FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00AW/LSC/2020/0050 (CVPREMOTE)**
Property	**:**	**Flats 3 & 4, 38-40 Elm Park Road, London SW3 6AX**
Applicant	**:**	**Mr D A Fernandez**
Representatives	**:**	**In person with assistance from Dr J Lowe**
Respondent	**:**	**Elm Lodge (Freehold) Limited**
Representative	**:**	**Ms L Hodgson**
Type of Application	**:**	**For the determination of the liability to pay and reasonableness of service charges (s.27A Landlord and Tenant Act 1985)**
Tribunal Members	**:**	**Judge Professor Robert Abbey** **Mr Mel Cairns MCIEH (Professional Member)**
Date and venue of Hearing	**:**	**10 December 2020 by an online video hearing**
Date of Decision	**:**	**22 December 2020**

DECISION

Decisions of the tribunal

(1) The tribunal determines that: -

(2) The applicant is liable under the terms of the leases of the property to pay service charges in respect of the installation of a new replacement passenger lift and that the service charges in respect thereof are reasonable.

The application

1. The applicant seeks a determination pursuant to s.27A of the Landlord and Tenant Act 1985 ("the 1985 Act") as to the amount of service charge payable by the respondent in respect of service charges payable for services provided for **Flats 3 & 4, 38-40 Elm Park Road, London SW3 6AX**, (the property) and the liability to pay such service charge.

2. 38-40 Elm Park Road, SW3 6AX is a lateral conversion of two Victorian houses, consisting of eight individual dwellings (four maisonettes and four flats) of which the applicant owns two of the flats, numbers 3 (his home) and 4 (which he rents out). The respondent is the landlord and freeholder.

3. With regard to flat 3, the applicant is the long leaseholder of the property pursuant to a lease dated 11 August 2017 made between (1) The respondent company and (2) the applicant with (3) Elm Lodge Limited described in the lease as an "other party". The term of the lease is 999 years from 1 July 2016. The respondent was incorporated on 14 May 2015 and according to records at Companies House, the applicant is a director of the respondent.

4. At the Directions hearing held before this video hearing on 10 March 2020 Judge Donegan directed that the issues to be determined by the Tribunal are whether parts of the cost of replacing the lift were reasonably incurred; and whether the applicant is liable to pay parts of the service charges for the lift replacement and, if so, the amount of those charges. The Tribunal also noted that these issues will turn upon expert evidence and no evidence will be required from lay witnesses.

5. As has been noted the disputed charges are for the service charge year 2017-2018 and relate to the installation of a replacement new lift within the block. In 2016 the respondent freehold company engaged Butler & Young lift consultants to report on the condition of the old existing lift and to advise on its replacement. Liftworks tendered for and ultimately (in December 2016) were instructed to replace the lift.

6. The applicant says in the application to the Tribunal that the installation took place in 2017 at a total cost of £108,166.80. The specification that was the basis for the section 20 notice issued to the applicant on 9 December 2016 in respect of the two flats he owns demanded £13,303.32 from the applicant, or 18% of the total cost, 18% being his share of the service charge, plus £5,400 he had already contributed to a lift reserve fund, also representing 18% of contributions to that fund. The s.20 notice served by the landlord is not in contention.

7. At the hearing the applicant confirmed that as set out in his statement the disputed service charges were in relation to the £7,265+VAT paid for structural works that he says were never completed, and the £2,000 for dispensation from the lift notifying body that he says may not in the end have been needed. All parties therefore accept that the other costs incurred were incurred reasonably so far as the expenditure on the new lift was concerned.

8. The relevant legal provisions are set out in the Appendix to this decision. Additionally, rights of appeal are set out below in an annex to this decision

9. Certain technical abbreviations and acronyms appear in this decision in relation to the expert evidence provided to the Tribunal. Therefore, the following definitions and guidance notes might assist.

    (i) LOLER; – these are the Lifting Operations and Lifting Equipment Regulations 1998. These Regulations place duties on people and companies who own, operate or have control over lifting equipment. This includes all businesses and organisations whose employees use lifting equipment, whether owned by them or not. All lifting operations involving lifting equipment must be properly planned by a competent person, appropriately supervised and carried out in a safe manner. LOLER also requires that all equipment used for lifting is fit for purpose, appropriate for the task, suitably marked and, in many cases, subject to statutory periodic 'thorough examination'. Records must be kept of all thorough examinations and any defects found must be reported to both the person responsible for the equipment and the relevant enforcing authority.

    (ii) LIFTCERT; – Is a company given approval as a notified body under the Lift Regulations 2016 and the Supply of Machinery (Safety) Regulations 2008.

(Lift Cert Ltd is a company approved as a Notified Body under the requirements of the Lifts Regulations 2016 by BEIS – Department for Business Energy and Industrial Strategy. The regulations implement the European Communities Lifts Directive (2014/33/EU)). They restrict the scope of their approvals to those companies involved in the Lift Industry as designers, manufacturers, suppliers, installers, testers, service, refurbishment, consultants and trade bodies representing the lift industry.

(iii) EN81-21 and EN 81-1; – The first of these is the 2018 Safety rules for the construction and installation of lifts - lifts for the transport of persons and goods. New passenger and goods passenger lifts in existing buildings. It applies to the permanent installation in existing buildings of new passenger and goods/passenger lifts, where some of the requirements of BS EN 81-20:2014 cannot be met due to limitations enforced by building constraints. The second of these is a previous European lift standard that changed in 2017. All new lifts placed into service after 31 August 2017 must comply with the new legislation. The introduction commenced with a three-year transition period which ultimately saw the previous standards EN 81-1 and EN 81-2 phased out completely, by 31st of August 2017.

(iv) CP114; - The Structural Use of Reinforced Concrete in Buildings (various editions). This concerns the structural use of reinforced concrete in buildings and deals with reinforced concrete, design and construction as applied to beams, slabs, columns, flat slab construction, walls and bases in buildings. Also deals with floors, roofs and stairs. The recommendations cover materials, strength requirements and permissible stresses in steel and concrete.

The hearing

10. The applicant was in person assisted by Dr Lowe and the respondent was represented by Ms L Hodgson. At the start of the hearing both parties confirmed that the expert evidence from both sides was agreed and that therefore neither expert was in attendance to give evidence or be cross-examined. The Tribunal therefore considered the reports and supporting documentation to provide the details of the expert evidence.

11. The tribunal had before it an electronic/digital trial bundle of documents prepared by the parties, in accordance with previous directions. The bundle was supplemented by some additional documents submitted in the week prior to the hearing. No objection to them was received by the Tribunal prior to the hearing. These documents were helpful and their late inclusion did not seem to the Tribunal to cause any prejudice and as such were allowed as late evidence. The Tribunal decided that it would be fair and proportionate to allow this late evidence and therefore included it in all its deliberations.

12. 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 MoJ 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 a bundle of many pages, the contents of which we have recorded and which were accessible by all the parties

The background and the issues

13. In the context of the Covid 19 pandemic and the social distancing requirements the Tribunal did not consider that an inspection was possible. However, the Tribunal was able to access the detailed and extensive paperwork in the trial bundle that informed their determination. In these circumstances it would not have been proportionate to make an inspection given the current circumstances and the quite narrow issues in dispute.

14. The dispute relates to the new lift in the property. The lift in question is a 4-person / 300Kg passenger electric traction lift installed by Liftworks serving 4 landings, these being the Ground, First, Second and Third floor. The lift was installed during 2017 and commissioned in July 2017. It is a value engineered product designed to meet with low usage / low volume of traffic predominantly within a domestic/residential environment. The lift is motor room-less with the machinery located at the head of the lift shaft (i.e., within the lift shaft) and the controls located within a locked under-stairs cupboard at the ground floor landing within the lift lobby.

15. The lift in question replaced an older design passenger lift which was of an electric traction bottom drive variety, with the motor room located within the basement of the Ground floor flat. This motor room was made redundant by replacement of the lift, and remains as a void space directly below the lift pit.

Summary of the applicant's expert evidence

16. The applicant employed an expert to provide the report agreed by the other side. Will Borg, Managing Director of Consulta Lift Limited., Innovation Centre Medway, Maidstone Rd., Kent ME5 9F compiled the report. He is a Vertical Transportation Consultant, having spent the last 36 years in the Lift Industry, and qualified initially via an indentured 4-year apprenticeship with OTIS Elevator Plc. in 1988 during which time he gained the relevant BTEC, EITB and City and Guilds qualifications together with a Distinction in Lift Technology.

17. His findings can be summarised from his report issued in July 2018 as follows: -

18. "The lift has been installed broadly in compliance with the specification issued by Butler & Young in that the materials and components are of sufficient quality and design and fit for purpose for which the lift is intended to be used.

19. The lift is compliant with the requirements of BS EN81:1 (The standard applicable at time of installation – with the exception of the depth of the lift pit AND the occupied space beneath the lift pit.

20. Given the presence of an electrically interlocked collapsible buffer within the pit, our conclusion is that dispensation has been granted by the notified body with regard to the depth of the pit.

21. Given the absence of detailed documentation which the Applicant has requested repeatedly from the contractor, the contractor's notified body (LIFTCERT) and the respondent (correspondence which will be included as part of the applicant's bundle), it is our conclusion that there is no dispensation granted with regard to the second point of non-compliance-(i.e.) the occupied space beneath the lift shaft) and that a pier is required to be constructed beneath the area of the counterweight buffers below the lift pit slab (as would have been compliant under EN81:1 which was in force at the time of installation/ commissioning of the lift) OR, in line with the new standards EN81:20 which came into force on 31st August 2017, and is the current standard applicable the area below the lift pit (i.e. the cupboard within the basement of the Ground floor flat) is required to be back filled so that no area exists below the lift pit which can be occupied by person/persons.

22. The alternative to the building of a pier (EN81:1) or backfilling of the space (EN81:20) would be to retro-fit a safety gear to the lift counterweight, which in our opinion is neither technically possible given the clearances available, nor advisable given the disruption and

costs which would far outweigh the pier or the backfilling solution to compliance."

23. The applicant says that the consequences of the altered specification were that £7,265 (+VAT) was paid towards works which had not taken place and a further sum was also in dispute. £2,000 (+VAT) had been included by Liftworks in their original 2016 tender as a provisional sum for the cost of seeking dispensation from the lift notifying body in respect of the lift pit depth. It was only subsequently and following a site visit that Liftworks realised that the lift pit would have to be demolished. Thus, the provisional sum of £2,000 (+VAT) set aside for possible dispensation in respect of the lift pit headroom was no longer relevant, yet Liftworks claimed it in their final invoice. It would appear that this also represents an overpayment for which the applicant says a refund is due.

Summary of the respondent's expert evidence

24. The respondent employed an expert to provide the report agreed by the other side. Paul Bartolo of The Lift Consultancy of 123 Minories London EC3N 1NT compiled the report in April and May of 2020. In his executive summary he observed that the vertical transportation in this residential building consists of a single electric-traction passenger lift installed in 2017 by Liftworks and serving four floors G, 1, 2 & 3 with a capacity load of 4 persons/300 kg and a rated speed of 1.0m/s with a front only 2-speed centre opening door arrangement. The expert observed that the overall condition, operation and reliability of the equipment can be classed as good.

25. He then confirmed that the company were asked to visit site to ascertain whether the current lift installation is compliant to the relevant standard. He says in findings that "We were able to independently ascertain from our site visit, the documentation reviewed and liaison with the lift installer, that the current Lift is installed to EN81-21. We have obtained confirmation of the location of the pier under the counterweight from the lift installers and this is provided in the appendix. We have also had sight of a letter from a structural engineer dated 22/06/2017 stating that the pit slab is capable of taking the most onerous loading from the new lift arrangement. Conclusion. The lift is correctly installed to EN81-21 as indicated in the Declaration of Conformity and is therefore fully compliant and a LOLER inspection should be undertaken prior to the lift going into service. There is no requirement for LIFTCERT or any other notified body to issue any further certification."

26. The Tribunal was shown a copy of the letter dated 22/06/2017. This was issued by Conisbee Consulting Structural Engineers. In it Bob Stagg BSc CEng FIStructE MICE wrote

"Further to my visits and research, I confirm that the existing lift pit slab is capable of taking the most onerous loading from the new lift arrangement, as detailed in my email dated 16th June 2017and confirmed as correct by Jason Brown of Liftworks in his email to me dated 21st June 2017.

That loading is as follows and is shown on Liftworks drawing No. 15141064/01/01 dated 7th February 2017.

The heaviest load is the car buffer at 3.3 tonnes but this is so unlikely to ever been used, since the car has a safety mechanism to stop it free falling, that it can be ignored. The same logic applies to the other buffer which according to the drawing could impose 3.3 tonnes on the slab.

The counterweight does not have a safety mechanism however so in the very unlikely event of the ropes breaking, it could free fall and would hit its buffer with a load of 2.7 tonnes. At the same time, it is possible that the car safety mechanism would activate and that imposes a downward load on the car guide rails of 1.4 tonnes on each. I have therefore checked the slab under the 3 point loads of 1.4, 2.7 and 1.4 tonnes combined.

Since this loading would only apply in an emergency situation, I have used ultimate limit state design and not factored up the loads.

I have assumed that the slab will have at least the minimum amount of reinforcement required by the concrete design codes in force at the likely time of construction, CP114. That required an amount of steel reinforcement in the slab to be equivalent to at least 0.15% of the area of the concrete section. This is a reasonable assumption. I also gain comfort from the evident good workmanship and robust nature of the lift and its shaft.

To take the loads detailed above, I estimate that the amount of reinforcement would need to be about 0.13% of concrete area, i.e. less than 0.15% and therefore the existing slab is adequate. It follows that the new steel post which was proposed to be installed under the lift pit slab below the counterweight buffer position is not needed."

Decision

27. The tribunal is required to consider whether the services were reasonably incurred and were they of a reasonable standard. To do this the Tribunal considered in detail both reports from the lift experts and

the surrounding documentation as well as the oral comments provided by the parties at the time of the video hearing.

28. The Tribunal were required to consider the lift installation in this property. The Tribunal were shown a "Declaration of Conformity from Liftworks in which that company "declare that the lift has been installed in conformity with The Lifts Regulations 1997 and the Council Directive on the approximation of the Laws of the Member States relating to lifts 95/16/EC and confirm compliance with the requirements of those Regulations. Also, EMC Directive 2004/108/EC." This is backed up by the conclusion of the expert acting for the respondent that confirms that the lift is correctly installed and is now fully compliant.

29. However, the applicant maintains that at the time of installation the lift was non-compliant due to issues outstanding in relation to the need for a brickwork pier underneath the area of the counterweight. He wrote "the work undertaken in building the blockwork pier underneath the area of the counterweight, now means that the lift installation complies with the standard in force at the time it was placed into service which is EN81:1.....Clearly, the lift did not fully comply to EN81:1 in the aspect of the occupied space within the area below the lift pit between the time it was commissioned and , this having been put right in January this year, surely means that the contention now is the intervening time between the two clear states which both the Respondent's lift consultants and ourselves are in agreement on." The tribunal was told that the brickwork installation was carried out at no cost to the respondent or the tenants. It was the view of the respondent that this work was not necessary but was carried out to try to resolve this dispute.

30. Accordingly, it would appear that at the time of the hearing all parties now accept that the lift installation is fully compliant and safe. However, it also apparent to the Tribunal that for a period after the installation the lift may not have been fully compliant for all the reasons touched upon above. Whether it was or was not so compliant is still largely unresolved for this intervening period, but does this make the service charge unreasonable? The Tribunal is mindful of the fact that the lift is now seen by all parties to be compliant and in a safe working condition.

31. It is the case that some blockwork has been carried out for whatever reason at no cost to the leaseholders and so therefore it seems to the Tribunal that there are no grounds for finding any unreasonable service charge. As Mr Stagg the structural engineer wrote "I also gain comfort from the evident good workmanship and robust nature of the lift and its shaft.... I estimate that the amount of reinforcement would need to be about 0.13% of concrete area, i.e., less than 0.15% and therefore the existing slab is adequate". From this extract from the letter written in

2017 the Tribunal take from it that the structural engineer thought the arrangement safe notwithstanding the comments made by the applicant's expert.

32. As the respondent noted "the Respondents had no reason to believe that the lift was not in compliance and reasonably relied on the experts involved. When Mr. Fernandez raised his objections, Quadrant – the managing agent - sought to understand and get to the bottom of them. There were conflicting views. With continuing pressure from Mr. Fernandez, eventually in the summer of 2019, it was recommended to add one layer of bricks to the lift pit in order to resolve the difference of opinion only. The works were scheduled for 2 December 2019. Liftworks rescheduled and the work was done on 31st January 2020. There was no cost. As the Independent Lift Consultant wrote in his report "The lift is correctly installed to EN81-21 as indicated in the Declaration of Conformity and is therefore fully compliant." The lift has a LOLER certificate, which states that it is safe to operate. It is also fully insured. As the Lift Consultant wrote: "There is no requirement for Lift Cert or any other notified body to issue any further certification"". The Tribunal accepts this as a satisfactory depiction of the disputed process.

33. The amounts challenged by the applicant come within the budget for the lift installation and the Tribunal cannot find any convincing evidence that they were unreasonably demanded particularly when a refund in taken into account that was made by the contractors in the sum of £2665. The fact that all parties now accept that the lift is fully compliant enables the Tribunal to determine that the installation works have been carried out to a reasonable standard thus making the charges reasonable.

34. For all the reasons set out above the tribunal is of the view that the service charges for the installation of the new lift at this block are reasonable and payable by the applicant.

Name: Judge Professor Robert Abbey **Date:** 22 December 2020

Appendix of relevant legislation and rules

Landlord and Tenant Act 1985 (as amended)

Section 18

(1) In the following provisions of this Act "service charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent -
   (a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord's costs of management, and
   (b) the whole or part of which varies or may vary according to the relevant costs.

(2) The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable.

(3) For this purpose -
   (a) "costs" includes overheads, and
   (b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

Section 19

(1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period -
   (a) only to the extent that they are reasonably incurred, and
   (b) where they are incurred on the provisions of services or the carrying out of works, only if the services or works are of a reasonable standard;

   and the amount payable shall be limited accordingly.

(2) Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise.

Section 27A

(1) An application may be made to the appropriate tribunal for a determination whether a service charge is payable and, if it is, as to -
   (a) the person by whom it is payable,
   (b) the person to whom it is payable,

(c) the amount which is payable,
(d) the date at or by which it is payable, and
(e) the manner in which it is payable.

(2) Subsection (1) applies whether or not any payment has been made.

(3) An application may also be made to the appropriate tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to -
(a) the person by whom it would be payable,
(b) the person to whom it would be payable,
(c) the amount which would be payable,
(d) the date at or by which it would be payable, and
(e) the manner in which it would be payable.

(4) No application under subsection (1) or (3) may be made in respect of a matter which -
(a) has been agreed or admitted by the tenant,
(b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
(c) has been the subject of determination by a court, or
(d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

(5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

ANNEX - RIGHTS OF APPEAL

1. 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.

2. 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.

3. 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.

4. 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.