FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00BG/LSC/2019/0224**
Property	**:**	**10 Bowden House, Rainhill Way, London E3 3HZ**
Applicant	**:**	**Poplar HARCA**
Representative	**:**	**Mr Fieldsend of Counsel**
Respondent	**:**	**Muhammad Abdul Salam & Fazal Rahman Ahmed**
Representative	**:**	**Mr Sufian of Counsel**
Type of Application	**:**	**For the determination of the liability to pay a service charge**
Tribunal Members	**:**	**Judge W Hansen (chairman)** **Mr W R Shaw FRICS** **Ms J Dalal**
Date of hearing	**:**	**11 & 12 November 2019**
Date of this Decision	**:**	**25 November 2019**

DECISION

Decision

(1) The Tribunal determines that the Respondents are liable to pay to the Applicant £24,640.68 by way of service charge for the major works to Bowden House which concluded in 2012.

(2) For the avoidance of doubt, nothing in this determination is intended to fetter the discretion of the county court in relation to county court interest or costs, including contractual costs.

Introduction

1. On 5 April 2019 the Applicant issued a claim in the County Court for arrears of service charge said to be due from the Respondents following major works that concluded in or about 2012. The works were qualifying works for the purposes of section 20 of the Landlord and Tenant Act 1986 ("LTA") and were carried out under a qualifying long-term agreement ("QLTA"). The principal sum claimed in the Particulars of Claim by way of service charge is £26,453.79. However, the Applicant has limited its claim before us to the sum of £24,640.68 as this was the sum set out in the notice under s.20(B), LTA which the Applicant claims to have served on 18 January 2012. On 12 June 2019 DDJ Hunter transferred the claim to this Tribunal. On 30 July 2019 Tribunal Judge Nicol identified the following issues as arising for decision:

   (i) Whether the consultation on the major works was adequate (Issue 1);

   (ii) Whether the cost of the major works was reasonable (Issue 2);

(iii) Whether the claim for the cost of the major works is barred by section 19 of the Limitation Act (LA") 1980 (Issue 3).

2. The parties have proceeded on the basis that those are indeed the issues which we have to determine, subject to the following qualifications. Firstly, the issue in relation to consultation is not whether the consultation was adequate. It is whether the statutory notices required under the Service Charges (Consultation Requirements) (England) Regulations 2003 ("the 2003 Regulations") were given, the dispute being as to whether the required notices were actually sent and/or received. Secondly, the Respondents seek to rely by way of limitation defence not only on s.19 of the Limitation Act 1980 but also on section 20B, LTA. The Applicant resists this on the basis that reliance on section 20B is not pleaded. Finally, the Tribunal raised with the parties whether we were being asked to determine the claim for costs pleaded in the Particulars of Claim. The parties agreed that that issue should be dealt with by the Court and we proceed accordingly.

3. We propose to deal with the issues identified above in the following order: Issue 3 first, Issue 1 second and Issue 2 third. Before we do so, we must comment on the way that the case has been conducted on both sides. There was, regretfully, a distinct lack of cooperation between the parties in terms of case preparation which made the Tribunal's job much more difficult than it should have been. By para 3 of the 2013 Tribunal Procedure Rules, the overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly. This includes

> *(a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties and of the Tribunal;*
>
> *(b) avoiding unnecessary formality and seeking flexibility in the proceedings;*
>
> *(c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;*

(d) using any special expertise of the Tribunal effectively; and

(e) avoiding delay, so far as compatible with proper consideration of the issues.

4. The parties' obligation is to (a) help the Tribunal to further the overriding objective; and (b) co-operate with the Tribunal generally.

5. The parties appear to have proceeded without regard to these obligations. There has been accusation and cross-accusation. There have been complaints about disclosure. There have been delays in compliance with the tribunal's directions and repeated extensions of time. There have been complaints about the contents of the (already voluminous) trial bundle. Ultimately, we decided that we could and should proceed with the hearing but in doing so, and to ensure fairness to both sides, we have strictly confined the parties to their pleaded cases. Consistent with the demands of fairness, we also excluded two very late witness statements which the Respondents sought to adduce in evidence.

Issue 3 (Limitation)

6. The Respondents are the long lessees of 10 Bowden House, Rainhill Way, London E3 ("the Flat"). The Flat is one of 16 in a block called Bowden House. They hold the Flat pursuant to a lease dated 6 March 1989 ("the Lease"), having acquired the leasehold interest in or about 2004. The Respondents rely on s.19, LA, on the basis that service charges are reserved as rent and/or recoverable as rent (see Clause 4(4) of Lease). Section 19, LA provides as follows:

"No action shall be brought … 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".

7. Schedule 5 of the Lease provides for an interim service charge and then a balancing payment or refund at the end of the Accounting Period. However, in relation to major works, no interim service charge is claimed as the works progress. Accordingly, what in practice happened in this case, and what in our judgment the Lease allows, is that the Applicant waited until the works had been completed, and then on 2 April 2014 the Applicant demanded the whole sum said to be due from the Respondents. That sum was based on a proportion of the total costs of the works, that proportion being based on the floor area of the Flat. No pleaded challenge was made to that proportion. Paragraph 6 of Sch 5 to the Lease refers to a certificate rather than a demand but we are satisfied, having regard to its contents, that the demand dated 2 April 2014 falls to be treated as a certificate under para 6. Under the terms of the Lease, the tenant is then given 28 days in which to pay. In fact, the Applicant gave the tenants 90 days in which to pay. To summarise, under the terms of the demand served pursuant to paragraph 6 of Sch 5 to the Lease the payment for the major works was due on or before 1 July 2014, being 90 days after 2 April 2014. The claim form in the county court was issued on 5 April 2019. This is within the 6-year limitation period allowed for rent claims under s.19, LA. Accordingly, the claim is not statute barred by s.19, LA.

8. As noted above, the Respondents also seek to rely on s.20B, LTA. This provides as follows:

> *(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.

9. We must first consider whether this defence is pleaded. In our judgment, it is not. The Respondents' statement of case in the Tribunal does not refer to s.20B. It refers only to s.19 LA. The defence in the county court says this: "*The claim is statute barred*". However, it does not plead s.20B and the remainder of the defence is consistent with reliance only on s.19 LA. In those circumstances, we consider that it is not open to the Respondents to rely on s.20B LTA. However, if we are wrong in that regard, we consider that the claim is not, in any event, barred by s.20B. We have considered *Westmark (Lettings) Limited v Elizabeth Peddle and Others* [2017] UKUT 449 (LC). We must ascertain when the costs were incurred. The evidence is not as clear as it could have been, and no doubt would have been had reliance on s.20B been pleaded. However, having regard to the stated contract date of 24 May 2010 (page 550E) and the contract period of 45 weeks (page 476), we are satisfied that the costs were incurred within the period of 18 months ending on the date when the notice dated 18 January 2012 was received by the Respondents, which we find was on or about 20 January 2012. The claim is not therefore barred by s.20B LTA.

Issue 1 (Consultation)

10. The works were carried out under a QLTA. The relevant consultation exercise is thus, firstly, Schedule 2 of the 2003 Regulations and, secondly, Schedule 3. There are three notices in the bundle as follows: Stage 1 notice QLTA dated 27 June 2007 (page 535); Stage 2 notice QLTA dated 31 March 2009 (page 544) and Major Works Notice dated 11 March 2010 (page 539). Mr Mitchell, who gave evidence for the Applicant, says that the first two notices were sent both to the property address and to the Respondents' correspondence address at 29 Towergate House. The third notice was sent only to the property address because the Applicant says that by that date, but not until 23

February 2010, the Applicant had been informed that the previous correspondence address at 29 Towergate House was no longer a good address for service. His evidence was criticized on the basis that he was not in post until 2016. Notwithstanding that, we accept his evidence as to the normal practice of the Applicant in relation to the service of notices and accept that that practice applied in 2007. We are satisfied on the evidence that all three notices were sent and received by the Respondents. We cannot accept Mr Salam's evidence that they were not received. Mr Salam in fact went further than that and suggested that they were not sent. We do not know how he could make that suggestion, unless it was an inference based on the fact that, according to him, they were not received. In any event, we are satisfied that all three notices were sent *and* received. However, even if we are wrong about receipt, we are satisfied that all three notices were sent to the property address and that this was sufficient service for the purposes of Clause 8(2) of the Lease: see e.g. *Southwark LBC v. Akhtar* [2017] L & TR 36 at [62]. There being no other issue in relation to consultation, we find that the requirements of the 2003 Regulations were satisfied. However, even if we had not been so satisfied, applying *Daejan v. Benson* [2013] 1 WLR 854, we would have dispensed with the consultation requirements unconditionally under s.20ZA LTA on the basis that the Respondents had not identified any relevant prejudice: see *Daejan* at [44].

Issue 2 (Reasonableness of Costs)

11. By paragraph 2 of Judge Nicol's directions dated 30 July 2019, the Respondents were directed to file a statement of case "*setting out which elements of the major works programme and its costs they object to, together with copies of any alternative quotes on which they rely*".

12. The Respondents' statement of case dated 30 September 2019 says this at paragraph 8:

> *"The Respondent disputed costs which the Applicant has claimed are as follows:*
>
> a. *Charge of 22,559.47 GBP for communal area that seems unrealistic as the area in the building is very small;*
> b. *Charge of 16,381.55 GBP for drainage repairs, although no repairs had been done;*
> c. *Charge of 28,462.28 GBP for communal lighting works that have nothing to do with the Respondent's property;*
> d. *Charge of 571.47 GBP for insulation to risers that the Applicant has not provided information or evidence for;*
> e. *Charge of 766.76 GBP for asbestos removal that the Applicant has not provided information or evidence for;*
> f. *Charge of 10,045.80 GBP for an overhaul existing communal cold-water tanks even though no such service exists in the block of the property;*
> g. *Charge of 5,026.79 GBP and 938 GBP for an IRS installation and door entry system that does not require or benefit from a security entry;*
> h. *Charge of 20,621.09 GBP for block entrances even though the block has only one entry for which the amount seems unrealistic;*
> i. *Charge of 42,418.29 GBP for some roof works that seem unrealistic;*
> j. *Charge of 67,027.71 GBP for structural and fabric repairs, but the work has never been carried out;*
> k. *Charge of 41,358.83 GBP for window replacements where low quality work has been carried out;*
> l. *Charge of 33,478.49 GBP described as a 12% fee and whose purpose is unclear".*

13. The Respondents' statement of case does not condescend to give any meaningful detail in relation to these challenges and the remainder of the statement of case is concerned with issues of consultation and

limitation apart from the assertion that "*the costs incurred by the Applicant are disproportionate and/or unreasonable*" (par 10, SoC).

14. The Respondents have provided no rival costings, there is no expert evidence to support their case and the witness statement of Mr Salam adds little or nothing by way of hard evidence to support the defence. In the main it consists, firstly, of complaints about not being provided with any breakdown of the costs claimed (despite multiple requests having allegedly been made for such information) and secondly, of the repeated assertion that the costs claimed "*seem unrealistic and unreasonable*". As to the first point, this was not put to Mr Mitchell and there is in fact no evidence before us of contemporaneous complaints; in any event Mr Salam accepted that he received the demand dated 2.4.14 and he could at that stage have instructed his own expert to consider what had been done and whether the costs claimed were reasonable. As to the repeated assertion that the costs claimed are unreasonable, this is not sufficient to sustain a meaningful challenge to the sums claimed, particularly in circumstances where the work was put out to (mini-)tender and the Applicant accepted the lowest tender which was provided by a contractor called Durkan Limited: see Tender Report at MM2. There is a very detailed Pricing Schedule and Scope of Works document provided by Durkan (page 476) and a post-works document prepared by the Applicant which shows the final cost (including preliminaries) of each of the items of work and the proportion chargeable to the Respondents based on the size of their flat (pp.528-529). The subsequent Demand (p.550A-D) was obviously based on this document and explains in detail how the final charge was computed. It is apparent from the Final Advice for Payment (page 550E) dated 12 July 2012 and the evidence of Mr Mitchell (paragraph 9 of his witness statement) that the work progressed in stages and was supervised by Bailey Garner LLP and the Applicant's Clerk of Works who submitted weekly reports confirming that the work had been carried out: see MM1. The work was then paid for as each stage was completed and signed off. As the works progressed, the need for some additional work was identified (e.g. to the roof where further inspection

revealed the need to replace the roof felt underlay for the entire building) and where this occurred, there was an additional employer's instruction: see e.g. pp.517-523 and MM3, MM4, MM5, MM8, MM9. In short, the Respondents have adduced no meaningful evidence to sustain any challenge to the sums claimed. We had the benefit of an inspection on the first day of the Trial but this was of limited benefit coming as it did more than 7 years after the work was completed. That said, there was nothing apparent to us on inspection that gave any support to the Respondents' claims.

15. The Tribunal has, in any event, carefully considered each of the individual complaints listed in paragraph 8 of the Respondents' statement of case and has concluded that they are without substance.

16. As to a. above, the charge is not "unrealistic" whatever that may mean. The communal area is not small as suggested and all tenants benefit from having the communal area properly maintained. There are no rival costings. There is, in sum, no evidence to sustain this challenge.

17. As to b. above, we are satisfied that the drainage repairs were done: see e.g. MM3.

18. As to c. above, the work was clearly done; we saw the evidence of it. The suggestion is that it has nothing to do with the Respondents' property and does not benefit the Respondents. This is both wrong and irrelevant. The Respondents, as do all the tenants in the block, benefit from communal lighting that works and in any event they are obliged to pay for it under the terms of Clause 5(5) taken together with paragraphs 1(1) and 1(2) of Schedule 5 to the Lease. There is, in sum, no evidence to sustain this challenge.

19. As to d., e., and f. above, these challenges were not pursued at the hearing but we are satisfied in any event that there is no evidence to support any of these challenges.

20. As to g. above, we repeat, mutatis mutandis, our comments under paragraph 18 above.

21. As to h. above, the charge is not "unrealistic" whatever that may mean. A significant amount of work was involved: see MM8. There are no rival costings. There is, in sum, no evidence to sustain this challenge.

22. As to i. above, the Condition Survey identified substantial disrepair to the roof: see e.g. photo at p.510. In fact, the roof was in an even worse condition than first feared and ultimately the roof felt underlay for the entire block had to be removed and replaced: see pp. 517-523. This in turn necessitated scaffolding and the removal of all the roof titles in order to access the underlay. A significant amount of work was required, contrary to the assertion of the Respondents that little or nothing was done to the roof. There are no rival costings. There is, in sum, no evidence to sustain this challenge.

23. As to j. above, we are satisfied, contrary to the Respondents' assertion, that the structural and fabric repairs were carried out: see MM9. There is no evidence to sustain this challenge.

24. As to k., on inspection the Respondents showed us 2 broken window handles and complained that the windows had not been properly installed. The 2 broken handles add nothing to the claim. We are not persuaded that they were broken shortly after completion of the works because if that had been the case, we consider it more likely than not that they would have been raised and attended to during snagging. Handles do break from time to time, but we have to reach a conclusion on the overall quality of the window installation. We did not consider that the installation was inadequate based on our inspection and there was no expert evidence to support the Respondents' contentions. Such evidence as there is establishes that the window installation was carried out by fully qualified contractors, was in accordance with building regulations and resulted in the issuance of a FENSA certificate: MM10. Based on the entirety of the evidence, we are satisfied that the installation of the replacement windows was carried out to a reasonable standard.

25. As to l., this fee is fully explained in paragraph 22 of Mr Mitchell's witness statement and we consider the charge to be reasonable.

26. For the reasons set out above, the tribunal determines that the sum payable by the Respondents to the Applicant by way of service charge for the major works that concluded in 2012 is £24,640.68.

    The matter will now be transferred back to the County Court and that court will deal with any remaining issues relating to interest and costs.

Name: Judge W Hansen **Date:** 25 November 2019