted and not in complete repair so that in principle the costs of remedy would fall to be recovered through the service charge (the first question) ; whether the works proposed by the Applicants are works whose cost could as a matter of lease construction be recovered through the service charge mechanism (the second question) and whether it would be reasonable to undertake the works and hence whether it would be reasonable to incur the cost of the works (the third question). The Applicants did not ask the Tribunal to consider the 4th question which was whether the estimated cost of the works is reasonable in amount? This leaves this issue open should the leaseholders wish to challenge it in future once the actual costs are known.

18. The Applicants provided factual evidence in written form from Mr Hoare dated 15th January 2021 in which he set out a chronology of the problems involving the lifts at each of the blocks from January 2017 to January 2021. The lift motor serving Grenville Court burnt out and there was a small fire and smoke penetrated the common parts. Relatively soon after that incident in February 2018 there was a major failure of the lift motor at Lowood Court. The motor had to be removed from site to be repaired which involved scaffolding being installed in the lift shaft. The repaired motor was reinstalled in April 2018 but had to be removed again following problems with the braking system causing further inconvenience to the leaseholders while the lift was out of service. Following the fire at Grenville Court the lift was out of service for several months at considerable inconvenience to residents while a repair solution was investigated in consultation with the residents group. They instructed their own lift consultants to advise them throughout the process. The refurbishment of the lift began in January 2020 and was completed in April 2020 at a cost of approximately £4500 per leaseholder. Following a significant period of problems with the lift at Frobisher Court the Residents Association approached the estate with a proposal to proceed with the refurbishment of their lift without the need to go through the tribunal process. There was 100% agreement from all leaseholders in that block to proceed with

the refurbishment works and the estate embarked on a consultation process in accordance with the requirements under the Landlord and Tenant Act 1985. A contract was awarded and work started on site on the 4th of January 2021 with a 12 week period. The cost of refurbishment of the Frobisher court lift was estimated to be approximately £5500 per leaseholder. Mr Hoare in his statement outlines the various incidents that have taken place at the blocks detailed in the application when the lifts have been out of order and when passengers have been trapped in the lift etc.

19. Mr Hoare also detailed the fact that as well as the proposed works in relation to the lifts, following guidance from the government after the Grenfell tower inquiry the estate commissioned a fire safety report on each block from a consultant called Beacon Partnership. The consultant's report recommends renewal of the external coloured panels and fire stopping work on all six blocks and states that the work should be completed within a 12 month period. It is proposed to combine these works with cyclical external repairs and redecoration in order to avoid the duplication of costs. Accordingly, the estate has embarked on the consultation process in accordance with the requirements of the Landlord Tenant Act 1985 and proposes to carry out these works in 2021. Pragmatically therefore the Applicants have decided to carry out the consultation process for the lifts but not start any work until 2022 in order to avoid a situation where the residents were paying for both the fire safety works and the lift works at the same time.

20. The Tribunal also had written evidence from Adrian Charles Brace a surveyor who works for the Applicants as the Director of Property. He outlined the recent history in respect of the lifts and detailed the fact that an inspection carried out by an independent surveyor Mr Hugh Gray (included in the hearing bundle at page 131 onwards) in March 2014 found that the lifts at that stage were in reasonable condition considering their age but they required replacement/complete refurbishment in order to ensure that they would not be out of service for prolonged periods because critical parts were unobtainable. Because the lifts were not out of repair at that time it was decided that it would not be reasonable for the Applicants to carry out

wholesale refurbishment. But it was emphasised that the position had changed since then and that the lifts had deteriorated. Mr Brace detailed consultations that had been carried out with the Residents Associations on the estate in relation to the lifts.

Respondents

21. It is fair to say that the leaseholders on the estate have differed in their opinion about the proposed works and some have supported the works. For obvious reasons the leaseholders who attended the hearing largely disputed the need for the works although there was some support from a minority of leaseholders who attended.

22. The leaseholders on the estate provided responses to the Applicants' case in various forms. There are a number of completed questionnaires which have been sent out by the Applicants inviting comment from those who objected to the works. In addition to these questionnaires there are written submissions by various leaseholders. Notably Mr Kunna provided a very detailed response to each of the issues raised by the Applicants in a schedule form. Mr Kunna objected to the works being carried out in his block, Drake Cour,t because he does not think that they are required. There was also a letter from Friter Quinton of 36 Glenhurst Court objecting to the work . Her main objection appears to be on the basis that she derives very little benefit from the lift because she is on a lower floor. There's also a detailed statement from Mr Holman of Lowood Court. He objected to the refurbishment of the lifts on several bases including that in his view the relevant provision in the lease does not allow replacement of the lifts and the works proposed were actually works of replacement. The tribunal also had the benefit of a response to the application from other Lowood Court residents objecting to the works based on apportionments and the amount of cost of the works that would be recovered. This was ultimately not a matter for the Tribunal to consider. The submission also stated that the work intended to be carried out by the Applicants would constitute improvement rather than repair. This was a repeated argument by the leaseholders during the hearing. Namely that this

was not really a refurbishment at all but constituted a wholesale replacement of the lifts. This is dealt with further below. The Tribunal also had a letter from Ian Bonner and Sophie Holden at flat one Lowood court in which they challenge the works. Again their principle concern was the apportionment of the costs between the flats which was not something that was at issue in the tribunal. They also raised the issue as to whether they were required to contribute to the lift works in view of the fact that they had their own front door accessed via the communal entrance where the lift is situated and that they had no benefit apparently from the lift. The Tribunal also had a statement from Stuart Owen of Marlow Court in which he put forward the argument that the lease term extended only so far as the lift carriage itself. The Tribunal has already indicated that it does not accept this argument. Further detailed arguments were put forward within the letter outlining various points and relying on legal provisions all of which have been considered by the Tribunal when making its ultimate decision. The Tribunal also had a statement from Claire Pollard who lives at Marlow Court. She objected to the lift works on the basis that she did not use the lift at anytime and she didn't need the lift in order to access the premises. Further in her view the lift was in good working order. Other statements of objections were received. They are not individually identified but all have been considered by the Tribunal.

The hearing

23. The applicants were represented by Tim Hammond. Mr Brace and Mr Hoare gave evidence on their behalf. The leaseholders were represented by Mr Holman, Mr Bonner, Mr Downes, Mr Owen and Mr Rhodes.

24. Mr. Hammond opened the case outlining the fact that the Applicants wanted to carry out substantial refurbishment of the lifts. He dealt with the various expert evidence including the historic report of Mr Gray which had been replaced by the two recent reports of Mr Chambers and Mr Vesma.

25. Mr Brace gave evidence and was cross examined at length by most of the leaseholders. Mr Hoare gave evidence. Again he was cross examined at some length by Mr Kunna, Mr Bonner and Mr Owen. On the afternoon of the first day Mr Chambers, the lift expert, gave evidence. He said he was a "lift geek". He gave a clear account of the proposals for the lifts on the estate.

26. On the second day of the hearing the leaseholders made submissions in turn. All of the submissions were impressive, clear and cogent and the Tribunal pays credit to the leaseholders none of whom had legal training. Mr Kunna relying on a passage from Hill and Redman submitted that the works in this case went beyond repair. He challenged whether the lifts needed replacing in Drake Court. His view was that the lifts were generally working, they were clean, they were properly maintained and in good condition. Mr Owen said that the passenger lift in Marlow court was in working order. He also submitted that the lease clause only dealt with the passenger lift itself and not the machinery. This has already been addressed in this determination above. His principal submission was that the works proposed went beyond the covenant in the lease because the covenant only allowed repair and not replacement. Mr Downes had produced a skeleton on behalf of residents in his block. He also based his submissions on the fact that the works proposed were not works of repair but went beyond that. He did however concede that the lifts were old and needed attention. Mr Bonner raised the question of whether he was required to contribute to the lift in view of the fact that he had his own entrance to the block and he was apparently not allowed to use the lift under the lease. Mr Rhodes said that he'd moved in to his flat in Knowle Court with his family in November 2020. He expressed considerable concern about the state of the lift in that block. He said it was not fit for purpose and required refurbishment or replacement as soon as possible.

27. In response Mr. Hammond addressed all of the points raised by the leaseholders in a fair and patient manner. He reminded the Tribunal of the decision in *Arnold v Britton* [2015]UKSC 36 which guides our consideration of lease terms. He submitted that the passenger lift must be viewed in context and must include all parts of the lift including the lift shaft, the mechanism the

motor etc because it would be absurd for only the lift itself to be repaired leaving a lacuna in terms of responsibility for the other items of repair. He looked at the question of repair and the extent of repair and referred to the case of *Carmel v Strachan* 24th May 2007 and determined that on occasions an obligation can extend beyond repair and even include improvement. He submitted that the Applicants are a charity and needed to recover 100% of the cost of the works and there was no obligation within the lease for the Applicants to pay any sums towards the service charge. In relation to Mr Bonner's submission about the lower ground floor flats and whether they should contribute to the service charge he said firstly that the question of cost was not being addressed at this hearing. Secondly he said that Mr Bonner had signed up to the lease which made it clear that there was a contribution from him towards items such as the lift and there was no variation in relation to the lower ground floor flats. The Tribunal accepts these submissions.

28. He also submitted that there were a series of gateways that the Tribunal needed to go through. The first question was: is the covenant engaged? He made reference to an extract at paragraph 13.03 in Dowding and Reynolds. The important question was whether the lifts had deteriorated to a point in terms of physical condition below which as a matter of evidence they were not in *complete repair*. Mr Chambers had made clear that the lifts had reached this condition. Also, the factual evidence was such that there had been breakdowns and entrapments etc. Accordingly, the lifts were not in complete repair. He said that Mr Owen and Mr Kunna had said that the lifts in their blocks were in good working order. This was not the same as being in complete repair and the leaseholders had not provided any expert evidence to support their submissions. Mr Chambers had made clear that the problems with the lifts existed in all of the lifts in each of the blocks. He stated that Mr Holman and Mr Downes had accepted that the lifts were not in a good condition and works were required in those blocks.

29. The second question posed by Mr. Hammond was what works are necessary to put the lifts back into the contemplated condition? Mr Chambers had given evidence of works that were necessary and these concentrated on the

requirement for a substantial refurbishment of each lift. The issues about whether this was a modernisation, a replacement or a refurbishment was essentially a semantic point. Mr Vesma suggested replacement. Mr Chambers had confirmed that three essential elements of the lifts were being retained: the steels, the guide rails and the counter weight. He submitted that this was sufficient for this to be a refurbishment and not a replacement. He confirmed that the replacement of parts of a lift with modern parts would still come within the realms of a repair relying on the decision of Lord Denning in *Morcom v Campbell Johnson* [1955] 1 QBD,106. He also relied on a passage from Dowding and Reynolds to the extent that repair can cover complete refurbishment.

30. The third question addressed by Mr. Hammond was whether it was reasonable to do the works? He said that the lifts had been a problem since at least 2014. They were in disrepair. Both experts had confirmed that the lifts needed attention and they were being poorly maintained and for the future substantial refurbishment was required. Accordingly, it was his firm submission that it was reasonable to carry out the works. Mr. Hammond repeated that it was not necessary for the Tribunal to consider issues of apportionment or repayment because this issue was being left for a later date should the leaseholders wish to challenge the cost of the works.

Determination

31. The Tribunal was impressed by all of the arguments in the case and the level of detail in the submissions on both sides.

32. The Tribunal intends to address the questions asked by the Applicants in their application:

Question 1

Whether the lifts are not clean, not in good condition, not lighted and/or painted, and/or not in complete repair so that in principal the cost of remedy would fall to be recovered through the service charge?

33. This question reflects the lease term relied upon by the Applicants. The expert evidence was very clear in this case, particularly the evidence of Mr Chambers who the tribunal found to be a very impressive witness. The lessees did not seek to rely on any expert evidence themselves. As well as the expert evidence of Mr Chambers the tribunal had clear and cogent factual evidence of the lifts being defective for long periods of time, incidents of fire, entrapment etc. In summary it was patently clear that all of the lifts within the applications were in disrepair and therefore the lease clause was engaged for each of the applications.

Question 2

Whether the works are works whose cost could as a matter of construction of the flat leases be recovered through the service charge *?*

34. The Tribunal was satisfied again by the evidence of Mr Chambers that refurbishment works were appropriate in this case. This was not an improvement. Several key elements of the lifts were being retained including the guiderails and the counter - weight. This was sufficient to mean that this could be classed as a refurbishment and that the works required could came within the lease clause. The clause itself is wide in the sense that it requires the lift to be kept in *complete repair*. This goes beyond simple repair and repair in any event as indicated by Mr. Hammond is a flexible concept. In the present case it is difficult to envisage how the lifts could be kept in *complete repair* without either being refurbished or replaced. In the present case the Tribunal is satisfied that the refurbishment is necessary in order to ensure that the lifts are in complete repair. It could of course be possible to continue to patch repair the lifts as has been done for a number of years. However, the lifts are 60 years old. There is a limit to which one can continue to patch repair

technical equipment like lift motors etc. The lifts in the present case in all of the blocks are well beyond their originally envisaged life. It is necessary in order to ensure that the lifts are in *complete repair* to carry out the refurbishment proposed.

Question 3

Whether it's reasonable to undertake the works and hence whether it's reasonable to incur the costs within the meaning of S19(1) of the act?

35. It has already been decided that the lift works are necessary and therefore the works are also reasonable. Indeed, the works are advisable and it would be remiss of the Applicants not to address the issue when there are so many problems clearly existing within the lifts. Accordingly, the Tribunal has no hesitation in determining that it is reasonable to undertake the work and incur the cost of the work. It is repeated however that this decision is not addressing whether the actual cost of the work is reasonable. That is an issue which the leaseholders may wish to challenge in the future.

35. In summary the Tribunal is satisfied that the lift in all of the blocks on the estate that have not already been refurbished should be refurbished.

Section 20 of the landlord and tenant act 1985

36. This was a well fought dispute. As indicated the Tribunal was impressed by the evidence brought forward and the submissions made by each side. It would be unfair to allow the Applicants to recover the cost of the proceedings under the service charge in these circumstances. Accordingly, the Tribunal determines that the section 20 C application is successful and the Applicants should not seek to recover the cost of the proceedings from the service charges of any of the leaseholders on the estate.

Judge Shepherd

29 March 2021

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).