FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00AK/LSC/2020/0180** **V:CVPREMOTE**
Property	**:**	**Flats 46 and 56 Maplin Close, Eversley Park Road, London N21 1NB**
Applicant	**:**	**Maplin Close (37-56) Management Company Ltd**
Representative	**:**	**Ms P Holder of HML**
Respondent	**:**	**Terence Charlton and Gareth James Humberstone (Flat 46)** **Natalie Wackett (Flat 56)**
Representative	**:**	**Mr M Feldman of Counsel (for Mr Charlton and Ms Wackett)**
Additional Respondents		**Michael Joseph Devane (Flat 46)** **Sidney Johnson and Elsie Johnson (Flat 56)**
Type of Application	**:**	**s27A and s20C Landlord and Tenant Act 1985**
Tribunal Members	**:**	**Judge F J Silverman MA LLM** **Mr M Taylor MRICS**
Date and venue of Hearing	**:**	**02 July 2021**
Date of Decision	**:**	**15 July 2021**

DECISION AND ORDER

1. **Michael Joseph Devane is added as a Respondent (Flat 46) and Sidney Johnson and Elsie Johnson are added as Respondents in relation to Flat 56. Natalie Wackett is removed as a Respondent.**
2. **The Tribunal determines that the parapet walls, and entire structure of the balcony area of both flats, save only the surface tiles, form part of the structure and exterior of the block and thus lie within the repairing responsibility of the landlord who is entitled to include any costs associated with the maintenance of this part of the structure in the service charge accounts for all tenants in the block to be payable by each tenant in their respective proportions**.
3. **No order is made under s20C or para 5 Schedule 11 Commonhold an Leasehold Reform act 2002.**

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 document which the Tribunal was referred to are contained in electronic bundles the contents of which are referred to below. The orders made in these proceedings are described above.

REASONS

1 The Applicant is the landlord and reversioner of (inter alia) Flats 46 and 56 Maplin Close Eversley Park Road London N21 1NB (the property) which are penthouse flats on the third and topmost floor of a purpose built block of flats forming part of a larger estate managed by HML on behalf of the Applicants.

2 HML wish to carry out repairs to the exterior of the property which will include work to the balcony/terrace areas demised to Flats 46 and 56. These two flats are the only flats in this block which enjoy outside space.

3 The works, which will be subject to a s20 notice, will include work to repair a longstanding leak thought to be emanating from the balcony of Flat 56 which is causing damage and inconvenience to the owner of the flat on the floor below.

4 The ownership and rights over the balcony of Flat 56 have been the subject of a protracted dispute between those acting for the freeholder and those acting on behalf of the proprietors of Flat 56. Consequently, HML thought it prudent to ask the Tribunal, in advance of the commencement of the works, to determine the ownership/rights pertaining to the balcony. The same issue is relevant to Flat 46 whose proprietors have also been joined as Respondents.

5 This matter falls to be determined under s27 Landlord and Tenant Act 1985 because it concerns the liability of a person to pay for an item which will fall due under the service charge provisions of the lease.

6 The Application was filed on 04 June 2020 and Directions were issued by the Tribunal on 11 March 2021, 16 March 2021, 10 May 2021, 14 May 2021 and 10 June 2021.

7 The Tribunal received and read circa 200 pages of electronic documentation, including the parties' respective statements of case, and witness statements which are referred to below.

8 The hearing took place by way of a remote video (CVP) link to which the parties had previously consented. Some difficulties were experienced with the Applicant's link to the hearing for part of which Ms Holder was only able to access by telephone.

9 The Applicant was represented by Ms P Holder accompanied by her Manager Ms P Dyer. Mr M Feldman of Counsel represented Mr Charlton and Ms Wackett. Mr Humberstone was separately represented but did not appear. Mr Charlton was not present at the hearing.

10 In accordance with current Practice Directions relating to Covid 19 the proceedings were recorded and the Tribunal did not make a physical inspection of the property but were able to obtain an overview of its exterior and location via GPS software.

11 In making the application the Applicant had correctly identified the names of the Respondent(s) from the land registry records. In relation to Flat 46 the registered proprietors were named as Terence Charlton, Michael Joseph Devane and Gareth James Humberstone who, it is understood are the executors of Mr Charlton's wife's estate of which Mr Charlton is the beneficiary. Mr Devane later asked the Tribunal to be removed from the application because he had retired from practice as a solicitor and was no longer a functioning executor. His name was accordingly removed from the Application. However, office copy entries of the title obtained by the Applicant dated 24 June 2021 (pages 195-196) show that Mr Devane remains as a registered proprietor of his property. Therefore, irrespective of the fact that he may have retired from his professional duties he remains as a legal title owner of this property and must be named as a Respondent to these proceedings in relation to Flat 46. He is therefore reinstated as a Respondent.

12 Ms Wackett had asserted to the Tribunal at a previous remote Directions hearing that, following her grandfather's death, she was the legal owner of Flat 56 and she was then added as a Respondent in relation to Flat 56 on the basis that she produced evidence of her ownership to the Tribunal by 17 May 2021 (page 119). Although Ms Wackett has produced to the Tribunal a copy of her grandfather's will (page 153) she has not produced a power of attorney, a death certificate of either of the named proprietors, an office copy probate appointing her as executrix, a copy assent/transfer of the property into her name or a copy of the land registry acknowledgment of having lodged an application to register Ms Wackett as the registered proprietor. She asserted that her solicitors had made an application to the Land Registry to register her title but produced no official evidence to support this. Once again, the official register entries of the title dated 24 June 2021 (pages 189-190) still show Sidney Johnson and Elsie Johnson as

proprietors of Flat 56 and until Ms Wackett can demonstrate her entitlement either as executrix or as a proprietor in her own name she is not entitled to take part in these proceedings. She currently has no interest in the property and thus no locus standi in these proceedings. Alternatively, she is prevented from taking part because she failed to comply with the Tribunal's Directions dated 10 May 2021.

13 The title to Flat 46 is currently held under a lease dated 13 July 2011 and made between the Applicant and Irene Pearl Read (later Charlton). That lease is supplemental to a lease dated 29 February 1972 as varied by a lease dated 23 February 1999. The property demised and covenants are consistent throughout all versions of the lease.

14 Flat 56 has a similar history with a current lease dated 13 July 2011 made between the Applicant and Sidney and Elsie Johnson supplementing earlier leases dated 11 May 1972 and 20 July 2000. As above the property demised and covenants are consistent throughout all versions of the leases save that the plan to the current lease of this flat contains a clarification of the extent of the balcony area to correct an error in an earlier lease caused by an incorrectly coloured plan.

15 In both cases the 1972 lease describes the demise as: 'All that third floor flat known as Number 46 [56] Maplin Close….(hereinafter called "the Flat") including one half in depth of the concrete between the floors of the Flat and the ceilings of the flats below it and garage no 46 [56] shown on the plan annexed hereto and thereon coloured pink (all which premises are hereinafter called "the demised premises")… The balcony area is in both cases coloured pink and so is part of the demise. The difficulty arises in that the floor of the balcony is not just the ceiling of the flat beneath, but part of the main roof of the building and this point is not addressed in the wording of the lease.

16 Both leases contain conventional repairing covenants ie the landlord is responsible for the structure and exterior and the tenant for the demised premises.

16 The plan to both leases delineates the surface area of the flat and balcony (as amended in the case of flat 56) but does not define the boundaries between the penthouse flats and those beneath them other than as cited above. This leaves an area of uncertainty in relation to the responsibility for the upkeep of the balcony because in both cases the balcony rests upon the roof structure of the main building and not above the ceiling of the flat below as described in the lease.

17 In both cases the users of the balcony are protected from danger by a parapet wall running round the edge of the balcony. The Applicant has accepted that this area is part of the structure of the block and responsibility for its maintenance lies with the freeholder (Clause 5 (c) (i)) who is entitled to recover the reasonable costs of upkeep from the various leaseholders under the service charge provisions contained in their leases.

18 It is understood that Ms Wackett and before her, her father had assumed responsibility for the balcony of Flat 56 and copious correspondence, some of it strongly worded, was filed by Ms Wackett in support of her assertion that the balcony to Flat 56 belonged to Flat 56 and she was thus entitled to prevent anyone from entering that space without her permission (see eg pages 153-156). That contention was accompanied by

an apparently contradictory assertion that the responsibility for repair of the balcony lay entirely with the Applicant freeholder.

19 Mr Feldman's submissions referred the Tribunal to the case of Ibrahim v Dovecorn Reversions Ltd (2001) 82 P&CR 28 where the court held that a roof terrace which also served as the roof of a lower part of the building was part of the main structure save only for the surface area of the tiles which fell within the remit of the leases of the flats in question. Although the case report contains the caution that the decision turned on its own facts and was dependent on the particular circumstances and wording of the lease in question, the case does bear a strong similarity to the situation under discussion.

20 He also pointed out that to date HML and its predecessors had always taken responsibility for the repair of the roof terraces and had spread the costs of repairs between all the tenants thus seemingly treating these areas as part of the structure and exterior falling within their landlord's repairing covenants.

21 On balance therefore, and having considered the submissions from both parties, the wording of the leases, the history of the conduct of the parties, the documentation supplied and the practical implications of the consequences of each party's assertions, the Tribunal has decided that it will follow the example of the Ibrahim case (above) and finds that the parapet walls, and entire structure of the balcony area of both flats, save only the surface tiles, form part of the structure and exterior of the block and thus lie within the repairing responsibility of the landlord who is entitled to include any costs associated with the maintenance of this part of the structure in the service charge accounts for all tenants in the block to be payable by each tenant in their respective proportions.

22 It follows from the above that the leaseholders of both flats 46 and 56 are required, subject to notice except in an emergency to give access to the freeholder and its authorised workmen and agents both to inspect and to carry out repairs and redecorations to the balcony area. Only the surface tiles on the balcony floor remain the property of and responsibility of each flat owner. While it is appropriate for the tenants to make observations as part of the s20 consultation process it is for the landlord to decide on the nature and scope of the repair works. The tenants' recourse, if there is a problem, lies in the reasonableness and /or payability provisions of s27A Landlord and Tenant Act 1985.

23 The Respondents asked the Tribunal to make an order under s20C Landlord and Tenant Act 1985 restricting the Applicant from recovering litigation costs through the service charge. The Applicant assured the Tribunal that no legal costs had been incurred and that any relevant costs would be borne by HML itself. The uncertainty of the wording of the leases in question justified the Applicant's decision to apply to the Tribunal for a determination in order to avoid a more contentious application after the current proposed works are completed. On that basis the Tribunal does not consider that an order under this section or under its equivalent provision in para 5 of Schedule 11 Commonhold and Leasehold Reform Act 2002 would be appropriate. The Respondents' application is refused.

24 **The Law**

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.

Commonhold and Leasehold Reform Act 2002

Schedule 11, paragraph 1

(1) In this Part of this Schedule "administration charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent which is payable, directly or indirectly—
(a) for or in connection with the grant of approvals under his lease, or applications for such approvals,
(b) for or in connection with the provision of information or documents by or on behalf of the landlord or a person who is party to his lease otherwise than as landlord or tenant,
(c) in respect of a failure by the tenant to make a payment by the due date to the landlord or a person who is party to his lease otherwise than as landlord or tenant, or
(d) in connection with a breach (or alleged breach) of a covenant or condition in his lease.

(2) But an amount payable by the tenant of a dwelling the rent of which is registered under Part 4 of the Rent Act 1977 (c. 42) is not an administration charge, unless the amount registered is entered as a variable amount in pursuance of section 71(4) of that Act.

(3) In this Part of this Schedule "variable administration charge" means an administration charge payable by a tenant which is neither—
(a) specified in his lease, nor
(b) calculated in accordance with a formula specified in his lease.

(4) An order amending sub-paragraph (1) may be made by the appropriate national authority.

Schedule 11, paragraph 2

A variable administration charge is payable only to the extent that the amount of the charge is reasonable.

Schedule 11, paragraph 5

(1) An application may be made to the appropriate tribunal for a determination whether an administration 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) Sub-paragraph (1) applies whether or not any payment has been made.

(3) The jurisdiction conferred on the appropriate tribunal in respect of any matter by virtue of sub-paragraph (1) is in addition to any jurisdiction of a court in respect of the matter.

(4) No application under sub-paragraph (1) 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.

(6) An agreement by the tenant of a dwelling (other than a post-dispute arbitration agreement) is void in so far as it purports to provide for a determination—
  (a) in a particular manner, or
  (b) on particular evidence,
  of any question which may be the subject matter of an application under sub-paragraph (1).

Section 47 Landlord and Tenant Act 1987

(1)Where any written demand is given to a tenant of premises to which this Part applies, the demand must contain the following information, namely—

(a)the name and address of the landlord, and

(b)if that address is not in England and Wales, an address in England and Wales at which notices (including notices in proceedings) may be served on the landlord by the tenant.

(2)Where—

(a)a tenant of any such premises is given such a demand, but

(b)it does not contain any information required to be contained in it by virtue of subsection (1),

then (subject to subsection (3)) any part of the amount demanded which consists of a service charge [F1or an administration charge] ("the relevant amount") shall be treated for all purposes as not being due from the tenant to the landlord at any time before that information is furnished by the landlord by notice given to the tenant.

(3)The relevant amount shall not be so treated in relation to any time when, by virtue of an order of any court [F2or tribunal], there is in force an appointment of a receiver or manager whose functions include the receiving of service charges [F3or (as the case may be) administration charges] from the tenant.

(4)In this section "demand" means a demand for rent or other sums payable to the landlord under the terms of the tenancy.

Withholding of service charges Landlord and Tenant Act 1985 s21

21 (1)A tenant may withhold payment of a service charge if—

(a)the landlord has not provided him with information or a report—

(i)at the time at which, or

(ii)(as the case may be) by the time by which,

he is required to provide it by virtue of section 21, or

(b)the form or content of information or a report which the landlord has provided him with by virtue of that section (at any time) does not conform exactly or substantially with the requirements prescribed by regulations under that section.

(2)The maximum amount which the tenant may withhold is an amount equal to the aggregate of—

(a)the service charges paid by him in the period to which the information or report concerned would or does relate, and

(b)amounts standing to the tenant's credit in relation to the service charges at the beginning of that period.

(3)An amount may not be withheld under this section—

(a)in a case within paragraph (a) of subsection (1), after the information or report concerned has been provided to the tenant by the landlord, or

(b)in a case within paragraph (b) of that subsection, after information or a report conforming exactly or substantially with requirements prescribed by regulations under section 21 has been provided to the tenant by the landlord by way of replacement of that previously provided.

(4)If, on an application made by the landlord to the appropriate tribunal, the tribunal determines that the landlord has a reasonable excuse for a failure giving rise to the right of a tenant to withhold an amount under this section, the tenant may not withhold the amount after the determination is made.

(5)Where a tenant withholds a service charge under this section, any provisions of the tenancy relating to non-payment or late payment of service charges do not have effect in relation to the period for which he so withholds it.

21B Notice to accompany demands for service charges

(1)A demand for the payment of a service charge must be accompanied by a summary of the rights and obligations of tenants of dwellings in relation to service charges.

(2)The Secretary of State may make regulations prescribing requirements as to the form and content of such summaries of rights and obligations.

(3)A tenant may withhold payment of a service charge which has been demanded from him if subsection (1) is not complied with in relation to the demand.

(4)Where a tenant withholds a service charge under this section, any provisions of the lease relating to non-payment or late payment of service charges do not have effect in relation to the period for which he so withholds it.

(5)Regulations under subsection (2) may make different provision for different purposes.

(6)Regulations under subsection (2) shall be made by statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of Parliament.

S22 Landlord and Tenant Act 1985

22 Request to inspect supporting accounts &c.
(1)This section applies where a tenant, or the secretary of a recognised tenants' association, has obtained such a summary as is referred to in section 21(1) (summary of relevant costs), whether in pursuance of that section or otherwise.

(2)The tenant, or the secretary with the consent of the tenant, may within six months of obtaining the summary require the landlord in writing to afford him reasonable facilities—

(a)for inspecting the accounts, receipts and other documents supporting the summary, and

(b)for taking copies or extracts from them.

(3)A request under this section is duly served on the landlord if it is served on—

(a)an agent of the landlord named as such in the rent book or similar document, or

(b)the person who receives the rent of behalf of the landlord;

and a person on whom a request is so served shall forward it as soon as may be to the landlord.

(4)The landlord shall make such facilities available to the tenant or secretary for a period of two months beginning not later than one month after the request is made.

(5)The landlord shall—

(a)where such facilities are for the inspection of any documents, make them so available free of charge;

(b)where such facilities are for the taking of copies or extracts, be entitled to make them so available on payment of such reasonable charge as he may determine.

(6)The requirement imposed on the landlord by subsection (5)(a) to make any facilities available to a person free of charge shall not be construed as

precluding the landlord from treating as part of his costs of management any costs incurred by him in connection with making those facilities so available.

Judge F J Silverman as Chairman
Date 15 July 2021

Note:

RIGHTS OF APPEAL

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application by email to rplondon@justice.gov.uk.
2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.
3. If the person wishing to appeal does not comply with the 28 day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.
4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.