FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00BF/LSC/2020/0195**
HMCTS code (paper, video, audio)	**:**	**V: CVPREMOTE**
Property	**:**	**Old Inn House 1 – 4 Carshalton Road Sutton SM1 4RA**
Applicant	**:**	**Elegant Properties Limited**
Representative	**:**	**Steven Newman solicitor of D & S Property Management Limited**
Respondent	**:**	**Leaseholders of Flats 1 – 28 (excluding Flat 15 which has no parking space) and the Residents Association**
Representative	**:**	**Ms Elizabeth Fisher**
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	**:**	**Mrs E Flint FRICS** **Mr T Sennett MA FCIEH**
Venue	**:**	**10 Alfred Place, London WC1E 7LR**
Date of decision	**:**	**13 July 2021**

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 V: CVPREMOTE. A face-to-face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. The documents that we were referred to are in two bundles totalling 760 pages, the contents of which we have noted. The order made is described at the end of these reasons.

Decisions of the tribunal

(1) The tribunal determines that the sum of £29,844.00 is payable by the Respondent in respect of the service charges for 2020.

(2) The tribunal makes the determinations as set out under the various headings in this Decision.

(3) The tribunal makes an order under section 20C of the Landlord and Tenant Act 1985 so that none of the landlord's costs of the tribunal proceedings may be passed to the lessees through any service charge

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 charges payable by the Respondent in respect of the service charge for 2020.

The hearing

2. The Applicant freeholder was represented by Mr Steven Newman, solicitor of D & S Property Management and the Respondents were represented by Ms Elizabeth Fisher of counsel, except for Mr Imran Khan of Flat 14 who represented himself.

The background

3. The property which is the subject of this application is a former office building which has been converted to 28 flats plus commercial premises and a basement car park. The building comprises self-contained residential flats, internal common parts, external common parts and commercial units.

4. The flats were marketed as "***a stunning new development of 28 stylish one and two bedroom apartments***", allocated basement car parking spaces were also available. Vehicular access to the basement

car park was via a car lift. It is the car lift which is the subject of this application.

5. A limited number of photographs of the building were provided in the hearing bundle. Neither party requested an inspection and the tribunal did not consider that one was necessary.

6. The Respondents hold long leases of their flats and car parking spaces which require 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 will be referred to below, where appropriate.

The issues

7. At the start of the hearing the parties identified the relevant issues for determination as follows:

   (i) The payability of service charges for 2020 relating to replacement of the RAM cylinder and associated works to the car lift.

8. Having heard evidence and submissions from the parties and considered all of the documents provided, the tribunal has made determinations as follows.

9. The amount in dispute at the date of the application was stated to be £103,609.73 because the Applicant proposed to undertake either substantial repairs to or the complete renewal of the Car Lift. However, in late 2020 the work considered to be necessary had been revised to replacement of the RAM cylinder and associated works and the costs reduced to £29,844 including VAT.

10. Mr Newman said that Section 20 consultation had been completed, the most competitive quote had been accepted, being the lowest cost of all the options considered.

11. A copy of the lease for flat 1 was included in the bundle since essentially all the leases were in similar form.

12. The landlord's obligations to repair the "Building" in general and the car lift specifically are set out at clause 4.4: "*Subject to the Tenant paying the Service Charge to maintain repair rebuild (as necessary) …refurbish …. and renew to include reasonable improvements …. The Common Parts …*"

13. The common parts are defined at clause 1.2 as being "*those parts of the building not otherwise exclusively demised to and or exclusively serving*

or benefitting any one flat and or any other lettable unit in the Building". The definition is detailed in the subclauses and lifts are specifically referred to in clause 1.2.3.

14. The Respondents obligations to contribute towards the service charge costs are set out in clause 3.1.2.2 of the lease and the relevant percentage is 3.125%.

15. The Respondents did not assert that the Section 20 consultation process was defective.

16. It was accepted by both parties that there had been issues with the reliability of the car lift once it had been installed.

The Applicant's evidence

17. The Applicant is the registered proprietor of the property known as Old Inn House, 1-4 Carshalton Road, Sutton, SM1 4RA ("the Building") as registered under title number SY296862. Mr Newman referred to the lease provisions relating to the landlord's repairing covenants and the leaseholders' covenants in relation to the service charge account.

18. Mr Newman explained that since the inception of the leases there had been a number of issues with the functioning of the car lift. Between March and November 2017 there had been 14 call outs, 11 of which were attributed to the doors. Various repairs had been carried out, some had been charged to the service charge account; others had been paid for by the freeholder, as a gesture of goodwill. In addition to the functionality of the lift, issues had been flagged on the maintenance reports and inspections undertaken by the insurers of the lift, in particular the leaking of oil into the pit.

19. Mr Newman said that the proposed works fall within the Applicants repairing covenant as set out above as it is a reasonable repair or improvement benefitting all leaseholders who have a parking space in the basement car park.

20. In October 2017 Summit, the long standing maintenance contractors recommended that the RAM piston and cylinder be replaced as it was old and worn while the doors, lift car, controller and ancillary equipment had already been replaced.

21. A second opinion was sought from Stannah Lift Services Limited. Stannah identified the main issue as being the oil leak rather than the piston/ram cylinder in their report of 15 November 2017. The Applicant instructed Stannah to carry out the works which included an overhaul of the doors and realignment at a cost of £16,200.07. The cost was paid for by the applicant and not charged to the service charge account.

22. The number of callouts was reduced once the issue with the doors had been resolved resulting, in Mr Newman's opinion, in the longstanding issues being resolved.

23. The lift insurers required regular inspection reports. The reports referred to ongoing oil leakage into the pit despite the ram seals having been replaced on a number of occasions. It was for this reason that the RAM cylinder was to be replaced.

24. The Section 20 consultation process was commenced by D & S Property Management in early November 2019. Following the final stages of the consultation process and having taken into account the representations made by or on behalf of the Leaseholders, regarding the costs of the works the freeholder decided on the proposed course of action. He said that it was clear from the Leaseholders' comments that the general view was that the Leaseholders should not pay for the works.

25. The Applicant had decided to replace the RAM Cylinder rather than carry out any other options because the lift cab had been replaced in 2016, in addition the remote control system had been replaced, the car lift doors overhauled and new lift shaft screening provided in 2018, all at the cost of the Applicant. If there were to be future problems with the lift doors, they could be addressed as and when because they are easily accessed.

26. The Applicant had approached the providers of the 10 year Structural Warranty and Zurich, the engineering insurers for the building. Both insurers had rejected the claims.

27. Mr Newman referred to the pre-contract documents supplied to all potential buyers and a copy of the marketing particulars. He noted that there was no reference to a new car lift in the particulars. He referred to a copy of the contract entered into by the Respondents for the purchase of their individual flats. The contracts detail the documents and representations which are and are not incorporated into the contract. Further the Buyer confirms within the contract that oral or written representations other than in the contract itself, documents annexed thereto or in the Sellers solicitors replies to the Buyers solicitors precontract enquiries shall not be relied upon.

28. Mr Newman called Mr Sheldon Fry of Elegant Properties Limited to give evidence.

29. Mr Fry confirmed that he had overseen the conversion, prior to any leases being granted and that it had never been the Applicant's intention to provide a new car lift because the building was a former office building with a car lift already installed. He had instructed the selling agents and denied telling them that a new car lift was to be installed. He accepted

that when prospective buyers had inspected the building the original lift car was not in situ.

30. During cross examination he said that the offer in November 2017 to pay for the cost of repairs if the insurers rejected the claim in respect of the long term issues which had been experienced with the lift was a goodwill gesture which had been satisfied following the overhaul of the doors. The email from D & S was not intended to be an offer to replace the lift.

31. He agreed that the flats had been marketed as a "new development" but said that was not the same as a new build. The flats themselves were new. He did not accept that buyers would expect all of the common parts to also be new. The fabric of the building was not new, the car lift was the same age as the building. When converting a building the developer uses as much as possible of the existing building, including the car lift. A new passenger lift had been installed because there was none when the building was used as offices.

32. It was apparent that the development was not a new build; it was a new development of flats sold with basement car parking spaces.

33. He agreed that it was the Applicant's intention to provide a functioning car lift. He believed the lift was working in early 2017.

34. Summit had advised that the RAM should be renewed on 9 January 2018, only Flat 3 had completed in 2018. He was referred to the timeline attached to the witness statement of the lessee of Flat 12: 15 March 2017 the car lift was left complete and working. 25 March 2017 the car lift was not working. He said lifts break down, even new ones. The passenger lift had broken down and it was a completely new lift.

35. During cross examination Mr Fry was unable to confirm whether the applicant had obtained a mechanical engineer's report when the building was purchased. He understood that the contractors had been asked to advise what works were required to make the lift functional. Summit knew the building and the lift very well. However, the applicant had considered it prudent to obtain a second opinion regarding the work necessary to ensure the functionality of the lift and had asked Stannah to report on the appropriate action to take. Stannah had reported back after consulting their hydraulics specialist. He was not aware if the hydraulic specialist had actually visited the building.

36. The applicant understood that the doors caused the lift to breakdown so frequently. Hence the applicant had paid for the doors to be adjusted to solve the ongoing problems. In doing so the applicant had fulfilled the promise, made in the email of 20 November 2017 sent by D & S, to pay for the long term issues. The frequency of the breakdowns had reduced significantly after this work was completed.

37. Mr Fry confirmed that none of the buyers' solicitors had raised a question regarding guarantees for the car or passenger lift.

38. Mr Newman contended that whether a building is in disrepair or not is to be judged against its condition at the commencement of the leases. When the leases were granted the car lift had an old ram cylinder. Therefore, he submitted the applicant is not obliged to provide a new ram cylinder as part of the development. However, the applicant, under the terms of the leases, is required to maintain the car lift to the standard it was at the inception of the leases. The wording in the leases enables the landlord to refurbish and undertake reasonable improvements.

The Respondent's evidence

39. Miss Fisher called Mr Chick of flat 18 to give evidence, he was acting as the unofficial representative of the residents' association and speaking on behalf of the respondents.

40. Mr Chick said that he had visited the development on 8 August 2016. He had seen the show flat which had been completed and flat 18 which was not finished at the time. He described the development as a building site: the basement was being used to store building materials, the car lift was in bits and he was told by the agent that it was going to be replaced.

41. The marketing material referred to Old Inn House as being a new development. Many of the flats had been purchased via the government's Help to Buy scheme whereby the government provided 40% of the purchase price. He understood the scheme was only available for new developments. Those flats purchased with a parking space should have included a new car lift rather than one 56 years old. Alternatively, the car lift should have been refurbished to a suitable standard to service the flats; in fact it had broken down within days of being commissioned. It was incumbent on the landlord to provide a working car lift as this is the only means of accessing the basement car park in a vehicle.

42. He referred to the fact that the solicitors for flats 12 and 27 had raised queries regarding the car lift and had been advised by the applicant's solicitors that the car lift was to be replaced. He was of the opinion that the lift was not fit for purpose and at the time of writing his witness statement the lift had been out of order for the whole of the previous weekend (16 and 17 January 2021) and consequently he could not use his car.

43. He accepted that as a first-time buyer he had been naive in taking what he had been told by the estate agents and the gloss in the marketing details at face value. He had assumed that a new development meant just that: the flats and common parts, including the lifts would be new. There was no reference in the brochure to part of the building being

refurbished. He understood that the building was a former office building which had been gutted to create new flats. He did not consider making cosmetic changes solved the wear and tear issues which had existed prior to the flats being sold

44. He had used the solicitors recommended by either the estate agent or the applicant because he had been told that he would receive a special deal if he used the particular firm of conveyancers.

45. Miss Eleanor Hacker of Flat 1 gave evidence. She had purchased the show flat. When visiting the development on 5 April 2017 she had viewed the car park and asked if the car lift was new. She said that she was told it was new. She could not remember a time when the car lift was working properly, it was always broken down over the Christmas holidays. She agreed that there had been some improvement since late 2020 although it was still not fully functional.

46. In reply to Mr Newman Miss Hacker confirmed that her contract contained the same terms as Mr Chick's. When asked if her concern was that the car lift was not new or not functional, she said if the lift had functioned properly, she probably would not have thought about it but now was of the view that only a new lift would suffice. She explained that she had bought a new flat in a new development so that she would not have to pay for ongoing repairs as you would if you bought an old property.

47. Mr Chang's witness statement at p466 of the bundle was taken as read.

48. Mr Khan said he had nothing further to add. The parking was not ready when he moved in. He had the same issues with the lift. The budget for 2021 includes £3000 for solicitor's fees for the application which he thought should not be paid for by the leaseholders.

49. In closing, Miss Fisher advanced three arguments in support of the respondents' contention that the costs in dispute should not be added to the service charge account. The Residents association view is that the landlord has not discharged its obligations regarding the provision of a fully functioning lift and therefore the leaseholders should not pay for the works.

50. She said that the respondents understood that there was to be a new car lift. The property had been marketed as a "new development", there were no caveats or suggestions that parts of the flats or communal areas would not be new. The landlord relies on fact that the external walls are not new but the car lift, unlike the walls, is liable to break down due to wear and tear. She submitted that the landlord's argument is untenable.

51. The car parking spaces were generally purchased with the individual flats. The car lift provided the sole vehicular access to and from the car park. It was reasonable to assume that a new development would include a new car lift. Moreover all the witnesses had stated that the estate agents had told them that there would be a new car lift. This was supported by the emails at p239 and p453 of the bundle.

52. Little weight should be placed on the evidence of Mr Fry who she said had been evasive, argumentative and speculative in his evidence e.g. his reasons for choosing Stannah to carry out repairs rather than Summit who were very familiar with the workings of the lift. She noted that the quotation from Stannah had not been obtained before the November email from D & S had been sent to the leaseholders. In addition, he had not provided any evidence regarding his instructions to the estate agents, despite his assertion that the estate agents would not have said that a new car lift was to be provided, contradicting the evidence of the Respondents.

53. The landlord has attempted to distinguish between a car lift and a lift car. However, in correspondence the terms were used interchangeably.

54. Miss Fisher further contended that as the landlord had failed to show that it had provided a car lift to a satisfactory standard the costs of the works should fall to the landlord. The leaseholders were entitled to rely on the email of 20 November 2017: the wording was unequivocable: the freeholder was going to pay for the long-term fix. The email should be taken at face value and any doubt determined in favour of the leaseholders. The contents of the email should be binding on the Applicant.

55. The Applicants consider that they have discharged their obligations, some payments have been made as a "gesture of goodwill". She reminded the Tribunal that Summit had advised that the RAM needed replacing, there was no explanation for going against the advice of Summit who were familiar with the lift. There was no evidence to suggest that Summit were not hydraulics experts. Whereas there was no evidence that Stannah's hydraulic expert had inspected the lift or issued a full report.

56. Miss Fisher asked the Tribunal to find that the Applicant was bound by the undertaking if the 17 November email, overriding the lease provisions.

57. She said that although there had been no formal section 20c application, she was making one now and asked the Tribunal to grant the application because through no fault of their own the leaseholders had purchased flats with a defective car lift.

58. Mr Newman in closing said that if the Tribunal finds that some correspondence between solicitors indicates that there was to be a new car lift, only those lessees could benefit from those statements.

59. The contracts had been drawn up to avoid representations by agents binding the freeholder. It was easy to misunderstand and treat a new lift car as a new car lift. None of the marketing details referred to a new car lift, nor do any of the guarantees supplied on completion.

60. The question is what was provided and what was done to make the lift operational. He accepted that there had been problems at the outset. Summit had recommended that the RAM cylinder be replaced. A second opinion was sought from Stannah. The landlord was entitled to decide how to discharge his obligations. Following the repairs paid for by the freeholder the frequency of the breakdowns had been significantly reduced.

61. He was of the opinion that the leaseholders wanted a new lift. The November 2017 email did not promise a new lift nor was it the landlord's intention to provide one. The Respondents had purchased new flats not new common parts. The landlord's obligation was to keep the lift working. The landlord has the right to make improvements i.e. replace the RAM cylinder which was leaking oil: this had been flagged up in the 6 monthly inspection reports. Although the repairs recommended by Stannah had not stopped the oil leaking the frequency of the breakdowns had decreased.

62. The D & S email of 20 November 2017 cannot be used to vary the terms of the leases. Following that email the lift doors had been replaced, the lift broke down less often. The Ram cylinder replacement was different work and should be paid for via the service charge account.

63. As to section 20c: if the landlord is successful the costs should be added to the service charge account. It was a matter of perceived fairness.

The tribunal's decision

64. The tribunal determines that the amount payable in respect of the replacement of the ram cylinder piston together with the associated works is £29,844 including VAT.

Reasons for the tribunal's decision

65. Repair and maintenance of the lifts falls within the definition of works which can be charged to the service charge account. The D & S email of 20 November 2017 did not vary the terms of the leases.

66. The lift was refurbished prior to or contemporaneously with the creation of the new leases. What was not replaced was the 50 year old original RAM cylinder and piston, which is the key component of the mechanism. In October 2017 Summit recommended that the RAM be replaced. They had noted that the original contained a welded join to reflect the depth of travel of the lift car necessary to descend to the basement garage level. They also noted that replacement or repacking of seals would not provide a long term solution and that replacement was a given. The condition of the RAM was evident when stripped down (cf p 113).

67. However, as the works are covered by the service charge regime in the leases the Tribunal's jurisdiction is limited to a consideration of the standard of the actual works, the subject of the application and the reasonableness of the costs.

68. The Tribunal accepts that the landlord is entitled to choose the method of maintenance under the terms of the lease and is satisfied that the works to replace the Ram piston and associated works were necessary and properly undertaken.

69. It is not in dispute that the functionality of the lift has not been consistent since the leases were granted. This Tribunal does not have jurisdiction to deal with claims relating to whether the functionality of the car lift was in accordance with the leaseholders' expectations when they purchased their leases. If they wish to pursue that aspect of their case they may wish to take further advice.

Application under s.20C

70. At the hearing, the Respondent applied for an order under section 20C of the 1985 Act. Having heard the submissions from the parties and taking into account the determinations above, the tribunal determines that it is just and equitable in the circumstances for an order to be made under section 20C of the 1985 Act, so that the Applicant may not pass any of its costs incurred in connection with the proceedings before the tribunal through the service charge.

71. The Respondents were not successful however they had no option but to pursue their case because they had not been able to fully ascertain the background to the works. Their expectations of the lift in terms of its functionality from the outset had not been met nor was the landlord's undertakings in respect of the lift easily understood by all concerned. Had the Summit recommendation been actioned when reported, the disruption to amenity of the leaseholders could have been reduced and the leaseholders could have anticipated that the current charge would have been covered by the undertaking in the managing agents email of November 2017. However, the landlord's intentions only became clear during the course of the hearing.

Name: Evelyn Flint **Date:** 13 July 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).