FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY) &

IN THE COUNTY COURT at EDMONTON, sitting at 10 Alfred Place, London WC1E 7LR

Tribunal reference	**:**	**LON/00AP/LSC/2019/0294**
Court claim number	**:**	**F0QZ52V3**
Property	**:**	**Flat 39 Fladbury Road, Tottenham, London N15 6SB**
Applicant/Claimant	**:**	**London Borough of Haringey**
Representative	**:**	**Ms Whittington of Counsel**
Respondent/Defendant	**:**	**Ms Naciye Kaya**
Representative	**:**	**Ms Kaya in person (accompanied by her son, Mr Aslan, and her sister, Ms Kazil**
Tribunal members	**:**	**Judge P Korn, Mr M Taylor FRICS and Mrs L West**
In the county court	**:**	**Judge P Korn, with Mr M Taylor and Mrs L West as assessors**
Date of decision	**:**	**3rd March 2020**

DECISION

Those parts of this decision that relate to County Court matters will take effect from the 'Hand Down Date' which will be:

(a) If an application is made for permission to appeal within the 28-day time limit set out below – 2 days after the decision on that application is sent to the parties, or;

(b) If no application is made for permission to appeal, 30 days from the date that this decision was sent to the parties

Summary of the decision made by the Tribunal

1. The sum of £22,762.91 is payable by Ms Naciye Kaya to the London Borough of Haringey as a service charge by 31st March 2020.

Summary of the decisions made by the Court

2. The following sums are payable by Ms Naciye Kaya to the London Borough of Haringey by 31st March 2020:
   (i) Legal costs and court fees of £2,454.03 in aggregate;
   (ii) Interest of £1,668.86 on the unpaid service charges at 4% calculated from 2nd April 2018 to 30th January 2020.

The proceedings

3. Proceedings were originally issued against the Respondent/Defendant on 26th April 2019 in the County Court Business Centre under claim number F0QZ52V3. The proceedings were later transferred to the County Court at Edmonton and then to this tribunal by the order of District Judge Cohen dated 30th July 2019.

4. Directions were issued and the matter eventually came to hearing on 30th January 2020.

The hearing

5. The Applicant/Claimant was represented by Ms Whittington of counsel. The Respondent appeared in person, together with her son, Mr Aslan, and her sister, Ms Kazil.

The background

6. The Property is a flat within a purpose-built block of flats.

7. Neither party requested an inspection of the Property and nor did the tribunal consider that one was necessary or that one would have been proportionate to the issues in dispute.

8. The Applicant/Claimant is the freehold owner of the building of which the Property forms part and the Respondent/Defendant holds a long lease of the Property which requires the landlord to provide services and for the tenant to contribute towards the cost of those services by way a variable service charge.

9. The Applicant/Claimant has set out in its written statement of case the relevant lease provisions and its general submissions as to why it considers the service charges in question to be payable in full.

The issues

10. The sums claimed by the Applicant/Claimant are as follows:

    (i) Arrears of service charge totalling £22,762.91, being the Respondent's/Defendant's share of the cost of major works carried out in the 2014/15 service charge year;

    (ii) Interest at the statutory rate of 8% from 2nd April 2018 to the final hearing date (these being the dates specified by Counsel at the final hearing); and

    (iii) Legal costs up to the date of transfer to the First-tier Tribunal.

11. At the start of the hearing the Respondent/Defendant identified her objections to the major works charges as follows:

    (i) The charges were not payable by virtue of the limitation period in the Section 125 Notice which was originally served on her;

    (ii) The charges were not payable by virtue of the limitation period contained in her lease as they related to the remedying of structural defects; and

    (iii) There were various errors in the original estimate of the charges.

County court issues

12. After the proceedings were sent to the tribunal offices, the tribunal decided to administer the whole claim so that the Tribunal Judge at the final hearing performed the role of both Tribunal Judge and Judge of the County Court (District Judge). Neither party objected to this.

Brief summary of parties' submissions on the issues

Statutory limitation period issue

Respondent's/Defendant's submissions

13. In her witness statement the Respondent/Defendant states that she purchased the Property under the 'Right to Buy' legislation in the Housing Act 1985 ("**the Housing Act**"), and she refers to the original landlord's offer notice dated 5th August 2003 given under section 125 of the Housing Act. In her submission the landlord's ability to charge service charges was limited by the Statement of Service Charge Estimated for the five-year period which formed part of the offer notice.

14. She also refers to a letter from the Applicant/Claimant dated 2nd March 2018 specifying a limit on how much she could be charged for major works. The letter states that if a section 20 notice relating to major works is issued within 5 years from the date of her purchase of the Property then the amount of service charge chargeable will be limited to the figure contained in section 3 of the landlord's offer notice. In this context she notes that the Applicant/Claimant served a section 20 notice on her on 23rd February 2005.

15. At the hearing she said that the major works in question were planned within the initial five-year period and therefore that she should not have to pay towards them.

Applicant's/Claimant's submissions

16. The Applicant's/Claimant's case is that these costs were not incurred until 2015, which is 7 years after the end of the five-year limitation period contained in the offer notice. There is also no document which establishes that the works concerned were even envisaged prior to 2014.

17. Specifically regarding the section 20 notice dated 23rd February 2005 referred to by the Respondent/Defendant, at the hearing Counsel for the Applicant/Claimant noted that there were different types of section 20 notice and said that the notice dated 23rd February 2005 related to a borough-wide qualifying long term agreement and was sent to all leaseholders of Council-owned properties in Haringey. It was not the sort of section 20 notice which related to any specific works, and there was no evidence that there were any specific works which the Applicant/Claimant intended to carry out in 2005.

Lease limitation issue and remedying of structural defects

Respondent's/Defendant's submissions

18. The Respondent/Defendant also refers to the limitation on contributions towards the service charge set out in clause 4(2) of her lease, the relevant parts of which reads as follows:-

"The Tenant hereby covenants … to pay to the Corporation [i.e. to the landlord] … a proportionate part of the reasonable expenses and outgoings incurred by the Corporation in the improvement repair maintenance renewal and insurance of the Building and the Estate and the provision of services therein … Provided that the Tenant shall not be required to contribute to the repair of any structural defect in the Building unless (i) the Tenant was prior to the granting of this Lease notified in writing of its existence or (ii) the Corporation first

became aware of the said defect after more than 10 years from the date hereof".

19. She notes the limitation on liability in relation to the cost of repair of structural defects and states that it is clear from the contractor's quote that the works in question were structural. She also refers to a Collins Dictionary definition of the word 'structural' and to the Australian case of *Wesfarmers General Insurance v Jameson (2016) NSWCATAP 136* in which she quotes the New South Wales Civil and Administrative Appeals Panel as defining a structural defect in a particular way.

20. Having stated/implied that in her view the works constituted the remedying of structural defects, she goes on to state that the works fall within the proviso to clause 4(2) of the lease as the Applicant/Claimant first became aware of the defects within 5 or 10 years from the date of the lease. It follows, in her submissions, that she is under no obligation to pay towards the cost of these works.

21. At the hearing she clarified her position by saying that the fact that the Applicant/Claimant issued a section 20 notice in 2005 demonstrated that they knew about the need for the major works. She added that the major works were already being anticipated in 2008/09 but that the major works programme was delayed because of her dispute with the Applicant/Claimant.

Applicant's/Claimant's submissions

22. In written submissions the Applicant/Claimant denies that the works involved the remedying of structural defects and states that the works carried out were primarily repair works pursuant to its repairing obligations under the lease.

23. At the hearing Counsel for the Applicant/Claimant submitted that all of the works were repair works, and she referred the Tribunal to the Schedule of Works in the hearing bundle. There was also no evidence of any structural defects. Counsel for the Applicant/Claimant also referred the Tribunal to the decision of the Upper Tribunal in *The Mayor and Commonalty and Citizens of the City of London v Various Leaseholders of Great Arthur House (2019) UKUT 341 (LC)* on the question of what constitutes a structural defect.

Respondent's/Defendant's follow-up point

24. The Respondent/Defendant was given an opportunity to make written observations after the hearing on the Upper Tribunal decision in the *Great Arthur House* case referred to above as she had not seen that decision prior to the hearing. In her written observations she states that the distinctions made by the Upper Tribunal are interesting but

ones that may require some thought. She also appears to suggest that its decision is not applicable to this case.

Errors in estimated charges

Respondent's/Defendant's submissions

25. The Respondent/Defendant states that there were several errors in the estimate relating to the major works. She makes a point about the notice of intention listing six separate estates and about there being some confusion regarding the amount attributable to her block. She also questions the contractor's calculations as to the total area of the flat roof, she suggests that there are differences between the contractor's estimated figures and the Applicant's/Claimant's figures, and she states that she did not benefit from certain works, namely asbestos removal, balcony glass roof replacements and cleaning, brickwork repairs and part external decorations.

Applicant's/Claimant's submissions

26. The Applicant's/Claimant's position is that there is no actual evidence of any errors. In any event, even if such errors did exist they would be irrelevant because the Respondent's/Defendant's challenge in this regard relates to the estimated cost and the Applicant's/Claimant's claim is based on the actual cost. Also, the actual cost is lower than the estimated cost.

Separate point re windows

27. Although not strictly part of the case, the Respondent/Defendant made a point about having replaced her own windows and therefore, in her view, not being obliged to contribute towards the cost of the replacement of other leaseholders' windows.

28. The Applicant/Claimant replied that, although not obliged to do so under the lease, it did sometimes (at its discretion) allow leaseholders to replace their own windows and not to be charged for a share of replacing other leaseholders' windows. However, that there was no evidence in this case of the Applicant/Claimant having given its consent to the Respondent/Defendant replacing her windows.

Mr Bester's evidence

29. The hearing bundle includes a witness statement from Mr Michael Bester, Leasehold Services Manager for the Applicant/Claimant. He notes that the Respondent/Defendant was sent an offer notice under section 125 of the Housing Act which included an estimate of service

charges for the first 5 years of the lease. That 5-year period ended on 14th December 2008, and the first costs for the works in question were incurred on 1st April 2015 which is 7 years after the limitation period ended. Therefore the limitation period, in his view, has no impact on her liability to pay.

30. Under clause 4.2 of the lease the Respondent/Defendant is required to pay towards the cost of works unless those works involve structural defects. He states that none of the works for which she has been charged relates to structural defects. In addition, the Applicant/Claimant is unaware of there being any existing structural defects to the building and it was not aware of there being any structural defects when the Respondent/Defendant purchased the Property.

31. The actual cost of the works was significantly lower than the estimated cost, and the Respondent/Defendant was only charged for the actual cost.

32. At the hearing Mr Bester was asked whether the Decent Homes programme was deliberately delayed just so that the Respondent/Defendant would be unable to rely on the limitation in her section 125 offer notice. He replied that this was a ridiculous suggestion; the Decent Homes programme was a very big programme and the only issue was whether and when the works needed to be done. As regards any suggestion that section 20 notices had been served much earlier than 2014 in relation to specific works, he said that based on a perusal of the database (which went back to 2005) there was no evidence that any earlier notices had been served.

33. As regards any errors that there may have been in relation to the estimates, Mr Bester said that these were irrelevant as the estimated cost was not the subject of this dispute; the Applicant/Claimant was claiming the actual cost.

34. In cross-examination, Mr Bester said that he was unable to comment specifically on the calculation of the area of the roof space.

Tribunal's analysis

Offer notice

35. The offer notice is dated 5th August 2003 and contains a statement of service charge estimated for the five-year period commencing six months after the date of the landlord's offer notice. The evidence indicates that the first costs for the works which are the subject of this claim were incurred on 1st April 2015 which is several years after the expiry of the limitation period under the offer notice. Therefore, the

cost of these works is not caught by the offer notice, i.e. there is nothing in the offer notice which means that the cost of these works is not payable in full.

36. The Respondent/Defendant has tried to suggest that the works in question were actually envisaged by the Applicant/Claimant much earlier than 2015. Even if this were the case we are not persuaded that it would be relevant, except conceivably if there was some evidence of a deliberate attempt on the part of the Applicant/Claimant artificially to delay the works by several years simply in order to justify including the cost in the Respondent's/Defendant's service charge. However, there is no such evidence and no other credible basis for accepting the Respondent's/Defendant's analysis. The section 20 notice dated 23rd February 2005 clearly does not relate to any specific set of works but is instead a notice sent generally to leaseholders within Haringey advising them of the intention to enter into a qualifying long term agreement.

37. In conclusion, therefore, the Respondent's/Defendant's argument on this point fails.

Lease provisions

38. Under the relevant section of clause 4(2) of the lease, the tenant is not required to contribute towards the cost of the repair of any structural defect in the building unless the tenant was notified in writing of its existence prior to the granting of the lease or the landlord first became aware of the defect after more than 10 years from the date of the lease.

39. A key issue, therefore, is whether all or some of the works in question constituted the repair of a structural defect. There is nothing in the contractor's schedule of works which suggests that any of the items listed relates to a structural defect, and we have a witness statement on this point from the Applicant's/Claimant's Leasehold Services Manager.

40. Mr Bester made himself available for cross-examination and we found him to be a credible witness. He stated that none of the works for which the Respondent/Defendant had been charged related to structural defects. The Applicant/Claimant was unaware of there being any existing structural defects to the building, and neither had it been aware of there being any structural defects when the Respondent/Defendant had purchased the Property.

41. At the hearing the tribunal asked the Respondent/Defendant to explain or justify why she considered the major works to involve the repair of structural defects but she struggled to do so. She is not an expert on the issue, she has brought no expert evidence in support of her assertions, and she appears simply to have been relying on guesswork.

42. As regards what a structural defect actually is, in the Upper Tribunal's decision in the *Great Arthur House* case Mr Justice Fancourt describes a structural defect as being *"something that arises from the design or construction (or possibly modification) of the structure of the Building. It is to be contrasted with damage or deterioration that has occurred over time, or as a result of some supervening event, where what is being remedied is the damage or deterioration. That is repair and is not in the nature of work to remedy a structural defect, even if it is part of the structure that has deteriorated".*

43. On the basis of the factual evidence before us we are satisfied that the works in question do not constitute works to deal with structural defects and that instead they constitute repair of damage or deterioration.

44. The Respondent/Defendant has quoted what appears to be part of a decision by a judicial body in Australia, but she has not provided a copy of the full decision and the decision is not binding on an English court or tribunal. In any event, we do not think that the decision – whatever its status – advances her case, and there seems to be much confusion in her written submissions as between the concepts of "structure" and "structural defect". To the extent that she is arguing that any repair to any part of the structure necessarily involves the remedying of a structural defect this is, in our view, simply wrong as a matter of law.]

45. Therefore, the proviso to clause 4(2) of the lease is not engaged in this case, and therefore the main body of clause 4(2), obliging the tenant to contribute towards the cost, still applies. Consequently, the Respondent's/Defendant's argument on this point fails.

Errors in estimated charges

46. We are unconvinced by the Respondent's/Defendant's submissions on this issue. She asserts that the contractor has miscalculated the area of the roof, but she has no expertise or credible evidence to support this assertion. Her other objections either are difficult to follow or misunderstand the fact that the claim relates to actual charges and not to the estimated charges. Therefore, her arguments on this point fail.

Windows issue

47. The Respondent/Defendant accepts that in principle the cost of works to windows is a service charge item. She claims to be entitled to refuse to pay towards the cost of works to other leaseholders' windows simply on the basis that she has paid for works to her own windows. This, though, is not the case unless the Applicant/Claimant has waived her obligation to do so, and there is no credible evidence that it has in fact

waived her obligation to do so. Therefore, her arguments on this point fail.

Claimant's claim for interest

48. The Claimant claims interest on top of the principal sum. The Defendant submits that it would be unfair for the Claimant to receive interest, seemingly on the basis that she was originally asked to pay within 7 days and that the Claimant did not give her the answers that she had been seeking in relation to the works to her windows.

49. The Claimant has been wholly successful on the main issue, as the service charges in dispute have been found to be payable in full. The Defendant's case has been very weak. Her objections to paying interest are not accepted and accordingly interest is payable.

50. With the regard to the amount of interest, at the hearing the Claimant sought this at the statutory rate of 8% but accepted that this was the matter for my discretion. In my view, the statutory rate, in an era of longstanding low interest rates, is too high and 4% would be a more appropriate rate.

51. As regards the period in respect of which interest is payable, the Claimant seeks interest for the period 2nd April 2018 to 30th January 2020 (the date of the final hearing) and this is accepted. Interest on £22,762.91 for the period 2nd April 2018 to 30th January 2020 at 4% works out at £1,668.86.

Claims for costs

52. The Claimant claims its costs up to the point at which the claim was transferred to the First-tier Tribunal, and it has produced a schedule of costs. It argues that costs should follow the event and that the costs being claimed are proportionate to the issues.

53. The Defendant submits that the Claimant's costs are not reasonable. She has also made her own claim for time taken off work to prepare for the case (80 hours at £25 per hour). She did not offer any legal authority for this cost claim.

54. Dealing first with the Defendant's cost claim, I do not consider that there is any legal basis for such a claim. In any event, she has lost the case comprehensively and it would not be appropriate to make a cost award in her favour.

55. It is accepted that costs generally follow the event in the county court, and I see no reason to depart from that principle in this case as the

Claimant has won comprehensively and the Defendant's case has been very weak. I also note the Claimant's chronology of events in the context of its cost claim.

56. As this matter was allocated to the Fast Track, full costs can be awarded (subject to the fixed costs of Counsel's fees), provided that they are justifiable. Having considered the schedule of costs, the list of tasks undertaken and the fee earner rates I do consider the costs to be justifiable and to be proportionate to the issues. The whole of the amount sought, being £2,454.03 including the court fee, is therefore payable.

Name: Judge P Korn **Date:** 3rd March 2020

ANNEX - 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.

3. If the application is not made within the 28-day time limit, such application must include a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.

4. The application for permission to appeal must 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. Any application for permission to appeal must arrive at the tribunal offices in writing within 28 days after the date this decision is sent to the parties.

6. The application for permission to appeal must state the grounds of appeal, and state the result the party making the application is seeking.

7. If an application is made for permission to appeal and that application is refused, or if no application for permission to appeal is made but, in either case, a party wants to pursue an appeal, that party must file an Appellant's Notice at the County Court office (not the tribunal office) within 28 days of the Hand Down date.

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

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