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**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)**

Case reference : **LON/00AU/LDC/2016/0015**

Property : **First Floor Flat, 4 Almeida Street,
London N1 1TA**

Applicant : **Mr Michael Gwinnell
Mrs Barbara Gwinnell**

Representative : **Mr Michael Gwinnell**

Respondent : **Ms Clarissa Kersal New**

Representative : **In person**

Type of application : **For the determination of the
reasonableness of and the liability
to pay a service charge**

Tribunal members : **Mr Jeremy Donegan (Tribunal
Judge)
Mr Duncan Jagger FRICS (Valuer
Member)**

**Date and venue of
paper determination** : **08 June 2016
10 Alfred Place, London WC1E 7LR**

Date of decision : **13 June 2016**

DECISION

Decisions of the tribunal

The tribunal determines that the Respondent is not liable to pay any contribution to the cost of pruning the maple tree in the garden of 4 Almeida Street ('the Property') for the service charge year 2014/15.

The application

1. The Applicants seek a determination pursuant to section 27A of the Landlord and Tenant Act 1985 ('the 1985 Act') as to the amount of service charges payable by the Respondent for the service charge year 2014/15. Only one item of expenditure is disputed, namely the cost of pruning a maple tree in the total sum of £345.60. The contribution demanded from the Respondent was £115.20, which she has paid.
2. The application was received by the tribunal on 02 February 2016 and was accompanied by a separate application, for dispensation under section 20ZA of the 1985 Act. Combined directions were issued on both applications on 08 February 2016.
3. The dispensation application was compromised in late April 2016 and the tribunal consented to the withdrawal of that application on 06 May 2016. The tribunal gave further directions on the section 27A application on the same date, including provision for a paper determination on the basis of written representations. None of the parties has objected to this or requested an oral hearing. The paper determination took place on 08 June 2016.
4. The relevant legislation is set out in the Appendix to this decision.

The background

5. The Applicants are the freeholders of the Property, which is a converted terraced house comprising three flats; a basement and ground floor maisonette, the Flat which is on the first floor and a second and third floor maisonette. The Respondent is the long leaseholder of the Flat. The Applicants have acquired the leasehold interests in the other two flats, which have merged with the freehold title.
6. The Applicants live at 3 Almeida Street, which is adjacent to the Property.
7. The Respondent's lease requires the Applicants to provide services and the Respondent to contribute towards their costs by way of a variable

service charge. The specific provisions of the lease are referred to below, where appropriate.

The lease

8. The lease was granted by Laurence Roger Isaacson (“*the Landlord*”) to the Respondent (“*the Tenant*”) on 09 May 1986, for a term of 99 years from 24 June 1983. The service charge proportion for the Flat is 20% and the service charge is expressed to be payable “...*by way of further rent...*”. The service charge year ends on 23 June in each year.
9. The Landlord’s covenants are to be found at clauses 4 and 5 of the lease. Clause 4(1) obliges the Landlord to insure the Property. Clause 5(1) obliges the Landlord:

*“To carry out such works as may be reasonable and necessary for the proper maintenance repair and decoration of the exterior of the property and of the roof (including the roof of the ground floor extension and the fixed ladder therefrom both of which are shown on the plan at first floor level) main structure and foundations thereof and of any building erected in connection therewith and the sewers drains water courses cables pipes wires entryphone system and other services the use of which is common to the demised premises and the maisonettes in the property **PROVIDED THAT** the Landlord shall not be responsible for any sewers drains or water courses cables pipes wires entryphone system and other services the use of which is solely for the demised premises or solely for the maisonettes in the property”*

The issues

10. The substantive issue to be determined by the tribunal is whether the Respondent is contractually liable to contribute to the cost of pruning the maple tree, pursuant to clause 5(1) of her lease. However the tribunal is also required to determinate two procedural issues, which are addressed at paragraphs 12-21 below.
11. The tribunal were supplied with a witness statement from the Respondent dated 04 May 2016 and a statement in response from the Applicants dated 19 May 2016.
12. The first procedural issue is the scope of the tribunal’s determination. In her statement of case, the Respondent asked the tribunal to extend the determination to cover the years 2002-15. Her total contributions for tree pruning in this period were stated to be £772.40.
13. In their statement of case, the Applicants contend that the determination should be limited to the service charge year 2014/15 on the following grounds:

- (a) their application concerns 2014/15 and the Respondent has not made an application for the earlier years;
- (b) they have only consented to a paper determination for 2014/15 and not for the earlier years; and
- (c) the Respondent paid her contributions to pruning costs, without question, for all prior years apart from 2012/13 and has agreed these service charges for the purposes of section 27A(4)(a) of the 1985 Act, or is estopped from disputing them.
14. The Applicants also raised the question of limitation and whether the challenge to some of the earlier years is time-barred. They pointed out that the time limit for actions to recover arrears of rent is six years (section 19 of the Limitation Act 1980). The Applicants invited the tribunal to determine the relevant limitation period and date from which such period runs.
15. The tribunal is unwilling to extend the scope of the determination to cover the earlier years. Rather its determination is limited to 2014/15, in accordance with the original application. This means it is unnecessary for the tribunal to decide whether any of the earlier pruning contributions have been agreed or the relevant limitation period and it declines to do so.
16. Both parties appear to be under the misapprehension that the tribunal can order repayment of any disallowed service charges that have actually been paid. This is incorrect. The tribunal's jurisdiction is limited by section 27A of the 1985 Act. It is only able to determine whether disputed service charges are payable. The tribunal is unable to make an order for repayment of any disallowed sums. Rather this would be a matter for the County Court.
17. It is open to either party to make a further section 27A application to determine the pruning costs in earlier years. Before doing so they may wish to consider the Upper Tribunal's decision in **Cain v Mayor and Burgesses of the London Borough of Islington [2015] UKUT 0542 (LC)**, which considered delays in disputing service charges, limitation and section 27A(4)(a) of the 1985 Act.
18. The second procedural issue is whether the Respondent's statement should be struck out and she be barred from taking any further part in these proceedings, pursuant to rules 9(7) and (8) of The Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013 ('the 2013 Rules'). In their statement of case, the Applicants complained that the Respondent's statement of case was served late and was not verified by a statement of truth.

19. The tribunal declines to strike out the Respondent's case. There was no statement of case from her. Rather she relied solely on her witness statement dated 04 May 2016. Although it was served late, it was produced more than a month before the tribunal's determination and the Applicants replied to it, in considerable detail, in their statement in response. The Applicants have not identified any prejudice caused by the late service of the Respondent's statement
20. The outcome of the case turns upon the wording of the lease; rather than witness evidence. The Respondent's statement clearly identified the legal argument to be determined by the tribunal. The Applicants have not identified any prejudice caused by the missing statement of truth.
21. This is a very low value case that is being determined in paper. The disputed pruning contribution is only £115.20 and the application needs to be dealt with in a proportionate manner. It would be contrary to the overriding objective, as set out at rule 3 of the 2013 Rules, to strike out the Respondent's case on purely technical grounds where no prejudice has been identified.

Maple tree pruning contribution 2014/15 - £115.20

22. It is convenient to deal with the Respondent's case first. The maple tree is in the garden at the Property and belongs to the Applicants. The Respondent does not have access to this garden, which is outside the demise of the Flat. The tree is not part of the common-parts and is not covered by the repairing obligation at clause 5(1) of the lease. Further there is no condition in the current building insurance policy, requiring the pruning of the tree.
23. The Applicants' case is that regular pruning of the tree was a requirement of the previous insurers, to safeguard the foundations from heave or landslip caused by tree roots. It is not an express requirement of the current insurers. However the current policy conditions oblige the Applicants to:

“-maintain the buildings to keep them in good condition and repair;

-take all reasonable steps to minimise the risk of accident, injury, loss or damage”

The Applicants contend that the pruning of the tree is necessary to avoid the policy being invalidated.

24. The Applicants also contend that the pruning of the tree falls within the repairing obligation at clause 5(1) of the lease, as it is a necessary precaution against damage to the foundations of the Property.

The tribunal's decision

25. The tribunal determines that the tree pruning contribution for 2014/15 is not payable by the Respondent.

Reasons for the tribunal's decision

26. The pruning of the tree is not covered by clause 5(1) of the lease. It is not "*...reasonable and necessary for the proper maintenance repair and decoration of the exterior of the property and of the roof (including the roof of the ground floor extension and the fixed ladder therefrom both of which are shown on the plan at first floor level) main structure and foundations...*". Rather it is undertaken as a preventative measure to restrict root growth that MIGHT cause damage to the foundations to the Property. If the tree is not pruned and the roots were to cause damage then this would be the responsibility of the tree owners. It follows that pruning of the tree is the responsibility of the Applicants, who currently own the garden and the tree.
27. It is conceivable that a failure to prune the tree might invalidate the building insurance. This does not make it a service charge expense. Rather the Applicants, as the freeholders of the Property, would have a claim against the tree owners (currently themselves) for invalidating the policy. The situation is analogous to a hypothetical situation where the Respondent stores combustible materials in the Flat. This could also invalidate the policy, in which case the Applicants would have a claim against her.
28. The tree currently belongs to the Applicants and is within their control. They are responsible for pruning it and cannot pass any associated costs to the Respondent, via the service charge.

Section 20C and refund of fees

29. There was no application for an order under section 20C of the 1985 Act, relating to the Applicants' costs of these proceedings. Equally there was no application for a refund of fees paid to the tribunal, under rule 13(2) of the 2013 Rules.

The next steps

30. The tribunal has disallowed the maple tree pruning contribution of £115.20, which the Respondent has paid. Hopefully it will be unnecessary for the Respondent to issue County Court proceedings to compel the Applicants to repay this sum.

31. As explained at paragraph 17 above, it is open to either party to make a section 27A application to determine the pruning costs in earlier years. Hopefully this will not be necessary and the parties can now resolve their differences. The sums involved are modest and should be capable of resolution, having regard to this decision and the Upper Tribunal's decision in Cain.

Name: Tribunal Judge Donegan **Date:** 13 June 2016

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.

Appendix of relevant legislation

Limitation Act 1980 (as amended)

Section 19

No action shall be brought, and the power conferred by section 72(1) of the Tribunals, Courts and Enforcement Act 2007 shall not be exercisable, to recover arrears of rent, or damages in respect of arrears of rent, after the expiration of six years from the date on which the arrears became due.

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.

Section 20

- (1) Where this section applies to any qualifying works or qualifying long term agreement, the relevant contributions of tenants are limited in accordance with subsection (6) or (7) (or both) unless the consultation requirements have been either—
 - (a) complied with in relation to the works or agreement, or
 - (b) dispensed with in relation to the works or agreement by (or on appeal from) the appropriate tribunal .
- (2) In this section “relevant contribution”, in relation to a tenant and any works or agreement, is the amount which he may be required under the terms of his lease to contribute (by the payment of

service charges) to relevant costs incurred on carrying out the works or under the agreement.

- (3) This section applies to qualifying works if relevant costs incurred on carrying out the works exceed an appropriate amount.
- (4) The Secretary of State may by regulations provide that this section applies to a qualifying long term agreement—
 - (a) if relevant costs incurred under the agreement exceed an appropriate amount, or
 - (b) if relevant costs incurred under the agreement during a period prescribed by the regulations exceed an appropriate amount.
- (5) An appropriate amount is an amount set by regulations made by the Secretary of State; and the regulations may make provision for either or both of the following to be an appropriate amount—
 - (a) an amount prescribed by, or determined in accordance with, the regulations, and
 - (b) an amount which results in the relevant contribution of any one or more tenants being an amount prescribed by, or determined in accordance with, the regulations.
- (6) Where an appropriate amount is set by virtue of paragraph (a) of subsection (5), the amount of the relevant costs incurred on carrying out the works or under the agreement which may be taken into account in determining the relevant contributions of tenants is limited to the appropriate amount.
- (7) Where an appropriate amount is set by virtue of paragraph (b) of that subsection, the amount of the relevant contribution of the tenant, or each of the tenants, whose relevant contribution would otherwise exceed the amount prescribed by, or determined in accordance with, the regulations is limited to the amount so prescribed or determined.]

Section 20B

- (1) If any of the relevant costs taken into account in determining the amount of any service charge were incurred more than 18 months before a demand for payment of the service charge is served on the tenant, then (subject to subsection (2)), the tenant shall not be liable to pay so much of the service charge as reflects the costs so incurred.
- (2) Subsection (1) shall not apply if, within the period of 18 months beginning with the date when the relevant costs in question were incurred, the tenant was notified in writing that those costs had been incurred and that he would subsequently be required under

the terms of his lease to contribute to them by the payment of a service charge.

Section 20C

- (1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court, residential property tribunal or the Upper Tribunal, or in connection with arbitration proceedings, are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.
- (2) The application shall be made—
 - (a) in the case of court proceedings, to the court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to a county court;
 - (aa) in the case of proceedings before a residential property tribunal, to that tribunal;
 - (b) in the case of proceedings before a residential property tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any residential property tribunal;
 - (c) in the case of proceedings before the Upper Tribunal, to the tribunal;
 - (d) in the case of arbitration proceedings, to the arbitral tribunal or, if the application is made after the proceedings are concluded, to a county court.
- (3) The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.