FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

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

Case Reference	**:**	**LON/00BG/LSC/2019/0224**
Court claim number	**:**	**F14YX538**
Property	**:**	**Flat 9, Bowden House, Rainhill Way, London, E3 3HZ**
Applicant/Claimant	**:**	**Poplar HARCA**
Representative	**:**	**Mr Fieldsend of Counsel**
Respondent/Defendant	**:**	**Mrs Shamin Ara Begum**
Representative	**:**	**Mr Kabir Mahmud, Brother and Lay Representative**
Type of Application	**:**	**For the determination of the reasonableness of and the liability to pay service charges**
Tribunal Members	**:**	**Tribunal Judge I Mohabir** **Mr M Cairns MCIEH** **Mr Clabburn**
In the County Court	**:**	**Judge Mohabir, with Mr Cairns and Mr Clabburn as Assessors**
Date and venue of Hearing	**:**	**13 February 2020** **10 Alfred Place, London WC1E 7LR**
Date of Decision	**:**	**28 April 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

Introduction

1. Unless stated otherwise, the page references herein are to the pages in the hearing bundle prepared by the Claimant/Applicant ("the Applicant").

2. The Applicant commenced proceedings in the County Court to recover service charge arrears totalling £20,700.51 in respect of Flat 9, Bowden House, Rainhill Way, London, E3 3HZ ("the property") together with statutory interest and costs.

3. The Defendant/Respondent ("the Respondent") is the long leaseholder of the property by a lease granted to her by the Applicant dated 24 February 2005 ("the lease"). As the Tribunal understood it, the Respondent was not disputing her *contractual* liability *per se* to pay the service charges claimed. These were challenged for the reasons set out in paragraph 9 below.

4. For the avoidance of doubt, the Respondent's covenant to pay a service charge contribution is found in clause 4(4) of the lease (page 17). The mechanism for calculating the Respondent's liability to pay a reasonable proportion is by reference to the Applicant's "Total Expenditure" (defined in paragraph 1(1) of the Fifth Schedule – page 30) incurred in carrying out its obligation under clause 5(5).

5. The service charge arrears claimed are comprised of two elements of service charges. Firstly, the sum of £19,827.73 was claimed for the cost of major works ("the major works costs") carried out mainly to Bowden House in 2010/11, in which the property is located. The works were carried out under a qualifying long-term agreement by the contractor, Durkan Limited. The contract date was 24 May 2010 with practical completion taking place on 15 April 2011. The date for making good defects was 9 May 2012. The cost of the major works is £312,465.92. The Respondent's service charge contribution was calculated by dividing the cost of the works by the total floor area of the building, which was

then multiplied by the floor area of the property. However, it is the Applicant's case that on 18 January 2012, it served a notice pursuant to section 20 of the Landlord and Tenant Act (as amended) ("the Act") stating that the cost of the major works was £291,049.92 and that the Respondent's service charge contribution is £18,842.87 (page 264). Therefore, the Applicant limits its claim in relation to the major works to the lower amount instead of the sum of £19,827.73 pleaded.

6. The second element of service charge costs was for the sum of £872.78, which separately related to the Respondent's annual service charge liability when the claim was issued in February 2019 ("the annual costs").

7. The Respondent filed a Defence and by an order made by District Judge Kemp on 5 September 2019, the claim was transferred to the Tribunal for determination.

8. A directions hearing took place on 5 November 2019 when it was decided that the Tribunal Judge would also sit as a judge of the County Court to decide all of the issues in this case including the claim for statutory interest and costs.

9. As at that date, the annual service charge costs had increased to £1,00.49 and permission was granted to include the increased sum. The Tribunal noted that the Respondent did not appear to dispute the amount and, indeed, on 10 January 2020 it was paid on her behalf. Therefore, the remaining claim only concerned the major works costs.

10. In relation to the major works costs, the Tribunal identified the following issues that required determination:

    (a) that no section 20 notices under the the Act notices were served by the Applicant regarding the qualifying long term agreement and the major works themselves. In the alternative, the

Applicant made an application for dispensation of the notices under section 20ZA of the Act.

(b) that the claim was statute barred by operation of section 5 of the Limitation Act 1985 and/or section 20B of the Act.

(c) that the works set out in paragraph 6(a) of the Defence (pages 162-3) were not carried out by the Applicant. However, in her statement of case, the Respondent raised a new issue as to the reasonableness of the cost of the disputed works.

Relevant Law

11. This is set out in Appendix to this decision.

Hearing

12. The hearing took place on 13 February 2020. The Applicant was represented by Mr Fieldsend of Counsel. The Respondent did not attend but was represented by her brother, Mr Mahmud, as a lay representative.

Procedural

13. Mr Mahmud made an application to adjourn the hearing. He said that the Respondent had been unable to attend because she is recovering from stage 3 cancer. On questioning, Mr Mahmud admitted that the Respondent's treatment had in fact ended in 2018 and there was no medical evidence before the Tribunal as to why she could not attend the hearing. The Tribunal, therefore, concluded that there was no good reason to adjourn the hearing and the application was dismissed. Furthermore, the Tribunal explained to Mr Mahmud that he could not give evidence on behalf of the Applicant as a witness because he had not served any witness statement.

14. The Tribunal granted permission to the Applicant and Respondent to rely on their additional disclosure provided at the hearing on the basis that no real prejudice was caused to either party by the late disclosure.

15. The Tribunal then drew the parties' attention to the earlier Tribunal decision dated 25 November 2019 found in the bundle (pages 790-801). This decision concerns Flat 10, Bowden House and was made by the leaseholders of the flat in relation to the same major works. Mr Mahmud confirmed that he was closely involved in the preparation of that case including the arguments, he had attended the hearing to fully support it and that the arguments advanced about the execution and/or reasonableness of the disputed items of work set out at paragraph 12 of the decision were the same as those being advanced by him in this case. He said that he had been "prevented" from participating in the proceedings by the Tribunal. In effect, he had been the proxy of the Applicants in that case. The only new items of work challenged in the Defence and not considered in the earlier decision, are the balcony repairs/redecoration (item 1) and electrical services inspection and survey (item 3), where it was determined that the cost of the disputed works was reasonable.

16. In the circumstances, the Tribunal invited submissions from Mr Mahmud as to why the Tribunal should not consider the identical disputed items of work were not *issue estopped by res judicata*. In other words, the same disputed items of work and cost in this case have already been the subject matter of the earlier Tribunal decision based on the same arguments and could not be re-litigated in the way that the Respondent sought to do.

17. Having carefully considered the submissions made by Mr Mahmud, the Tribunal ruled the disputed items of work challenged in this case were *issue estoppel by res judicata* save for items 1 and 3 above[1]. Put another way, the Respondent was seeking to obtain a more favourable decision based on the same arguments and evidence considered in the earlier

[1] see: ***Arnold v National Westminster Bank*** **plc** [1991] 2 AC 93

decision. To effectively re-hear the same issues would be, in our judgement, a wholly artificial exercise. If so, this would potentially lead to different decisions based on the same facts, which would be inconsistent and perverse.

Decision

Were the Section 20 Notices Served?

18. It is the Applicant's case that the relevant section 20 notices in relation to the qualifying long-term agreement and the major works were both served on the 27 June 2007 and 31 March 2010 respectively. They were posted to the address at 34 Rosemary Drive, Ilford, Essex, IG4 5JD.

19. It is the Respondent's case that she resided at the subject property until January 2014 when she moved to Rosemary Drive. She only became aware of the major works for the first time when she received a letter from the Applicant dated 16 February 2017. Mr Mahmud, therefore, submitted that the Respondent had not been served with any of the relevant section 20 notices.

20. The same point was taken by the leaseholders in the earlier decision about non-service of the section 20 notices and rejected by the Tribunal. In that case, Mr Mitchell on behalf of the Applicant, gave the same evidence that the notices had been served at both the property address and the leaseholder's usual or last known address, namely, 34 Rosemary Drive.

21. The Tribunal accepted Mr Mitchell's evidence that the Respondent had informed the Applicant of her change of address to Rosemary Drive on or about 27 March 2007. Apparently, the reason for this is that the Respondent had sublet the property. The change of address is corroborated by the contemporaneous entry made in the note pad for the Respondent's service charge account (page 844). Thereafter, it is clear that the Applicant successfully corresponded with the Respondent at the Rosemary Drive address.

22. The Tribunal, therefore, found that the Respondent did in fact move to the Rosemary Drive address in or about 27 March 2007. It follows that the Tribunal was satisfied that she was sent and received the relevant section notices relating to the qualifying long-term agreement and the major works at that address.

23. Further, and in the alternative, given the Tribunal has found that the Respondent's correct address was 34 Rosemary Drive, this was sufficient for the deemed service provisions in clause 8(2) of the lease (page 79)[2]. Accordingly, the Tribunal was satisfied that the Applicant had validly carried out statutory consultation under the Service Charge (Consultation Requirements) (England) Regulations 2003 in relation to the qualifying long-term agreement and the major works. Therefore, it was not necessary for the Tribunal to go on to consider the Applicant's application for dispensation.

Limitation

Limitation Act 1980

24. The Tribunal accepted the Applicant's submission that there is no "limitation defence" under the Limitation Act 1980 as being correct. In any event, the Tribunal was satisfied that the claim was issued on 6 February 2019 and the service charge demand was issued on 2 April 2014. Therefore, the claim was issued within the 6-year limitation period.

Section 20B Notice

25. For the avoidance of doubt, the Tribunal finds that the contract for the major works was dated 24 May 2010 and practical completion occurred on 15 April 2011, which is the relevant date for the purpose of section 20B (page 837). The Tribunal also finds that the section 20B notice was served by the Applicant on 18 January 2012 (page 264). Therefore, the

[2] see: ***Southwark LBC v Akhtar*** [2017] L & TR 36 at 62

Tribunal was satisfied that none of the major works costs is caught by the 18-month limitation period imposed by section 20B of the Act.

Reasonableness of Costs

Balcony Repairs/Redecorations (Item 1)

26. The Respondent's pleaded case is that no work was carried out because she has no balcony at the property. The inference is that the Respondent did not consider that she should be liable for these costs. However, at the hearing, Mr Mahmud accepted that there are 4 balconies at the building and that the Respondent was contractually liable to contribute towards these costs.

27. In her statement of case, the different argument advanced by the Respondent was that the cost of this work was excessive. The original estimated costs were £6,808.23 whereas the final costs amounted to £8,385.46. Mr Mahmud asserted that only some balcony repairs were carried out and submitted that the cost must inherently be unreasonable. The Tribunal allowed the Respondent to make this (different) argument because it had been evidentially met by the Applicant in its supplementary statement of case.

28. The explanation for the difference in the figures for the cost of this work can be found at paragraph 15 of the Applicant's supplementary statement of case (page 835). The difference is the preliminary cost incurred during the completion of the works, which had not been included during the tendering exercise. It was applied at a rate of 12% of the overall cost. The Tribunal accepted this evidence and found the cost for this item of work to be reasonable. Furthermore, the Respondent had not provided any evidence to demonstrate that the final cost was unreasonable. The Tribunal was satisfied that the increase in cost over the initial estimate for the work did not render the final cost unreasonable.

Electrical Services Inspection and Survey (item 3)

29. The Respondent's position in relation to this item of work was similar to that regarding the balcony repairs/redecorations. Her pleaded case is that the Applicant carried out no works and Mr Mahmud maintained this assertion despite there being no evidence to support it.

30. In the alternative, the Respondent submitted that the cost was unreasonable because the estimated figure was £6,828.04 whereas the final cost was £8,385.46.

31. There was clear evidence of the electrical installation having been tested on 20 August 2010 (page 808). The resulting inspection report identified 14 items of work that required corrective action with 2 items requiring urgent remedial work (page 804). The Tribunal accepted the evidence of Mr Mitchell that the work formed part of the tendering process and was carried out by the Applicant. The Tribunal also accepted his evidence that the difference in the estimated cost and the final cost was explained by the inclusion of the preliminary costs for the same reasons set out at paragraph 28 above. The Tribunal, therefore, found that this work had been carried out by the Applicant and the cost was reasonable.

32. Accordingly, the Tribunal awards the Applicant judgement in the sum of £18,842.87 payable by 28 days from service of this decision.

Interest

33. The Applicant has claimed statutory interest at a rate of 8%. However, the Tribunal considered that a rate of 2% from the date of the service charge demand (2 April 2014) to the date of the hearing (13 February 2020) was appropriate. This equates to 2,143 days. The Tribunal made no award for interest after the date of the hearing because this is a reserved decision and it would not be equitable for the Respondent to pay any further interest in the interim.

34. The daily rate on interest on the sum of £18,842.87 at the rate of 2% is £1.03. Multiplied by 2,143 days produces a figure of £2,207.29 for interest also payable by 28 days from service of this decision.

Costs

35. The Applicant did not address the Tribunal on the issue of costs. It is not clear from the Particulars of Claim how the Applicant is claiming its costs. Paragraph 8 appears to contend that the costs incurred by the Applicant are claimed as administration charges under Schedule 11 of the Commonhold and Leasehold Reform Act 2002. These are sought in the sum of £1,020 and "such further costs as the Court thinks just".

36. If the Applicant's pleaded case is that its costs are being claimed as administration charges pursuant to the lease, then the Tribunal noted in paragraph (1) of its Directions order dated 5 November 2019 that the lease does not make provision for contractual costs to be recovered.

37. Therefore, the Applicant's entitlement to its costs will require a separate determination by the Tribunal. For this reason costs are reserved subject to the following directions:

    (a) By **19 May 2020** the Applicant shall file and serve a witness statement clarifying whether its costs are claimed pursuant to the lease or on a party and party basis by reference to its Particulars of Claim.

    (b) By **9 June 2020** the Respondent shall file and serve a witness statement in reply, if so advised.

38. In the event that the Tribunal decides that the Applicant is able to recover its costs and on what basis, it will issue supplementary directions regarding the assessment of those costs.

Tribunal Judge I Mohabir

28 April 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.

Appendix of 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 a leasehold valuation 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 a leasehold valuation 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) a leasehold valuation 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.