First-tier Tribunal
Property Chamber
(Residential Property)

Case reference	**:**	**LON/00AG/LBC/2022/0036**
Property	**:**	**Lower Ground Floor Flat, 28A Mornington Terrace, Camden, London NW1 7RS**
Applicant **Represented by**	**:**	**28 Mornington Terrace Ltd.** **Susan Leverick (lay)**
Respondent **Represented by**	**:**	**Susan Elizabeth Grimsdell** **Robyn Cunningham of counsel (RWK Goodman LLP)**
Date of Application	**:**	**18th May 2022**
Type of Application	**:**	**For a determination that breaches have occurred in covenants and/or conditions in a lease between the parties (Section 168(4) Commonhold and Leasehold Reform Act 2002 ("the 2002 Act"))**
Tribunal	**:**	**Bruce Edgington (lawyer chair)** **Jacqueline Hawkins**
Date & place of hearing:		**21st September 2022 at 10 Alfred Place London WC1E 7LR (one Tribunal Member and two witnesses heard the hearing by video and telephone link)**

DECISION

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1. The long lease of the property is dated 8th August 1985 and was renewed and extended by a Deed of Surrender and Re-grant dated 31st May 2016. The current reversioner is the Applicant, 28 Mornington Terrace Ltd., and the current long leaseholder is the Respondent who purchased the original lease in 1993. The current term is for 999 years commencing on 31st May 2016 and the rear garden including a lime tree (now cut down) is now included in the demise. This application alleges that the Respondent is in breach of a number of terms of the said lease, as follows:

   (a) Clause 2(17)(i)
   "*Not to do or suffer to be done anything which may render any increased or extra premium payable for the insurance of the Building*

or which may make void or voidable any policy of such insurance and to reimburse to the Landlord forthwith on demand any increased or extra premium which may be payable in respect of the Building by reason of any such thing and forthwith on demand from the Landlord or its insurers cease from doing or suffering to be done that thing which caused an increase or extra premium to become payable".

The allegation is that a lime tree in the back garden and within the land forming part of the leasehold title has not been kept in such a reasonable condition by the Respondent so as to avoid subsidence and damage to buildings. Insurance claim(s) have allegedly led to an increased insurance premium and other insurance issues.

Decision: No breach as the Respondent has not 'done' anything or suffered anything to be 'done' which has resulted in anything set out in this clause

(b) Clause 2(17)(ii)
"*If the Demised Premises or any neighbouring property shall be destroyed or damaged and if the amount of any insurance in respect thereof shall be wholly or partially irrecoverable by any act neglect default or omission of the Tenant or its agents servants licensees or invitees or anyone deriving title through under or in trust for or acting on behalf of it the Tenant will forthwith on demand pay and make good to the landlord…all costs claims losses and other expenses whatsoever incurred paid or payable by them or any of them in connection with or consequent upon such destruction or damage and the reinstatement and making good thereof or such part or portion of such costs claims losses and other expenses as shall be irrecoverable as aforesaid*"

The allegation is that because of the damage allegedly caused by the said lime tree the Applicant has had to pay an insurance excess and increased insurance premiums.

Decision: No breach as there is no act, neglect or default on the part of the Respondent resulting in such payments.

(c) Clause 2 of the 1st Schedule
"*The right to subjacent and lateral support and shelter and protection from the elements for the Demised premises from the other parts of the Building and from the foundation and roof thereof*".

The allegation is that the said lime tree and the Respondent's failure to maintain it has caused damage to the building.

Decision: No breach as (a) it has not been proved on the balance of probabilities that the cracks in the building were caused by the roots of the lime tree and (b) such damage was not, in any event, caused by 'other parts of the building and from the foundations and roof thereof'.

(d) Clause 2 of the 3rd Schedule

"*Not to do or permit to be done any act or thing in or upon the Demised premises or any part thereof or any part of the Building which may be or grow to be a damage nuisance or annoyance to the Landlord or any of the tenants or occupiers of other parts of the Building or to the neighbourhood*".

The allegation is that the damage caused by the failure to maintain the lime tree has caused damage and a nuisance and annoyance to the Applicant landlord.

Decision: No breach. The Applicant has not proved that the Respondent has failed to maintain the lime tree.

(e) Clause 13 of the 3rd Schedule
"*To keep the garden at all times clean and tidy and properly tendered*"

The allegation is that the word 'tendered' is an error and should be 'tended' and the Respondent has failed to comply with this in view of the damage caused by the lime tree.

Decision: No breach. There is little or no evidence that the Respondent has failed to tend to the lime tree which is the only allegation.

Reasons

Introduction

2. The Applicant has applied to the Tribunal for a determination that the Respondent is in breach of the terms of a long lease so that it can serve a forfeiture notice pursuant to section 146 of the **Law of Property Act 1925** ("the 1925 Act").

3. The bundles of documents filed with the Tribunal for the purpose of the hearing include witness statements and legal submissions. There are 2 Respondent's bundles and 2 Applicant's bundles and any page numbering in this decision will set out which bundle is being referred to.

4. The Tribunal issued a directions order on the 24th June 2022 requiring both parties to file evidence. It timetabled the case to this hearing.

The Law

5. Section 168 of the 2002 Act introduced a requirement that before a landlord of a long lease could start the forfeiture process and serve a notice under Section 146 of the 1925 Act, such landlord must first make "...*an application to a leasehold valuation tribunal for a determination that a breach of a covenant or condition in the lease has occurred*".

6. On 1st July 2013, the Leasehold Valuation Tribunal was subsumed into this Tribunal which took over that jurisdiction.

7. In the case of **Forest House Estates Ltd. v Al-Harthi** [2013] UKUT 0479, LRX/148/2012, Peter McCrea FRICS considered the matters which should be determined by this Tribunal in fulfilling its duty under this legislation. He said, at paragraph 30,:-

> "*The question of whether a breach had been remedied by the time of the LVT's inspection was not an issue for determination by the LVT. Questions relating to remedy, damages for breach and forfeiture are matters for the court. The LVT was entitled to record the fact that the breach had been remedied by the time of its inspection, but that finding was peripheral to its main task under section 168(4) of the 2002 Act. The LVT should have made an explicit determination that there had been a breach of covenant, notwithstanding that the breach had subsequently been remedied at the time of the LVT's inspection*"

8. That decision is binding on this Tribunal and means, in effect, that the law as it stands is that the only task of this Tribunal is to say whether there has been a breach even if the breach has been rectified so that there was no longer a breach at the date of the Tribunal's determination. The reason for that is that this Tribunal is not determining whether to grant relief against forfeiture. That is a matter for the court. Having said that, the Tribunal is entitled to express a view about relevant matters in order to assist the court, but these would be irrelevant to the main determination.

9. **The *Contra Proferentem* Rule**
   It could certainly be argued that some of the terms of the lease are ambiguous. It is also true to say that the number of decided cases which would assist the Tribunal in interpreting these particular terms in the lease are extremely limited. In order to assist courts (and Tribunals) in these difficult matters of interpretation, the *contra proferentem* rule was devised many years ago. It is not, of course, the only rule of interpretation but it is, perhaps the most relevant to this problem. It translates from the Latin literally to mean "against (*contra*) the one bringing forth (the *proferens*)".

10. The principle derives from the court's inherent dislike of what may be described as 'take it or leave it' contracts such as residential leases which are the product of bargaining between parties in unfair or uneven positions. To mitigate this perceived unfairness, this doctrine was devised to give the benefit of any doubt to the party upon whom the contract was 'foisted', i.e. the tenant.

11. In the case of **Granada Theatres Ltd v. Freehold Investments (Leytonstone) Ltd** [1958] 1 WLR 845, Mr. Justice Vaisey said, at page 851, that "a lease is normally liable to be construed contra proferentem, that is to say, against the lessor by whom it was granted". The same applies to any successor in title to the original lessor.

The Inspection

12. The members of the Tribunal did not consider it necessary to inspect the property in order to determine the issues raised. Neither party has requested an inspection and they have included a number of photographs in the bundles. The Tribunal has looked at Google Earth to see a view of the property from above and it is understood that it is 5 storey mid-terraced house constructed in about 1850 and subsequently converted into

4 self contained flats. It is said to be a Grade 2 listed building in a conservation area. There are a number of trees in the back gardens of properties in this location.

The Hearing

13. Those who attended the hearing in person were Susan Leverick for the Applicant, the Respondent, Susan Grimsdell, and her counsel, Robyn Cunningham with, it appeared, her pupil or someone from her solicitors. The other Tribunal member was present by video link and Franca Fubini and Claire Lazenby were listening on the telephone but not actually contributing to the hearing.

14. Unfortunately, there was a technical problem with the video link. The other Tribunal member could not be heard and so she joined by telephone and loudspeaker. The 2 witnesses were on the telephone and could speak to that Tribunal member.

15. It became clear that the technical problem was not going to be cured in the short term. The Tribunal chair therefore explained to the parties that he had considered the documents and skeleton argument filed and wondered whether this was a case which could be determined on submissions. In other words, did either party want to cross examine any witness. Both parties said that they did not and wanted the case determined that day by submissions.

16. The Applicant's representative revealed, somewhat surprisingly, that the Applicant was not seeking to forfeit the Respondent's lease. It had been the decision of the directors that it would be cheaper to make this application rather than seek legal advice as to whether the Respondent was liable to the Applicant for the insurance excess and higher premiums being sought.

17. The first question to be dealt with was that on the 5th September 2022 i.e. more than 2 weeks before the hearing, the Applicant had lodged over 100 pages of further evidence including 3 witness statements. It was initially indicated by those representing the Respondent that she would object to any of that evidence being considered by the Tribunal. In fact, at the commencement of the hearing it was agreed that it was better that the Tribunal considered all the evidence, which it did.

Discussion

18. As the order sought could have very serious consequences for the Respondent leaseholder, it is clear that the burden of proof is important and rests with the Applicant landlord.

19. The Applicant has produced a report obtained by its insurance company from Gavin Catheline MCIOB BDMA dated 9th December 2019 following a crack which is said to have suddenly appeared in the hallway of the upper ground floor flat in October 2019. The conclusion reached was that this was likely to have been caused by a lime tree at the back of the rear garden. The report recommended removal of the tree.

20. There was also some history of that tree having caused damage to the garden wall adjacent to it and suggestions that damage had been caused to other walls, although the evidence that this was definitely caused by this tree is not clear. It could have been caused by other trees.

21. The four long leaseholders of the house in which the property is situated are all shareholders and directors of the Applicant. It is clear from the evidence that they were all aware of this tree and that it was possible that it could cause damage to buildings. Advice had been obtained that the canopy should be regularly maintained and in that way the extent of more root penetration would be contained.

22. The Respondent has produced a copy of the report she received from her building society (page 39 of the Respondent's 1st bundle) following an inspection on the 9th June 1993. The report at pages 40 and 43 records that "*there are two large deciduous trees growing within 10 metres at the rear of the building and in general, trees can cause problems to structures and services on shrinkable sub-soils. The trees should be regularly pruned*". The quote on page 43 goes a little further and says "*there is no evidence of any significant associated damage*". Whether this refers to the building generally or just the Respondent's flat is not stated.

23. The Respondent's case is that she did have the tree inspected and treated from time to time by a tree surgeon although she did not keep receipts save for 2 from tree surgeons dated 21st November 2012 and 27th November 2013 at pages 47 and 48 in the Respondent's 1st bundle, the latter of which is definitely for 'tree work and pruning' and is for £525.

24. Further, on page 75 of that bundle there is a letter from Isca Barum, the Applicant's insurance broker sent on the 11th June 2019, recording that the Respondent had consulted with "*the Tree Surgeon she uses to carry out periodic maintenance/management of the tree*". There is then a quote from his report which says that the tree should be reduced and management carried out every 2-3 years. This was a few months before the crack appeared in the building and the tree was then removed at the behest of the Respondent.

25. The Applicant's case is, in effect, that the Respondent should have kept all receipts, and as she hasn't, they doubt whether the 'management' was done regularly. One of the shareholders works from home and says that she saw no-one inspecting or treating the tree. Having said that, she accepts that she has impaired vision.

26. The Respondent arranged for the lime tree to be felled on the 7th February 2020, leaving a stump (paragraph 25 of the Respondent's statement of case).

27. A subsequent letter from the insurer's consulting engineer dated 4th December 2020 records that "*the soil strata in this area is London Clay Formation which is susceptible to seasonal volume change and can be influenced by tree root activity. We suspect there may have been trees in close proximity of the wall in neighbouring gardens that have since been removed*".

28. It is unfortunate that the relationship between the shareholders has clearly broken down with the Applicant expecting the Respondent to pay all of the costs including an insurance excess of £2,500 and increased insurance premiums arising from the damage which could have been caused by the lime tree.

29. The problem is that this is all in hindsight. Prior to the damage to one of the flats, everyone was in agreement i.e. the tree should remain and be trimmed from time to time. Even after the damage was caused and the advice as to causation had arrived there was reluctance to just get rid of the tree. It was the Respondent who took the decision, reasonably quickly, to have it removed.

30. The fact of the matter is that the lime tree was there, the risks were considered and yet the Applicant, who is responsible for keeping the building insured against all reasonably ascertained risks, decided not to take action before the crack appeared and, even then, seemed to be reluctant to remove the tree. It was the Respondent's decision to get it removed with the help of a tree surgeon she said she had consulted over the years. The only insurance that the Respondent would have been wise to take out would be contents insurance which would not cover a tree in the garden.

31. Trees are part of nature and one often sees an avenue of tall trees along a road or in the front and rear gardens of houses, some of which may be quite close to buildings. It is simply not possible to see the extent of the root penetration but there is no suggestion that local authorities or home owners should just remove these trees because of the risk they may or may not pose.

Conclusions

32. As far as the alleged breaches are concerned, the Tribunal has considered all of the evidence and submissions made by the parties and its conclusions are set out in the decisions above, having taken *contra proferentem* into account.

33. It must be remembered that it is for the Applicant to prove (a) that the Respondent positively ignored advice and (b) that it properly assessed risk to the building to ensure that the insurers were aware of any particular risk of damage. It has proved neither, in this Tribunal's opinion. The advice from the insurer's assessor that the damage to the building was caused by the lime tree's roots is not from an arborealist and there is evidence that the roof had been leaking for some time over the damaged flat.

34. The leaseholders will have to share the costs referred to in the application.

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Judge Edgington
26th September 2022

ANNEX - RIGHTS OF APPEAL

i. 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 London.RAP@justice.gov.uk to the First-tier Tribunal at the Regional office which has been dealing with the case.

ii. 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.

iii. 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.

iv. 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.