FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	CHI/29UN/LSC/2020/0115
Property	:	Arlington House, All Saints Avenue, Margate, Kent CT9 1XP
Applicant	:	Sue Kenton (Flat 10H) 64 leaseholders named in the Schedule at 825-827 of the hearing bundle
Representative	:	John Keith Moss (Flat 11B)
Respondent	:	Metropolitan Property Realization Limited
Representative	:	Memery Crystal LLP
Type of Application	:	Reasonableness of service charges – Section 27A Landlord and Tenant Act 1985
Tribunal Member(s)	:	Judge Tildesley OBE Mr C Davies FRICS Mr D Ashby FRICS
Date and venue of Hearing	:	20 July 2021 Hearing conducted by means of Cloud Video Platform
Date of Decision	:	25 August 2021

DECISION

Summary of the Decision

1. The Tribunal determines that a service charge on account in the sum of £680,430 is payable in relation to major works for the refurbishment of the two lifts. The sum is made up of £535,000 for the lift works, £24,000 for surveyor's fees, £8,025 for managing agents' fees and £113,405 for VAT.

2. The Tribunal is not persuaded by Counsel's analysis of the lease that the Respondent has authority to recover the costs of these proceedings through the service charge. In the alternative the Tribunal makes an Order under section 20C of the Landlord and Tenant Act 1985 preventing the landlord from recovering the costs of these proceedings against the Applicants through the service charge.

Background

3. The Applicants seek a determination under Section 27A of the Landlord and Tenant Act 1985 as to whether a service charge on account in the sum of £826,725 is payable in relation to major works for the replacement of two lifts.

4. The demand for the service charge comprised £648,720 (contract price for the replacement of two lifts), £24,000 (surveyor's fees), £16,218, (managing agent's fee) and VAT of £137,787.60. The demand was originally issued on the 15 October 2020 and was subsequently replaced by a fresh demand requiring payment on 25 March 2021.

5. The Applicants also seek an order for the limitation of the landlord's costs in the proceedings under Section 20C of the Landlord and Tenant Act 1985 and Para 5A of the Commonhold and Leasehold reform Act 2002.

6. Arlington House is 1960's residential tower block with 18 floors consisting of 142 apartments located on the sea front in Margate Kent. The construction is of steel reinforced on-site-cast concrete.

7. The Respondent owns 36 flats in the building which are let on short assured tenancies. The remaining 106 flats belong to long leaseholders

8. The issue in this case concerned the proposed costs for the replacement of the two lifts in the building. The parties were agreed that the lifts required substantial works. The Applicants accepted that the works were urgent and necessary. The Applicants, however, blamed the Respondent for taking too long to carry out the works which had led to an unwarranted escalation in the costs. The Applicants argued that the Respondent had no reason to tender

the works following the Tribunal's decision on 12 May 2020 to grant the Respondent dispensation from the consultation requirements in connection with major works. The Applicants considered the Respondent's preferred option of the complete replacement of the two lifts with a standard passenger lift and a firefighting lift too costly and not required. Instead the Applicants contended for refurbishment of the lifts for which two quotations had been received at significantly lower costs than the preferred tender for replacement of the lifts.

9. Respondent's Counsel pointed out that there was no dispute that the works to the lifts should be carried out. According to Counsel, the dispute concerned what works should be carried out and what they should cost. Counsel summarised the parties' positions as: the Applicants preferred less comprehensive and less expensive works whilst the Respondent preferred the option that conformed to current standards which included a firefighting lift. In Counsel's opinion the dispute between the parties turned on the question of reasonableness.

10. Counsel submitted that costs were not the only factor to be considered when examining the issue of reasonableness. In Counsel's view the Respondent's preference for the solution that conformed to current standards and maximised fire safety at a cost that was not so great met the standard of reasonableness. Thus Counsel asserted that the Tribunal should accord the Respondent a margin of appreciation in making the final decision on which option should be taken forward in carrying out the necessary works.

The Proceedings

11. On 12 May 2020 the Tribunal granted the Respondent dispensation with conditions from the consultation requirements in respect of the proposed works to the lift.

12. This Tribunal notes that on 12 May 2020 that the Applicant had obtained a specification and quotation for the works which had gone out to tender and a tender report was produced. At [14] the Tribunal recorded:

> "The tender report recommended United Lift Services at a price of £442,685 plus VAT. The tender refers to administration and supervision being charged by Technical Lift Consultancy Ltd at 20%. This tender report of September 2019 recommended that the works should be "instructed without delay to avoid the certain probability that both lifts will suffer a critical failure, with any attempt at repair being uneconomical, due to the obsolescence of all the equipment".

13. At [27] the Tribunal imposed the following condition to the order for dispensation:

> "The Applicant will, at its own cost, procure a report from an independent lift engineer who has not previously reported on the lifts at the property. They will be specifically asked to comment whether in their opinion the lifts are obsolete and whether in their professional opinion replacement is a reasonable approach if the lifts are obsolete rather than repair or refurbishment. Such report shall be provided to all the leaseholders as soon as reasonably practicable after receipt and the Applicant shall have regard to the same.
>
> The Applicant shall serve Notification of Estimates including a schedule of any responses to the initial notice (in respect of which the window for observations has now closed). The time estimate for leaseholders to make any observations shall be reduced to 14 days from the date of service of this notice.

14. In accordance with the conditions on which dispensation was granted, the Respondent obtained an independent report from Griffin Elevators in June 2020 that was supplemented by an email on 12 June 2020. The Report concluded that the lifts were fully obsolete and required replacement in their entirety. The Respondent decided to commission a new specification from LCG Consultancy and obtained tenders from four companies with a further four companies declining to tender. The tender from Griffin Elevators at £648,720 plus VAT came in at the lowest and formed the basis of the supplemental demand for service charges which triggered this Application.

15. On 6 April 2021 the matter came before the Tribunal which after hearing from the parties decided that independent expert evidence was required in this case. The Tribunal gave the parties permission to rely on the jointly instructed written evidence of an expert consulting lift engineer and that the expert's report should be limited to the following issues:

    (i) whether replacement or repair of the two lifts in the building is appropriate, including the need for a firefighting lift;

    (ii) to prepare a specification of the required works;

    (iii) to prepare an estimate of the cost of the works.

16. Mr Ralph Michael Smith of Vertica Europe was appointed as the jointly instructed expert and he produced a report on 14 June 2021.

17. The hearing was reconvened on 20 July 2021 before a differently constituted Tribunal. The Applicants were represented by Mr Moss. Mr Edwards of Counsel appeared for the Respondent. Mr Smith the jointly instructed expert was also in attendance.

18. At the commencement of the proceedings Judge Tildesley directed that the proceedings to be held in private because Havant Justice Centre had been closed following a COVID outbreak. Judge Tildesley also informed the parties that Mr Davies, the valuer member had been an equity partner for Parsons Son & Basley the managing agents but this appointment had ceased in 2000, and that Mr Davies had had no contact with the firm. Judge Tildesley informed the parties that Mr Davies' involvement did not in his view constitute a conflict of interest because of the passage of time. The parties made no representations to the contrary.

19. The Respondent supplied a bundle of documents comprising 1123 pages. References to documents are in [ ]. The Applicants adduced witness statements from Ms Kenton (Flat 10H), Mr Moss (Flat 11B), Ms Barwell on behalf of Mr Moderegger (Flat 13F), Ms Whiting (Flat 12C), Mr Jastrzebi (Flat 10H), Mr Barnett (Flat 9F), Ms Stewart (Flat 5E) and Mr and Mrs Pengelly (Flat 7E). The witness statements were admitted as read with no cross examination by Counsel. The Tribunal heard from Mr Smith, the jointly instructed expert, who was asked questions by the parties' representatives.

The Facts

20. The critical matter in this case was whether the lifts at the property should be refurbished or replaced. In this regard the parties directed the Tribunal's attention to the surveys, quotations and tenders in the hearing bundle. The Tribunal also received expert evidence from Mr Smith.

21. The Applicants relied on the estimate supplied by Specialist List Services (SLS). SLS reported that the lift equipment was 58 years old and had been subjected to limited investment which had impacted on the overall reliability and condition of the lifts.

22. SLS' first report of 20 May 2020 recommended a price of £321,388 excluding VAT [574] plus an additional cost of £17,135.00 for health and safety works which gave a total cost of £338,523 excluding VAT for works to the lifts. The second report dated 29 March 2021 recommended a price of £374,290 [914]. SLS stated that if the works were carried out it would give a 20 to 25 year lifespan with parts to the lifts.

23. Mr Smith's view on the specification used by SLS was that it was refurbishment. Mr Smith stated that under the specification SLS retained the car interior and doors and landing doors, and that it was essentially limited to replacing the control systems. Mr Smith expressed concern that SLS did not intend to replace the lift machinery which he considered to be very worn. Also the retention of the landing equipment meant that no fire rating could be applied to the lifts. Finally, Mr Smith said that the reports made no reference to fire safety works.

24. The Tribunal noted that SLS's tender price for the specification prepared by LCG Lift Consultancy (full replacement) was £699,680 plus VAT [148].

25. The Respondent had carried out a tender exercise in July 2019 against the specification supplied by Technical Lift Consultancy Limited. The specification was entitled the "Modernisation of Two electric Passenger Lifts". The Respondent received three tenders Guideline Lift Services (£495,950 plus VAT), Liftec Lifts (£450,985 plus VAT), and United Lift Services (£442,685 plus VAT). In January 2021 the Respondent approached the two contractors offering the lowest tenders for an updated price. Only Liftec provided a new price which was £514,885 plus VAT. The Tribunal understands that TLC's specification was for refurbishment of the lifts not replacement.

26. The Respondent referred to the "Report on the Lift Installations at Arlington House" prepared by Griffin Elevators Limited dated 9 June 2020. The Executive Summary stated:

> "The lifts were originally installed by Otis in approximately 1962 as indicated by the controller identification plate available on site. Recent insurance reports were not made available at the time of inspection, as a result Griffin were unable to pass comment. The lifts have remained virtually untouched since installation with only minor works to the car finishes having been carried out. The major system components are life expired in accordance with CISBE Guide M. In accordance with the findings of this report it is recommended that the lifts are removed in their entirety and completely new lifts installed, along with a fully compliant Firefighting Lift as the building is over highest occupied floor is over 18m from the main entrance level. For the above works to be carried out, we would estimate a budget of £250,000.00-£300,000 for the standard passenger lift and £350,000.00- £400,000.00 for the firefighting lift excluding VAT, builders work and professional services which was estimated at £100,000".

27. The "Griffin Report" formed the basis of the specification dated June 2020 produced by LCG Lift Consultancy [82] which went out to tender. The Respondent obtained the following tenders for the works:

a) Target Lifts Ltd quoted for £792,386.80 plus VAT.
b) Specialist Lift Services Ltd quoted for £699,680.00 plus VAT.
c) Acute Elevators Ltd quoted for £691.680.00 plus VAT.
d) Griffin Elevators Ltd quoted for £648,720.00 plus VAT

28. The tender report recommended that Griffin Elevators were awarded the contract on costs and the most specification

compliant. On 9 March 2021 Griffin elevators revised the price upwards to £681,249 plus VAT (and a further provisional sum of £60,165 plus VAT for a backup generator) making a total cost £741,414 plus VAT. Their reason for the increase was because the cost of steel had nearly doubled in the UK since the works were first tendered which had led to larger than 15 per cent cost increases on the lift cars, architraves, guide rails, brackets, shaft facias, shaft division screens and all other architectural, structural and fabricated steel work. The raw material cost increases in the UK had also led to cost increases of the electrical works. Griffin Elevators indicated that it would maintain the revised tender until 30 June 2021.

29. Mr Smith opined that the lift equipment at Arlington House was substantially beyond end of life but he recommended major refurbishment rather than replacement on the grounds of reduced disruption to residents, assured robustness of solution and lower cost. Mr Smith stated that repair alone was not sufficient. Mr Smith also identified an imminent risk of failure with the lifts.

30. Mr Smith explained under his recommendation of refurbishment of the lifts the cars would be replaced but the counterweight, guiderails, and their brackets would be retained. Mr Smith would also let the eventual contractor decide whether to replace the sling in which the lift car was mounted. Mr Smith stated that the retained items would have no adverse effect on the performance and the safety of the refurbished lifts. Mr Smith pointed out that the counterweight was a lump of cast iron, and that the guiderails had not worn down appreciably and were within points of a millimetre of their thickness when they were installed some 50 years ago. Mr Smith indicated that if guiderails were replaced it might involve additional steelwork in the open side of the lift shaft to affix the new guiderails which now came in standard lengths. Mr Smith emphasised that in his proposal all other lift equipment would be wholly new.

31. Mr Smith's estimate of the costs of the proposed works was £490,000 excluding VAT or £588,000 including VAT. Mr Smith also included an estimate of costs of £28,500 for optional works excluding VAT or £34,200 including VAT. The optional works included essential electrical works of £9,000 which were only optional in the sense of whether the lift installer or a separate electrical works performed the works. The remaining £19,500 of costs for optional works included £16,000 for automatic rescue, £1,000 for directionally illuminated safety edges and £2,500 for the full painting of the machine room. Mr Smith stated that the automatic rescue enabled the lift to be moved to the next level so that occupants could get out more easily in the event of a lift failure. Mr Smith expressed confidence in the estimate of costs provided. Mr Smith said that he had analysed each line of expenditure to ensure the accuracy of the final estimate.

32. Mr Smith stated that lift 2 was a fireman's lift which was a regular passenger lift with a fireman's override control switch provided at ground floor level. The override switch enabled the Fire and Rescue Service to assume control of the lift in the event of fire. Mr Smith said that this was not the same as a firefighting lift which had better structural protection than the fireman's lift together with lift control and communication systems and a secondary back up power supply. Mr Smith stated that the firefighting lifts were used to bring both the firefighters and their equipment to the floors in the building where the fire was located.

33. Mr Smith argued that the need for the property to have a firefighting lift could not be answered as a "yes or no". Mr Smith stated that his recommendation for major refurbishment over replacement was not governed by a decision for or against a firefighting lift. Mr Smith acknowledged that if this was a new building a firefighting lift would be required because of the height of the building in line with BS 9991. Mr Smith said that BS8899 ("the Code") was the relevant code of practice for the improvement of firefighting and evacuation provisions to existing lifts. Mr Smith highlighted clause 5.1 of the Code which said that "any improvement of an existing lift towards the provisions of a firefighting lift was expected to have benefit to those carrying out fire and rescue operations". Mr Smith, however, indicated that the Code required the assessment of the benefit of a firefighting lift had to be performed in the context of a wider building fire strategy. Mr Smith also added that there was no legal requirement for existing lifts to be upgraded to a firefighting lift.

34. Mr Smith suggested that the question of improving the fire safety of lift 2 had not been considered as part of a wider building strategy for the property despite the existence of fire risk assessments and some building improvements .

35. The Applicants pointed out that an extensive programme of fire safety works had been carried out on the property following the issue of a Fire Enforcement Notice in May 2019 which was lifted in September 2020. The works included works to means of escape routes and communal doors and improved compartmentation individual flats. The Applicants stated that in 2020 two fire risk assessments had been undertaken on the property. According to the Applicants, the assessments had not identified the need for firefighting enhancements to the passenger flats. The most recent fire risk assessment had confirmed the viability of the "Stay Put" policy in the event of a fire in the building. Mr Moss indicated that there were staircases at either end of the building which could be used by the Fire and Rescue Service to access the floors to tackle any fire.

36. The Respondent relied on a letter from the Kent Fire and Rescue Service (KFRS) dated 17 June 2021 which had been provided with copies of the "Griffin" report and Mr Smith's report. KFRS said that every building should be provided with suitable access and facilities for fire-fighting purposes. According to KFRS, the time taken to move sufficient resources to the scene of operations had a direct impact on the rescue of casualties, the development of the fire and the safety of firefighters. KFRS said that its policy was that all tall residential buildings with an occupied floor greater than 18 metres above fire and rescue access level should be provided with a firefighting lift.

37. Mr Smith accepted that the improvement of the firefighting capability of lift 2 would be of benefit for the property. Mr Smith was of the opinion that the refurbishment of the lift 2 should include the firefighting features integral to the lift car. Mr Smith acknowledged that this would not achieve full firefighting status but would be a step in the right direction. Mr Smith stated that careful "cost versus benefit" consideration would have to be given to the more expensive items associated with full firefighting status. Mr Smith referred specifically to the cost of the generator to provide the secondary power to the firefighting lift. Mr Smith noted that Griffin had allowed a provisional sum of £60,000 for the generator but according to Mr Smith there appeared to be no consideration to where the generator would be housed and the associated building costs. Mr Smith also went into detail about protecting the lift car and shaft from the discharge of water by firefighters used to dampen a potential fire. Mr Smith acknowledged Mr Moss' point that excess water might escape via the stairwells.

38. Mr Smith supplied a document headed "Fire-use Feature Notes" which summarised the features of a firefighting lift, how they related to lift 2 and what actions might be required [1022]. Mr Smith explained that fire features associated with the lift car, such as the communication system, master control point, ancillary equipment and water-proofing could be incorporated in the specification at a relatively modest cost estimated at £20,000. In Mr Smith's view, this would enable the Respondent at some future date to implement a full firefighting lift without replacing the lift car and doors. Mr Smith advised that if a partial solution was adopted it would be important to ensure that the signage on the lift did not create confusion for the firefighters so that they knew that lift 2 was not a firefighting lift.

39. The Applicants asked Mr Smith for details of his fee if he was appointed as supervising engineer for the installation of the lifts. Mr Smith's quotation had three separate elements [1105]. A fee of £13,704 excluding VAT for the role of Supervising Engineer which included preparing the specification and going out to tender. A fee of £3,765 for Principal Designer (Construction Design and Management Regulations) who ensured compliance with health

and safety requirements and which would be carried out by a separate person. A fee of £5,195 for the role of Contract Administrator and Project Management. Mr Smith stated that it was essential to have a Supervising Engineer for the project so as ensure that the contractor delivered the works to the specification.

40. The Tribunal concluded on the facts that the two lifts at the property were beyond the end of life and that they required wholesale refurbishment as described by Mr Smith or replacement in their entirety. The Tribunal did not consider that the SLS' proposals of the 20 May 2020 and 29 March 2021 as favoured by the Applicants were viable. In the Tribunal's view, the proposals did not address significant issues of disrepair particularly in relation to the lift machinery, and failed to consider the question of fire safety. The Tribunal notes that when SLS was asked to tender for the enhanced specification prepared by LCG Lift Consultancy their price was almost £700,000.

41. The Applicants placed weight on SLS' indication that their proposals would provide an additional 20 to 25 years lifespan for the lifts which they contrasted with the lifespan of 15-20 years supplied by Griffin. The Tribunal did not consider SLS' lifespan realistic given the limitations of the specification to which SLS was operating.

42. The Tribunal observes that the tipping point between the choice of major refurbishment and replacement is whether a firefighting lift should be installed in the property. Although Mr Smith attempted to redefine the question as major refurbishment versus replacement, the facts of the dispute inevitably focussed on the importance of fire safety for a building which has 18 floors above ground level. The Tribunal concluded that there was no legal requirement to replace an existing lift with a firefighting lift but that it was a legitimate consideration which carried weight when deciding which option to pursue. Ultimately the choice of which option in the context of service charges would depend upon the assessment of the reasonableness of the costs within the meaning of section 19 of the 1985 Act.

Reasons

43. The Tribunal is deciding whether a service charge on account in the sum of £826,725 is payable in relation to major works for the replacement of two lifts. The amount of £826,725 comprised £648,720 (contract price for the replacement of two lifts), £24,000 (surveyor's fees), £16,218, (managing agent's fee) and VAT of £137,787.60. The demand was originally issued on the 15 October 2020 and was subsequently replaced by a fresh demand requiring payment on 25 March 2021.

44. In order to make its determination under section 27A of the 1985 Act the Tribunal has to be satisfied that (1) the service charges are recoverable under the lease (2) the charges are reasonable and (3) the charges have been properly demanded.

45. The parties accepted that the charges were recoverable under the leases. Respondent's Counsel explained that there was some variation in the precise wording of the relevant terms of the Applicants' leases but in every case the leases authorised the recovery of the costs associated with the major works to the lifts.[1] The Applicants did not challenge Counsel's construction of the lease. The Tribunal also agreed with Counsel's construction and is satisfied that the costs for the major works for the lifts are recoverable under the terms of the lease.

46. The Respondent accepted that the Applicants' leases contained different payment provisions, and that it followed that not all the Applicants were liable to pay the October demand by the due date[2]. The Respondent had corrected its mistake and issued new demands requiring payment by 25 March 2021. The Applicants raised no other issues about whether the service charge had been properly demanded. The Tribunal is, therefore, satisfied that the later demand requiring payment by 25 March 2021 is in accordance with the terms of the various leases held by the Applicants and the statutory requirements.

47. The contentious issue between the parties is whether the costs were reasonable. Section 19(2) of the 1985 Act provides the statutory test for on account service charges which is "where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable".

48. The Court of Appeal in *Avon Ground Rents Limited v Cowley* [2019] EWCA Civ 1827 ruled that whether an amount was reasonable as an advance payment was not generally to be determined by the application of rigid rules but should be assessed in the light of the specific facts of the case. The Court of Appeal added that considerations which should be taken into account in determining the question of reasonableness under section 19 (2) included the time at which the landlord was likely to become liable for the costs and how certain the amount of costs was. Further the wording of section 19(2) was intended to allow for flexibility, given that it did not define what was reasonable.

49. The Applicants asserted that there had been a historic failure by the Respondent to replace the lifts which had resulted in an unwarranted escalation of costs which would now have to be borne by the leaseholders. The Applicants in their statement of case

[1] See the Respondent's statement of case at [626]
[2] See Respondent's statement of case at [650].

referred to the Respondent's issue of section 20 consultation notices of lift works on three occasions during 2014 and 2015. Additionally in 2014 the Respondent obtained a specification for lift works from ILECS but did not progress it. Further in 2018 the Respondent again intended to carry out substantial lift works but did nothing. The Tribunal at [11] to [13] recorded the chronology of these proceedings starting with the grant of dispensation from the consultation requirements on the 12 May 2020 on the ground of the urgency of the works.

50. Counsel argued that the history of the Respondent's actions in relation to the repair of the lifts was not relevant to the facts of this case. Counsel relied on the decision of the Upper Tribunal in *Daejan Properties Ltd v Griffin* [2014] UKUT 206 (LC) at [88] which said:

> "As the Lands Tribunal (HH Judge Rich QC) explained in *Continental Ventures v White* [2006] 1 EGLR 85 an allegation of historic neglect does not touch on the question posed by s.19(1)(a), Landlord and Tenant Act 1985, namely, whether the costs of remedial work have been reasonably incurred and so are capable of forming part of the relevant costs to be included in a service charge. The question of what the cost of repair is does not depend on whether the repairs ought to have been allowed to accrue. The reasonableness of incurring the cost of remedial work cannot depend on how the need for a remedy arose."

51. The Tribunal agrees with Counsel's submission subject to the following caveats:

i. The Applicants may have a claim for damages in respect of any increased costs to the extent they are attributable to a breach of covenant. Such a claim may be expressed as a set off in an application to determine actual service charges or in court proceedings for breach of covenant. Council accepted this in principle but pointed out that the Respondent would deny that it was in breach of its repairing covenant, and asserted that the Applicants had not articulated within this application a compelling case for breach of covenant.

ii. The fact of delay as distinct from a potential cause of action for breach of covenant may be a relevant consideration for the assessment of reasonableness.

52. Counsel argued that this was a case where the Respondent was faced with two options each of which had reasonable outcomes, and that it was not for the Tribunal to interfere with the Respondent's chosen course of action if it produced a reasonable outcome. In support of his proposition Counsel relied on the Court of Appeal decision in *Waaler v Hounslow LBC* [2017] EWCA Civ 45 at [37]:

> "In my judgment, therefore, whether costs have been reasonably incurred is not simply a question of process: it is also a question of outcome. That said it must always be borne in mind that where the landlord is faced with a choice between different methods of dealing with a problem in the physical fabric of a building (whether the problem arises out of a design defect or not) there may be many outcomes each of which is reasonable. I agree with Mr Beglan that the tribunal should not simply impose its own decision. If the landlord has chosen a course of action which leads to a reasonable outcome the costs of pursuing that course of action will have been reasonably incurred, even if there was another cheaper outcome which was also reasonable."

53. Counsel contended that the Respondent's choice of adopting the recommendations of the Griffin report of total replacement of the lifts including the installation of a firefighting lift was reasonable. Counsel advanced the Respondent's case by the following propositions:

a) **Is the outcome on cost so significant that reasonableness required prioritising reducing it?** Counsel argued that the major works would run into hundreds of thousands of pounds (of which the Respondent would bear a considerable proportion). Counsel accepted that there would ultimately come a point where conforming to good practice would cost so much more than a 'next best' approach that it could not be justified. Counsel submitted in this case, the Respondent did not consider that point had been reached.

b) **Is it unreasonable for the Respondent to follow the recommendation to install a firefighting lift?** Counsel pointed out that it was possible to install a firefighting lift which conformed to current standards and good practice. Although it was not a legal requirement to have such a lift, the Respondent would be reluctant to economise by voluntarily departing from what had been recommended as good practice when it came to a matter as important as fire safety. Counsel said that the Respondent was supported in that position by the clear policy of Kent Fire & Rescue Service. Finally, according to Counsel, the Respondent's would be seen as a reasonable choice by current lessees not participating in this application and by future lessees.

c) **Does reasonableness require a new specification and tendering process?** Counsel stated that the Respondent opposed the argument that reasonableness required it to abandon the previous specification and use

the not yet finalised specification accompanying Mr Smith's report as the basis for a wholly new tendering process. That would entail substantial further delay. In circumstances where only one lift was operable and its future reliability very doubtful, avoiding further delay was a very weighty consideration.

54. Counsel in his Skeleton advanced other propositions involving "conflict of interest" and "the Applicants' evidence on lift works in other buildings". The Tribunal noted that Mr Moss did not advance these specific parts of the Applicants' case at the hearing, and the Tribunal decided that they were not relevant to the question of reasonableness. Counsel also addressed the shortcomings in the SLS' proposals which the Tribunal has dealt with at [40] above.

55. The Tribunal considers the Court of Appeal decision in *"Waaler"* represented a turning point in how the question of reasonableness in the context of service charges should be approached. Prior to *Waaler,* the focus was on the rationality of the landlord's decision-making process, the Court of Appeal shifted that focus by adding the concept of outcome which included the interests of the tenants. Lewison LJ at [46] said

> "Although I am fully aware of the desirability of predictability in the law and practice, and appreciate that landlords want to avoid the risk of non-recovery of costs incurred in good faith, the open textured nature of a test of reasonableness makes it dangerous even to attempt to be prescriptive. Factual situations are almost infinitely variable, and different considerations will come into play in different circumstances. Parliament has deliberately chosen an open ended and flexible test, and has left all factual determinations to the good sense of the F-tT.

56. The Tribunal finds the following facts:

a) The two lifts at the property were beyond the end of life and that they required wholesale refurbishment as described by Mr Smith or replacement as proposed by Griffin

b) There was no legal requirement to replace an existing lift with a firefighting lift but that it was a legitimate consideration which carried weight when deciding which option to pursue. Ultimately the choice of which option in the context of service charges would depend upon the assessment of the reasonableness of the costs within the meaning of section 19 of the 1985 Act.

c) There had been significant delay on the Respondent's part in implementing a satisfactory solution for the repair of the lifts which had been ongoing since 2014.

d) In May 2020 the Respondent had been granted dispensation from consultation requirements in respect of major works on the lifts on the ground that the works were urgent. The Respondent at that time was proceeding on a specification for major refurbishment of the lift which did not include a firefighting lift. The Tribunal acknowledges that as a condition of the dispensation the Respondent was required to procure a report from an independent lift engineers to comment whether in their opinion replacement was a reasonable option. In those circumstances the Tribunal accepts that the delay occasioned by the Respondent in considering the Griffin report was understandable.

e) The price for the wholesale replacement of the lifts with a firefighting lift was not certain, and the eventual price was likely to be significantly higher than the original tender upon which the service charge demand was based. On 9 March 2021 Griffin revised the price upwards for wholesale replacement with a firefighting lift from £648,720.00 plus VAT to £741,414.00 plus VAT (an uplift of 14.2 per cent). Also the Respondent indicated that there was no guarantee that Griffin would hold that price. Further Mr Smith indicated that the price supplied by Griffin did not include the cost of potential building works to house the generator for supplying the secondary power supply for the firefighting lift. Finally Mr Smith was unable to assess whether the generator proposed by Griffin met the necessary specification for a firefighting lift.

f) Mr Smith's estimate for refurbishment of the lifts was derived from calculating the likely cost based on experience for each line of expenditure which promoted confidence in the accuracy of the estimate. The estimate was in line with the tenders for the lift specification prepared Technical Lift Consultancy Limited for refurbishment carried out in July 2019.

g) Mr Smith supplied estimated costs for upgrading lift 2 so that the lift car and doors met the requirements of a firefighting lift which would enable the Respondent at some future date to upgrade to a full firefighting lift if it was considered necessary to do so.

h) Mr Smith estimated costs for refurbishment of the lift with essential electricity works totalled £499,000 plus VAT. The costs of the optional works were £19,500 (£16,000 for automatic rescue, £1,000 for directionally illuminated safety edges and £2,500 for the full painting

of the machine room) and £20,000 for upgrading the car and doors of lift 2 with the features associated with firefighting lifts.

i) The margin of difference between the tender of Griffin and Mr Smith's estimate included the optional works and firefighting upgrading was £203,000 (38 per cent) which in the Tribunal's view is significant.

j) The Applicants comprised 61 per cent of the long leaseholders who were independent of the Respondent. The Applicants wished the works to the lifts to be carried out without delay. They had expected the Respondent to have completed the works by now, and had experienced considerable inconvenience and potential risks to health and safety with the breakdown of the lifts. The Applicants said that individual leaseholders were facing demands varying between £4,960 and £6,283 which were significant sums of money particularly as there was no guarantee when the works would be undertaken.

k) The Applicants were not convinced with the benefits of having a firefighting lift particularly in the light of the various reports on fire safety at the property which had not recommended improvements to the fire safety of the lifts.

l) The Respondent through its ownership of 36 flats at the property would be making a substantial contribution to the costs of the major works, and held a legitimate view that the works should meet best practice with regard to fire safety.

m) The Tribunal considered that the proposal for wholesale replacement of lifts with a firefighting lift carried a higher risk of delay than progressing with the refurbishment option as advocated by Mr Smith. The Tribunal formed the view that there remained considerable uncertainty about the eventual costs of the wholesale replacement and that the current demand in dispute was not sufficient to cover the known costs for replacement. Also the Tribunal was not convinced that the dispensation from consultation covered the wholesale replacement of lifts. The Tribunal on the other hand considered that the costs of refurbishment was relatively certain and that if the Respondent proceeded on the basis of Mr Smith's proposal with enhancement the tendering exercise would be relatively swift and probably would not require a further application for dispensation.

57. The Tribunal having regard to the facts found places weight on avoiding further delay in implementing the works to the lift and the need to have certainty about the eventual costs. In this regard the Tribunal is satisfied that the option of wholesale replacement does not result in reasonable outcomes. The Tribunal would add that the potential difference in cost between the options of wholesale replacement and major refurbishment is significant and has reached the point where priority should be given to reducing it. The Tribunal acknowledges the Respondent's desire to ensure that the lifts comply with best practice regarding fire safety of lifts. The Tribunal, however, considers that this can be best achieved by carrying out Mrs Smith's suggested improvements to the lift car and doors.

58. The Tribunal, therefore, decides that a sum of £535,000 plus VAT is no greater amount than is reasonable for the costs of the refurbishment of the lifts. The Tribunal has arrived at £535,000 by adding the estimated costs of £16,000 for automatic rescue and £20,000 for fire safety to the basic estimate of £499,000 proposed by Mr Smith.

59. The Tribunal having regard to the evidence of Mr Smith on the necessity for a consulting engineer and the associated roles of Principal Designer (CDM Regulations) and Contract Administrator decides that a fixed sum of £24,000 plus VAT is no greater amount than is reasonable.

60. The Tribunal is not convinced about the reasonableness of the costs of the managing agent which was calculated at 2.5 per cent of the contract price. Counsel said that the costs represented the time spent by the managing agent in carrying out the statutory consultation on the works, dealing with leaseholders enquiries and for preparing and sending out the service charge demands. The Tribunal notes that there has been no statutory consultation on these works, and that the preparation of the demands would be within the standard costs of a managing agent. The Tribunal accepts that the managing agent would incur additional costs when the works are carried out in liaising with leaseholders about the plans for the works. The Tribunal applying its general knowledge and expertise considers an amount of £8,025 (1.5 per cent of the contract price) plus VAT is reasonable.

61. The Tribunal determines that a service charge on account in the sum of £680,430 is payable in relation to major works for the refurbishment of the two lifts. The sum is made up of £535,000 for the lift works, £24,000 for surveyor's fees, £8,025 for managing agents' fees and £113,405 for VAT.

62. The Tribunal considered whether the works could be phased in order to mitigate the financial burden on the leaseholders. The

Tribunal accepted Mr Smith's opinion that it was not possible to phase works without a significant increase in costs.

63. The Tribunal is not persuaded by Counsel's analysis of the lease that the Respondent has authority to recover the costs of these proceedings through the service charge. In the alternative, the Tribunal makes an Order under section 20C of the Landlord and Tenant Act 1985 preventing the landlord from recovering the costs of these proceedings against the Applicants through the service charge. The Tribunal is satisfied that it is just and equitable to make such an Order because the Applicants have been successful in reducing the service charge, and that the necessity for the proceedings has been in part due to the Respondent's delay in not carrying out the works to the lifts earlier. The Tribunal does not agree with the Respondent's assertion that the Applicants have conducted the proceedings in a vexatious manner.

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. The application should be send by email to rpsouthern@gov.uk

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).