FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY) and
IN THE COUNTY COURT AT MAYOR'S & CITY OF LONDON COURT, sitting at 10 Alfred Place, London WC1E 7LR

Tribunal Reference	**:**	**LON/00BG/LSC/2019/0204**
Court claim number	**:**	**F16YX350**
Property	**:**	**6 Willis Street, London E14 6NB**
Applicant/Claimant	**:**	**Poplar HARCA**
Representative	**:**	**Capsticks Solicitors LLP**
Respondent/ Defendant	**:**	**Michael Moore**
Type of Application	**:**	**Reasonableness of and liability to pay service and administration charges**
Tribunal Members	**:**	**Judge Nicol** **Mr TW Sennett MA FCIEH** **Mrs L West**
In the county court	**:**	**Judge Nicol (sitting as a Judge of the County Court [District Judge]), with Mr TW Sennett and Mrs L West as assessors**
Date and venue of Hearing	**:**	**7th October 2019** **10 Alfred Place, London WC1E 7LR**
Date of Decision	**:**	**16th October 2019**
Formal hand-down date	**:**	**28th October 2019**

ORDERS AND REASONS

Determination of the Tribunal:

(1) Service charges in the sum of £15,882.84 are reasonable and payable by the Respondent to the Applicant.

Order of the county court:

(2) The Defendant shall pay interest of £548.64 on the above sum.

(3) Pursuant to paragraph 5A of Schedule 11 of the Commonhold and Leasehold Reform Act 2002, it is not just or equitable that the Claimant should recover their costs of these proceedings and so there is no order as to costs.

Permission to appeal:

(4) If either party wishes to appeal, they must first seek the permission of the Tribunal in relation to the Tribunal's determination and the permission of the court in relation to the court's order. The rules governing the Tribunal's procedure (Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 Part 6) and those governing the court's procedure (Civil Procedure Rules Part 52) are different and so the following directions are made in order to co-ordinate any application for permission.

(5) This order and judgment shall be formally handed down on 28th October 2019 in order to allow either party to make an application for permission to appeal against the court's order in accordance with CPR 52.3(2)(a) (see Appendix 1 to this decision). Neither party should attend on that date but, if either party wishes to make an application for permission to appeal, they should write to the Tribunal before that date indicating that they wish to do so. Thereafter, any such application will be dealt with using the Tribunal's procedure:

(a) A written application for permission must be made to the First-tier Tribunal at the Regional office which has been dealing with the case.

(b) The application for permission to appeal must arrive at the Regional office by the extended time limit of 25th November 2019.

(c) If the application is not made within this time limit, such application must include a request for an extension of time and the reason for not complying with the 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.

(d) The application for permission to appeal must state the grounds of appeal and state the result the party making the application is seeking.

(e) If permission to appeal the court's order is refused, the court will direct the period within which any Appellant's Notice must be filed at the appellate court in accordance with CPR 52.12(2)(a).

Relevant legal provisions are set out in Appendix 2 to this decision.

Judgment/Reasons

1. The parties are hereafter referred to by their Tribunal designation, namely Applicant and Respondent.

2. The Applicant is a social landlord created to take over housing stock formerly owned and managed by the London Borough of Tower Hamlets. The Respondent is the lessee of the subject property, a two-storey ground-floor maisonette in a four-storey purpose-built block. The block consists of three parts, each with four maisonettes on the first two floors and four on the upper two floors above, with stair access to the upper maisonettes between each part.

3. The Applicant issued a claim in the county court (claim no: F16YX350) for the following:

(a) Major Works Service Charge	£16,356.02
(b) Other service charges	£1,824.20
(c) Interest	
(d) Costs	

4. The Respondent filed a Defence in county court form N9B. He asserted that he was not refusing to pay anything but that, despite his requests, the Applicant had failed to provide a breakdown of their costs.

5. On 3rd June 2019 Deputy District Judge Walder ordered that this matter be transferred to the Tribunal.

6. The Tribunal held a case management conference on 2nd July 2019, attended by both parties. Amongst other matters, the directions provided:

   (a) The Judge chairing the Tribunal at the final hearing would also sit as a judge of the county court.

   (b) The Applicant was obliged to send to the Respondent any document on which they intended to rely.

7. At the hearing on 7th October 2019, Mr Edward Blakeney of counsel represented the Applicant, as he had done at the case management conference, and the Respondent attended in person.

8. Mr Blakeney was also accompanied by Mr Matthew Mitchell, a Home Ownership Officer with conduct of this matter on behalf of the Applicant. The bundle prepared by the Applicant's solicitors for the hearing included what purported to be a witness statement from Mr

Mitchell. The Tribunal directed the parties' attention to the court's guidance on witness statements in *JD Wetherspoon plc v Harris* [2013] EWHC 1088 (Ch); [2013] 1 WLR 3296:

> **38** CPR r32.4 describes a witness statement as "a written statement signed by a person which contains the evidence which that person would be allowed to give orally".
>
> **39** Mr Goldberger would not be allowed at trial to give oral evidence which merely recites the relevant events, of which he does not have direct knowledge, by reference to documents he has read. Nor would he be permitted at trial to advance arguments and make submissions which might be expected of an advocate rather than a witness of fact. These points are made clear in paragraph 7 of Appendix 9 to the Chancery Guide 7th ed (2013), which is as follows:
>
> > A witness statement should simply cover those issues, but only those issues, on which the party serving the statement wishes that witness to give evidence in chief. Thus it is not, for example, the function of a witness statement to provide a commentary on the documents in the trial bundle, nor to set out quotations from such documents, nor to engage in matters of argument. Witness statements should not deal with other matters merely because they may arise in the course of the trial.
>
> **41** I recognise, of course, that these rules as to witness statements and their contents are not rigid statutes. It is conceivable that in particular circumstances they may properly be relaxed in order to achieve the overriding objective in CPR r 1 of dealing with cases justly.

9. It seemed to the Tribunal that Mr Mitchell's witness statement consisted entirely of either a review of documents into which he had no input or legal submissions. While it functioned as a supplementary statement of case, it was not a witness statement and was not a basis for Mr Mitchell to give further oral evidence. Therefore, the Tribunal heard no witness evidence from the Applicant.

The items in dispute

10. The Applicant had provided a summary of the major works costs as an attachment to their letter dated 7th December 2017, which also enclosed the service charge demand with the summary of rights and obligations. In his statement of case, the Respondent picked out 15 items from this summary which he disputed, of which the total value of his share was £8,849.49 plus fees at 12%. Therefore, he did not dispute the remaining £5,754.10 of the major works service charge or the other service charges of £1,824.20.

11. The Applicant agreed to refund a charge of £60.37 for "Further Cavity wall insulation".

12. By the time of the hearing or at the hearing, having read or heard the Claimant's more detailed explanations, the Respondent conceded or decided not to contest the following items from his list:

4	Replace windows Willis Street	£205.53
5	Cavity wall insulation	£87.24
7	Vulkern flooring	£32.42
9	Doors	£73.53
11	Refuse	£81.18
13	Brick Cleaning	£57.85

13. The Respondent continued to contest the following items:

1	Other Wall Repairs	£2,450.53
2	Private balconies	£325.85
3	Communal Access Decking balconies	£1,324.58
8	Enclosed Communal Areas	£2,579.42
10	New Rear patio doors	£991.71
12	BT Cable tidying up works	£275.74
14	BT Enhancement works	£303.54
15	Fees at 12%	£1,752.43

14. The Respondent objected that he could not see works to the walls of his building which would justify the Other Wall Repairs and had no work done to his rear patio door. He also asserted that he did not benefit from work done under the headings of Communal Access Decking balconies and Enclosed Communal Areas because they principally concerned the areas by which the upper maisonettes were accessed. However, his principal complaint was that he could not understand what the works were for and that the summaries provided by the Applicant still did not provide the kind of breakdown he was looking for.

15. In order to respond to the Respondent's statement of case, in their own statement of case the Applicant quoted heavily from a document or documents which did provide more details of the works. From their own specialist knowledge and experience, the Tribunal guessed that the document in question was the specification of works and Mr Blakeney did not demur. While the Tribunal's directions did not specifically require the Applicant to disclose the specification of works, it did direct the Applicant to provide copies of documents on which they intended to rely. By quoting it in their statement of case, the Applicant was relying on it. In breach of the directions, they did not provide a copy.

16. In any event, there is no document more relevant to a dispute about major works than the specification of works. The Applicant has been in front of the Tribunal many times before and should be aware of this. As regular visitors to the courts, they would also be aware of the ongoing general duty to disclose relevant documents by which a party notifies the other of relevant documents in their custody or control. Again, Mr Blakeney did not demur when the Tribunal made this point about disclosure to him.

17. The only reason Mr Blakeney proffered for the Applicant's failure to disclose the specification of works is that the specification for the entire project, covering the entire estate, ran to some 2000 pages. If that had been the problem, the Applicant could and should have mentioned it and offered the Respondent a means of viewing it, perhaps by pre-arranged appointment at a suitable venue. The complete failure of disclosure is not acceptable.

18. It is clear there are other documents which were also relevant and disclosable, such as the long term qualifying agreement under which the Applicant said the works were done and documents which would explain how the costs across the estate were apportioned between individual parts. In relation to two items, numbers 10 and 14 in paragraph 13 above, the Applicant was unable to produce any relevant information or documents at all. The fact that the works were completed as long ago as 2012 might be part of the explanation but, in fact, the Applicant did not even purport to explain at any time why the Respondent's charges were being sought so long after the event – their letter of 15th July 2013 notifying the Respondent of the delay in demanding the service charges in accordance with section 20B(2) of the Landlord and Tenant Act 1985 did not provide any explanation.

19. The apportionment to parts of the estate was an important issue. As part of the original consultation on the works in accordance with section 20 of the Landlord and Tenant Act 1985, by letter dated 14th October 2010 the Applicant had provided a spreadsheet setting out works within the project and which of those works were relevant to each of 9 areas within the estate. The area relevant to the Respondent was labelled "6-52 Willis Street" covering the three conjoined blocks of maisonettes referred to in paragraph 2 above. However, under the Respondent's lease, his service charges are calculated by reference to just his block, "6-12 & 30-36, Willis Street, E14".

20. By some process which was not described or explained, the Applicant had allocated a part of the total cost of the estate works to "6-52 Willis Street". The Respondent's share was the ratio of the floor area of his flat (70m^2) to the floor area of the 24 maisonettes in the three conjoined blocks (1,719m^2). This calculation is not in accordance with the Respondent's lease.

21. It is possible that using the costs particularly attributable to the Respondent's block and the floor area of the maisonettes just in that

block would produce exactly the same figure for the Respondent's service charge. However, that seems highly unlikely. The Respondent's observations about the wall works and his rear patio door suggest, as might be expected, that the works to each of the blocks were not identical and/or the costs of those works would not have been apportioned in identical amounts. Nor did the Applicant suggest at any time that they would have been so apportioned.

22. The Tribunal is left with the situation that, due to the Applicant's failure to disclose relevant documents, it does not have the material on the basis of which it can be satisfied that the Respondent's service charges were accurately calculated. The Applicant was specifically put on notice by the Respondent that they needed to justify their charges and to provide more details of the works in question.

23. The Tribunal is forced to do the best it can with what it has. Mr Blakeney urged the Tribunal to trust that the Applicant has calculated the Respondent's service charge accurately but their basic errors in relation to disclosure and using a definition of the Respondent's block which did not accord with his lease do not justify that degree of faith.

24. In relation to item numbers 10 and 14 in paragraph 13 above, the Applicant's failure to produce any evidence justifying them means that the Tribunal has little choice but to find that the charges of £991.71 and £303.54 arising from those costs cannot be regarded as reasonable or payable. In relation to the remaining charges (other than the 12% fees) totalling £6,956.12, the Tribunal cannot be satisfied that any more than 90% may be reasonable. Therefore, they are reduced by 10% (£695.61).

25. The Respondent asserted that the fee rate of 12% of the other costs seemed excessive. However, it is in line with supervision and administration rates charged by other landlords for major works projects and the Tribunal is satisfied that 12% is a reasonable rate. Nevertheless, the Tribunal's conclusions above, reducing some charges, mean that the amount charged for fees must come down proportionately.

26. By the Tribunal's calculation, £2,051.23 (£60.37 + £991.71 + £303.54 + 695.61) must come off the Respondent's service charges. The fees on that sum, at a rate of 12%, would have been £246.15. Therefore, a total of £2,297.38 is not reasonable or payable, leaving the Respondent's total liability as £15,882.84, consisting of £14,058.64 for the major works and £1,824.20 for other service charges.

Interest

27. Mr Blakeney submitted that the county court should exercise its power under section 69 of the County Courts Act 1984 to award interest on the sums found to be owing by the Respondent at a rate of 4 or 5% per year. He submitted that interest should run from 28 days after the Applicant's demand of 7th December 2017 in respect of the major works

and from 14 days after the Respondent's last payment, being 15th April 2018, in respect of the other service charges.

28. The court accepts that interest is payable in accordance with Mr Blakeney's submissions, save that his suggested rate is too high. Interest rates currently being as low as they are, 2% is a more suitable rate.

29. The Tribunal calculates the interest payable to the Applicant by the Respondent as follows:

- £14,058.64 x 642 days x 2% = £494.56
- £1,824.20 x 541 days x 2% = £54.08

Total interest £548.64

Costs

30. Mr Blakeney also sought an order that the Respondent pay the Applicant's costs, summarised on Form N260 for a total of £9,451, pursuant to the Applicant's contractual right to seek costs incurred in contemplation of a section 146 notice under clause 3(9) of the lease.

31. However, the court has the power under paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 to reduce or extinguish such costs if it is just and equitable to do so.

32. The Respondent's complaint from the very start, when the major works charges were raised by the Applicant and throughout these proceedings, has been the lack of information and of a detailed breakdown of the charges. Mr Blakeney made the bold submission that providing that information would not have altered the Respondent's approach but that is not justified by the evidence, namely that he conceded a number of items having had the opportunity of hearing the Applicant's more detailed explanations.

33. As already described above, the Applicant is in severe breach of the Tribunal's directions and their duty of disclosure. Given that the Respondent is also in severe breach of his obligation to pay his service charges, it would not have been just to strike out the Applicant's claim but, nevertheless, the Applicant's breach has consequences.

34. The court cannot know whether these proceedings, or at least the final hearing, could have been avoided if the Applicant had provided the relevant information and documents, but it is a serious possibility. In that context, the court notes that the Applicant failed to take another opportunity to bring proceedings to an end more expeditiously when, at the case management hearing on 2nd July 2019, the Tribunal suggested, and the Respondent accepted, that the parties should mediate using the Tribunal's free mediation scheme. Mr Blakeney attempted to justify his client's refusal to participate in a mediation by reference to the Respondent previously offering only £6,000 in settlement and, in the

Applicant's view, the lack of merit in the Respondent's defence. In both the court and the Tribunal's view, these are not adequate reasons for the Applicant's refusal to mediate.

35. In the circumstances, it is the court's view that it would not be just or equitable for the Applicant to recover their costs. Therefore, no order is made in relation to costs.

Name: NK Nicol **Date:** 16th October 2019

Appendix 1 - RIGHTS OF APPEAL

Appealing against the tribunal's decisions

1. 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 date this decision is sent to the parties, unless the Tribunal has extended that period, in which case it must arrive by the extension date.

3. If the application is not made within the time limit, such application must include a request for an extension of time and the reason for not complying with the 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 state the grounds of appeal, and state the result the party making the application is seeking.

Appealing against the decisions made by the Judge in his/her capacity as a Judge of the County Court

5. The Civil Procedure Rules state:

52.3 – Permission to appeal
(2) An application for permission to appeal may be made—
(a) to the lower court at the hearing at which the decision to be appealed was made; or
(b) to the appeal court in an appeal notice.

52.12 – Appellant's notice
(1) Where the appellant seeks permission from the appeal court, it must be requested in the appellant's notice.
(2) The appellant must file the appellant's notice at the appeal court within—

(a) such period as may be directed by the lower court (which may be longer or shorter than the period referred to in sub-paragraph (b)); or
(b) where the court makes no such direction, …, 21 days after the date of the decision of the lower court which the appellant wishes to appeal.

Appealing against the decisions of the tribunal and the decisions of the Judge in his/her capacity as a Judge of the County Court

6. In this case, both the above routes should be followed.

Appendix 2 – relevant legislation

Landlord and Tenant Act 1985

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.

Commonhold and Leasehold Reform Act 2002

Schedule 11, paragraph 5A

(1) A tenant of a dwelling in England may apply to the relevant court or tribunal for an order reducing or extinguishing the tenant's liability to pay a particular administration charge in respect of litigation costs.

(2) The relevant court or tribunal may make whatever order on the application it considers to be just and equitable.

(3) In this paragraph—

(a) "litigation costs" means costs incurred, or to be incurred, by the landlord in connection with proceedings of a kind mentioned in the table, and
(b) "the relevant court or tribunal" means the court or tribunal mentioned in the table in relation to those proceedings.