FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY) &

IN THE COUNTY COURT at Watford sitting remotely by CVP video

Tribunal reference	**:**	**LON/00BG/LSC/2019/0289**
Court claim number	**:**	**F28YX332**
Property	**:**	**4 Ashcombe House, Bruce Road, London E3 3NW**
Applicant/Claimant	**:**	**Poplar HARCA**
Representative	**:**	**Sam Madge-Wyld of Counsel instructed by Capsticks Solicitors LLP**
Respondent/Defendant	**:**	**Sheikh Mohammad Abdur Raquib**
Representative	**:**	**In person**
Tribunal members	**:**	**Judge N Hawkes** **Ms M Krisko FRICS** **Ms L West**
In the County Court	**:**	**Judge N Hawkes sitting as a District Judge**
Date of decision	**:**	**1 October 2021**

DECISION

This decision takes effect and is 'handed down' from the date it is sent to the parties by the Tribunal office:

Summary of the decisions made by the Tribunal

(1) Of the sum of £24,430.73 which is claimed by the Applicant in respect of the major works which form the subject matter of this application, the Tribunal finds that £23,209.19 is payable by the Respondent.

Summary of the decisions made by the Court

(2) Any application concerning costs and/or any representations concerning interest shall be filed and served by **5 pm on 22 October 2021**.

The background

1. The Applicant/Claimant is the registered freehold owner of 1-28 Ashcombe House, Bruce Road, London, E3 3NW ("the Block"). The Respondent is the registered leasehold owner of 4 Ashcombe House ("the Property"). The Block was formerly owned by the London Borough of Tower Hamlets and is occupied both by long leaseholders and social tenants.

2. Proceedings were originally issued against the Respondent/Defendant on 13 March 2019 in the County Court under Claim Number F28YX332.

3. At Paragraph 5 of the Particulars of Claim, the Applicant/Claimant asserts that:

   "In breach of covenant the Defendant has failed to pay the monies due under the Lease and there remains due and owing to the Claimant at 4 March 2019 the sum of £24,430.73."

4. This sum is a charge in respect of major works which were undertaken in 2010-2011. The Applicant/Claimant also claims interest in the sum of £10,313 to 5 March 2019, continuing at the daily rate of £5.35, and costs.

5. The Respondent/Defendant filed a Defence form dated 25 March 2018 stating:

   "Paid via cheque recorded delivery with letter of full and final settlement as per attached … A detailed Defence with supporting bundle of documents will be filed within 28 days."

6. A notice of proposed allocation to the Multi-Track was issued on 5 April 2019 but the claim has not been allocated.

7. Archstone Solicitors gave notice that they were acting for the Defendant on 18 April 2019 and a more detailed Defence dated 15 May 2019 ("the Defence") was filed.

8. At Paragraph 4 of the Defence, the Respondent/Defendant states:

   "4. In respect of paragraph 5 of the POC, the Defendant denies that there is a liability either existing or subsisting as asserted by the Claimant for the sum of £24,320.73 "the claimed sum" due upon the

Property. In respect to the same, the Defendant would further clarify as follows:

a. The Claimed Sum was being sought by the Claimant in respect to major works that had purportedly been undertaken to the Property or the block;

b. Right at the outset, the Defendant refused that the works had either been carried out and/or that the works had been carried out to a satisfactory standard.

c. The Defendant further discovered that the Claimant had not adhered to the consultation process for major works correctly and as a result of the said and other reasons communicated to the Claimant, on the 9th May 2015 the Defendant made an offer of settlement on a full and final basis in settlement of the matter upon the basis of a payment of £250.00. In particular, a cheque was sent to the Claimant in full and final settlement.

d. On 15th May 2015, the Defendant's cheque payment was cashed by the Claimant and thereby deemed accepted in full and final settlement."

9. On 9 July 2019, the proceedings were transferred to the County Court at Central London. The proceedings were then transferred to this Tribunal by the order of District Judge Brooks dated 16 July 2019 which provides:

"The claim be transferred to First-tier Tribunal (Property Chamber), 10 Alfred Place, London WC1E 7LR."

10. After the proceedings had been 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).

11. Directions were issued on 3 September 2019 leading up to a hearing which was due to take place before a differently constituted Panel on 25 November 2019.

12. On 25 November 2019, the hearing was adjourned with further Directions because the expert member of the Tribunal was unwell. At paragraph (5) of the Directions, the Tribunal noted that the Respondent/Defendant has the conditions anxiety and depression and at paragraph (11) of the Directions dated 25 November 2019, the Tribunal states that it was concerned the Respondent may need reasonable adjustments.

13. Ms Jabbari of Counsel, who represented the Respondent/Defendant at the hearing of 25 November 2019 took instructions and asked that the final hearing should incorporate hourly 5 minute breaks. The hearing

was relisted with a time estimate of 2.5 days (plus half a day for the Tribunal's deliberations).

14. By Court order dated 25 November 2019, the Respondent/Defendant was granted permission to file and serve an Amended Defence by 16 December 2019.

15. On 26 February 2020, Archstone Solicitors gave notice that they had ceased to act for the Defendant.

16. A proposed Amended Defence was filed on 12 February 2020 and, on 28 February 2020, Judge Martynski (sitting as a District Judge), made the following order:

"Upon considering the Claimant's application (to strike out the Defendant's amended defence which was filed on 12 February 2020) and upon the Court being of the view that the Defendant's amended Defence is of no effect (given that he only had permission to file an amended defence by 16 December 2020 which he failed to do).

IT IS ORDERED THAT:

No order on the Claimant's application"

17. An application was then made by the Respondent/Defendant for an extension of time to file an Amended Defence and, on 17 March 2020, Judge Martynski (sitting as a District Judge), made the following order:

"Upon considering the Defendant's application (dated 5 March 2020 - to be given a further extension of time to file an amended defence) and upon considering the witness statement of Matthew Mitchell dated 10 March 2020.

IT IS ORDERED THAT:

Defendant's application is dismissed

...

Reasons:

1. Following a transfer from the County Court, directions were given in this Tribunal on 3 September 2019. The final hearing at the Tribunal offices was due to be heard on 25 November 2019. That hearing could not go ahead due to the illness of one of the tribunal members. Further directions were given on the hearing date and these included the Tribunal Judge (sitting as a Judge of the County Court) making an order giving permission to the Defendant to amend his Defence to raise the following matters;

(a) The lawful demanding of Service Charges

(b) A set-off

(c) A Scott Schedule limited to the issue raised in the Schedule already filed with the Tribunal

The deadline for filing and serving the amended Defence was 16 December 2019.

2. The Tribunal purported to give the Defendant an extension to file his amended Defence to 17 January 2020 (this extension was not valid as it was not an order made by a Judge).

3. The Defendant filed his amended Defence on 12 February 2020.

4. The Defendant's reasons for the late filing of his Defence can be *summarised as follows:*

(a) He ran out of money so had to dis-instruct his solicitors

(b) He was under extreme stress due to his father having a stroke; further his mother is elderly and unwell (it appears from the documents submitted by the Defendant that his father was admitted to hospital in or about 12 February 2020).

5. It appears from the amended Defence that it goes beyond the scope allowed in the order of 25 November 2019 in that;

(a) It raises further general issues

(b) It seeks to rely on further expert evidence for which no permission has been given

(c) It does not follow the issues raised in the Scott Schedule filed on 20 November 2019

(d) It has not been marked clearly to show what exactly has been amended."

18. In July 2021, the Respondent/Defendant made a further application for an extension of time and, on 16 August 2021, Judge Carr (sitting as a District Judge), made the following order:

"Upon considering:

· the Defendant's application to be given a further extension of time to file an amended defence dated 22 July 2021 (together with accompanying copy amended Defence dated 11 February 2020 and

N244 application for further extension of time to file an amended defence dated 5 March 2020);

· the Claimant's witness statement in response (third witness statement of Matthew Mitchell dated 4 August 2021 together with exhibit); and

· the Defendant's witness statement in reply together with exhibits dated 12 August 2021

IT IS ORDERED THAT:

(1) The Defendant's application is dismissed."

19. In setting out the reasons for making this order, Judge Carr referred to Judge Martynski's order of 28 February 2020 and then stated:

"3. Since that application, the claim was relisted for hearing to take place over 20 – 22 June 2020. The parties agreed their Bundle. Unfortunately, due to the first national lockdown brought about by the covid-19 pandemic, that hearing was vacated.

4. Due to the necessity of listing for a face-to-face hearing, the hearing was relisted for 14-16 June 2021. The Tribunal sent to the parties its request for information about the attendance of witnesses and for the parties to agree an indicative trial timetable, together with its covid Guidance, on 8 June 2021.

5. On 9 June 2021, the parties agreed a trial timetable. On 10 June 2021, the Defendant notified the Tribunal that he had symptoms that accorded with possible covid infection (a doctor identified an upper respiratory tract infection and recommended that he take a covid test), and the hearing was again vacated.

6. On 10 June 2021, at 20:39, the Defendant purported to resile from his agreement over the trial timetable. That precipitated a large number of letters and emails from the parties in respect of which the Tribunal had to provide directions or indications. In particular, in my letter of 17 June 2021, I stated as follows:

> *3. The Bundle before the Tribunal is that prepared in accordance with the Directions, and encompasses the parties' statements of case. No permission has been sought or given for any additional documentation or further argument to be raised.*
>
> *4. Given that the hearing was previously adjourned only days before the hearing was due to be convened, and the bundle has been prepared for in excess of a year and no issue with the contents of the bundle had been raised at any earlier stage, the Tribunal is going to take some persuading from any party*

making such an application that it should exercise such discretion.

7. That led to the Defendant stating in an email on 18 June 2021 that he would seek to make a further application to rely on the Amended Defence of 11 February 2020. That application was received fully fee-paid on 22 July 2021 and I gave directions for the Claimant to respond by 5 August 2021, and the Defendant to provide any brief reply by 12 August 2021. I notified the parties that I considered it proportionate that this application be determined on the papers.

8. The hearing of the claim has been relisted for 6-8 September 2021.

9. The Defendant relies in his application on the facts and matters that he relied on in his previous application of 5 March 2020 (for which purpose he attaches the said application). The contents of his 22 July 2021 application are further explication of those previous matters and of his main case. He asserts that the Claimant will not be prejudiced by his being given permission to rely on the Amended Defence of 11 February 2020, as the Tribunal will already need to consider items raised in the Scott Schedule, the expert is already due to give evidence, and it will be better for the Court and the Claimant at the hearing to have the professionally drafted document as he is a litigant in person who will simply frustrate the court and Claimant.

10. The Claimant simply responds that this matter has already been decided by Judge Martynski. Should the Defendant have had grounds to say that the decision was wrong, he ought to have appealed it. He did not. The claim has already been adjourned three times. The bundle is ready and has been since April 2020. The costs being incurred as a result of the multiple adjournments are disproportionate, and would be more so were the Defendant now given permission to rely on the Amended Defence of 11 February 2020.

11. The Defendant's reply is lengthy (a five-page witness statement accompanied by 20 exhibits) and substantially seeks to argue his main case. In it, he asserts that the Claimant seeks to rely on a technicality of procedure, rather than explain how admitting the Amended Defence of 11 February 2020 would prejudice them. He asserts that the Claimant ignores the errors that 'weren't picked up on'.

12. Insofar as the Defendant identifies any such 'errors', none of them are allegations that Judge Martynski's decision was wrong in law or fact or otherwise procedurally improper.

13. I refuse the Defendant's further application to rely on the Amended Defence of 11 February 2020, on the following bases:

(a) The Defendant is simply relitigating the application on which a final decision has already been made. He does not in his application raise any change of circumstances. In fact, he specifically relies on the

self-same application of 6 March 2020 which has already been determined. This Application has already been decided and his means of challenge to it was to appeal. Any such appeal would now be substantially out of time, his appeal rights having expired 21 days after that decision was sent to him. That is more than a mere 'technicality'. On that basis alone the application is dismissed as it is an abuse of process.

(b) In the alternative, even had the Defendant raised a change of circumstances rendering this application amenable to a different decision, the Defendant does not address the delay (of an additional 16 months) in this further application. Judge Martynski's decision specifically notified to the parties that they had seven days from the date of the order to apply to set it aside or vary it.

(c) Neither does the Defendant address the relief from sanctions criteria to be ascertained from Denton v TH White [2014] EWCA Civ 906.

(d) The Defendant has not sought to deal with the offending matters raised in Judge Martynski's decision of 17 March 2020 as regards the form and contents of the Amended Defence of 11 February 2020.

(e) The Defendant's position on the want of prejudice that would be caused to the Claimant is simply untenable with the upcoming fourth listing of this hearing for which both parties have been prepared since April 2020.

(f) In those circumstances, even had the application been amenable to a new decision, I would have dismissed it.

(f) Given the above, I consider that the Defendant's application is totally without merit."

The hearing

20. The final hearing took place both in person and remotely by CVP video from 6 to 8 September 2021.

21. The Applicant/Claimant, Poplar HARCA, was represented at the hearing by Mr Madge-Wyld of Counsel and the Respondent/Defendant, Mr Raquib, appeared in person. Ms West appeared by CVP video and all other participants in the hearing appeared in person.

22. The Court and Tribunal heard oral evidence from:

    a. Matthew Mitchell, a Home Ownership Officer employed by the Applicant/Claimant;

    b. Timothy Warden, a Senior Building Surveyor employed by the Applicant/Claimant;

c. Clive Peters BSc MRICS, the Applicant/Claimant's Head of Asset Investment;

d. Aktar Ali, a Leasehold Officer employed by the Applicant/Claimant; and

e. The Respondent/Defendant.

23. The Panel arranged for regular breaks to take place during the course of the hearing and invited Respondent, and the others present, to request additional breaks at any point in the proceedings.

24. The Tribunal is not generally carrying out physical inspections due to the coronavirus pandemic, the work which forms the subject matter of this dispute was undertaken approximately 10 years ago, and colour photographs were provided in the hearing bundle. In all the circumstances, the Tribunal did not consider it to be necessary or proportionate to carry out an inspection.

The issues

25. By clause 4(4) of the Respondent/Defendant's lease of the Property ("the Lease"), the Respondent/Defendant is obliged to pay the *"Service Charge"*.

26. By the Fifth Schedule to the Lease, the Service Charge is *"Such reasonable proportion of Total Expenditure as is attributable to the Demised Premises …"*.

27. The Total Expenditure includes *"the total expenditure incurred by the Lessors in any Accounting Period in carrying out their obligations under Clause 5(5) of this Lease …"*. The Applicant/Claimant's repairing covenants in connection with the Block are set out at clause 5(5) of the Lease.

28. It is clear from the orders set out above that the issues before the Court and Tribunal are limited to the issues raised in the Respondent/Defendant's Defence dated 15 May 2019, in summary:

a. whether the claim had been settled by the Applicant/Claimant banking a cheque in the sum of £250 ("the cheque issue");

b. whether the Applicant/Claimant has failed to comply with the consultation requirements in respect of major works ("the consultation issue"); and

c. The Respondent/Defendant's challenge to the standard of the work ("the reasonableness issue").

29. At times, it was necessary to remind the Respondent/Defendant of the limited scope of these proceedings. At the commencement of the hearing, the Respondent/Defendant produced two files of additional

documents upon which he wished to rely and, at other times during the course of the hearing, he sought to rely upon documents which were not included in the hearing bundle.

30. With the agreement of the Applicant/Claimant, the Tribunal looked at five photographs produced by the Respondent/Defendant which were not in the hearing bundle. The Tribunal has also considered an email to from the Respondent/Defendant to his solicitor dated 9 May 2015 which the Applicant/Claimant had requested sight of. The documents before the Tribunal were otherwise limited to the documents contained within the hearing bundle.

31. The Respondent/Defendant closely questioned the Applicant/Claimant's witnesses as to their qualifications. The Tribunal has taken into account the qualification and experience of each witness in assessing their evidence.

32. Following the conclusion of the hearing, the Respondent/Defendant sought to communicate with the Tribunal. The Tribunal explained that no further evidence or submissions would be received following the conclusion of the hearing. No direction had been made permitting further evidence or submissions from either party.

33. In order to keep the decision to a manageable length, the Tribunal has not sought to reproduce every submission which was made and has focussed on setting out the information which is needed in order to understand the Tribunal's determinations.

The determinations of the Tribunal

The cheque issue

34. It is not in dispute that a cheque was posted by the Respondent to the Applicant on 9 May 2015 and it is not in dispute that the Applicant presented the cheque on or before 15 May 2015.

35. It is the Respondent's case that the cheque was accompanied by a letter addressed to Nneka Olaleye at Poplar HARCA dated 15 May 2015 in the form attached to his Acknowledgement of Service ("the Offer Letter") which included the following statement:

> *…"I write to you* ***attaching cheque (no 100046) payment of two hundred and fifty pounds in a full and final settlement without prejudice to outstanding works still to be carried out from attached list & brickwork defect resolved****. The payment is tended as an offer of settlement which will be deemed to have been accepted by you and therefore be contractually binding if it is presented to your bank and cleared for payment on the terms written in bold. If you are not willing to accept the payment on these*

terms & accept liability as per below, would you please return the payment and I will assume therefore that the dispute will continue. …

…

If however you do not accept any of the liability then please return my cheque back. *The remainder outstanding annual service charge as promised – one third would be paid by July or August then in monthly instalments."*

36. A different version of this letter, which the Respondent states was not sent out, is exhibited to the Respondent's witness statement. The Respondent contends that the Applicant received the Offer Letter and that, by presenting the cheque, the Applicant accepted the sum of £250 in full and final settlement of the Applicant's claim for approximately £24,000 plus interest. The Applicant disputes that the Offer Letter was sent or received.

37. It is for the Tribunal to determine, on the balance of probabilities and on the basis of the evidence before us, whether it is likely that the Offer Letter was sent and received. Mr Ali, Mr Mitchell and the Respondent gave oral evidence concerning the cheque issue.

38. Mr Ali has been employed by the Applicant since early 2015. His role at the material time was as an Administrative Assistant responsible for handling incoming post.

39. Mr Ali gave evidence that incoming letters were scanned and saved on the Applicant's database under the property address and that a hard copy would have been passed to him to sort. He stated that, if the matter was simple, he would deal with the correspondence. However, if correspondence concerned a service charge dispute, he would refer the letter to an advisor in the Private Tenures Team.

40. Mr Ali said that, if a cheque was received without a covering letter, the hard copy would be passed straight to the Finance Team to bank and a record of the cheque would be made in a cheque book. He stated that members of his team did not deal with cashing cheques.

41. Mr Ali gave evidence that he has searched the Applicant's database for "4 Ashcombe House" in order to ascertain what correspondence was received by the post room in 2015 concerning this address. The search results are exhibited to his witness statement and there is no record of the Offer Letter having been received.

42. During Mr Ali's oral evidence, it became clear that the period searched started part-way through 2014 and ended part-way through 2016 and that data appears for 14 Ashcombe House because this address contains

the number and words "4 Ashcombe House" within it. Mr Ali stated that there is only one post room and that a letter addressed as the Offer Letter was addressed would (on the assumption it was delivered) only be delivered to this post room.

43. The Respondent found it unsatisfactory that Mr Ali was unable to recall whether or not he had seen specific correspondence in 2015. Given the passage of time and the volume of post likely to have been processed, the Tribunal does not find Mr Ali's inability to recall specific correspondence surprising. His evidence concerned the practice which was followed in the post room. In response to questioning by the Respondent, Mr Ali stated that the post room staff had no handbook or Code of Conduct book but that there was a practice which everyone in the post room had to follow.

44. Mr Ali did not agree with the Respondent that "a stop" had been placed on the Respondent's account. He stated that, when a case was "going through legal", it was the job of the administrative assistant to pass correspondence concerning the case on to the relevant advisor or manager. However, if a lessee wished to make payment, the existence of a dispute would not prevent a cheque received without a covering letter from being cashed.

45. Mr Mitchell gave evidence that he is a Home Ownership Officer employed by the Applicant with conduct of this matter. At paragraphs 8 to 10 of his witness statement dated 13 March 2020 he states:

"8. In respect of the alleged settlement cheque, I note that back in 2015, the lessee was making regular monthly payments of £250. I produce at Exhibit MM9 an updated copy of Statement of Account. In line with the Applicant's process for handling incoming post, if a cheque without a cover letter was received, it would have been dealt with by the admin assistants. They would have looked on the leaseholder's account for recent transaction[s] and, in the case of regular monthly payments, if the cheque matched recent sums paid in, then it would have been banked and allocated to the account.

9. In respect of service charge accounts, the Applicant operates a main account for the property where routine service charges are invoiced and any transactions relating to routine service charges are recorded, in addition to subaccounts dealing with one off items, such as major works or other admin charges recharged to leaseholders. The Respondent's account is 2425, while the service charges subaccount is 2425 0 and the subaccount for major works is 2425 5.

10 The Applicant believes that, as the cheque sent in by the Respondent was in the sum of £250.00, for anyone dealing with the cheque in the absence of a cover letter and looking at the property account, it would appear as though the Respondent was making another one of his

regular monthly payments. For the avoidance of doubt, the Applicant denies receiving the cover letter dated 9 May 2015."

46. Mr Mitchell gave evidence that his team could take payments over the telephone but that banking cheques is the role of the Finance Team. He denied seeing the Offer Letter prior to its production in these proceedings.

47. Mr Mitchell was unable to recall every specific item of correspondence concerning the Respondent. He stated that correspondence between the Respondent and the Applicant's solicitors would be stored on the solicitors' system rather than on the Applicant's system. In response to questions from the Respondent concerning why the numbers 0 and 5 do not appear on his statements, Mr Mitchell stated that the subaccounts are for internal purposes.

48. The Respondent also gave oral evidence concerning the Offer Letter. As stated above, a different version of this letter, which the Respondent states was never posted, is exhibited to his witness statement. Both versions of the letter are signed. The Respondent strongly disputed Mr Madge-Wyld's suggestion that there are two different versions of this letter because, knowing that the letter had not gone out, the Respondent sought to improve upon it.

49. The Respondent gave evidence that, on 9 May 2015, he sought the advice of a solicitor friend concerning the content of his first draft and then sent out an amended letter which takes account of the solicitor's advice. Accordingly, on the Respondent's evidence, the two versions of the letter are a first draft and a final version.

50. The Respondent stated that he has both a shorthand signature and a longhand signature and that the solicitor advised him that the signature on the letter should match the signature on his cheque. The solicitor also made some proposals concerning the wording of the letter which included the insertion of the words "without prejudice". The Respondent explained that he is unfamiliar with this type of expression and that his letter writing skills are limited.

51. The Respondent initially stated that he had not instructed this solicitor before. His account of what occurred on 9 May 2015 is as follows. He e-mailed the solicitor the draft letter. The solicitor e-mailed him 15-20 minutes later and the Respondent then started to make amendments. The Respondent said that the draft letter was sent to both the solicitor's personal and professional e-mail accounts and that it was not described as a draft.

52. When asked why he had signed a draft letter, the Respondent said that he had thought the letter was ready to go out but had then decided to

double check. It is unclear why the Respondent sent the proposed letter to his solicitor in PDF rather than in Word format. The Respondent stated that, after he had made the amendments proposed by his solicitor, they had a chat and the solicitor said "that's fine". The letter was then posted.

53. The Respondent stated that when he formally instructed Archstone Solicitors in respect of this matter, in April 2019, he gave his solicitor the claim form and the Acknowledgement of Service which exhibits the version of the Offer Letter which the Respondent says went out.

54. When asked why the solicitor would have exhibited to the Respondent's witness statement, in place of the Offer Letter attached to the Acknowledgement of Service, a draft sent to him by email some 4.5 years earlier when the Respondent was not a client, the Respondent explained that he did not know what his solicitor's habits were. He also stated that there had been a misunderstanding and that he had in fact instructed the solicitor before in connection with matters concerning the Land Registry. He had thought he was being asked whether he had instructed the solicitor before in respect of his dealings with the Applicant. He explained that he is not entirely proficient in English and the Tribunal has taken this into account.

55. The Respondent gave evidence that he did not check the exhibit to his witness statement because he trusted the solicitor. He stated that he had personally written "Doc 1" on the version of the letter which is exhibited to his witness statement.

56. The Respondent accepted that, in early 2016, he had general service charge arrears of approximately £6,000; that he could not at that time afford an additional £24,000 of debt; that, at the end of April 2015, the Applicants' solicitors made him aware that they were instructed to recover outstanding sums and threatened forfeiture; and that, by 9 May 2015, the Applicant had contacted the Respondent's bank. However, the Respondent strongly objected to the suggestion that he was "desperate" at this time and explained that he had been trying to sort out the dispute.

57. The Respondent also gave evidence that he had been instructed to liaise with Nneka, the person to whom the Offer Letter was addressed. When asked why he did not copy the letter to the Applicant's solicitors when he knew that solicitors had been instructed, the Respondent said that he had not done so because he considered the Applicant's solicitors to be untrustworthy.

58. The Respondent accepted that he had received correspondence from the Applicant's solicitors, including an e-mail dated 3 July 2015 stating that the Applicant had no knowledge that the cheque had been sent in

full and final settlement and that the cheque was rejected on this basis but was accepted as part-payment of an outstanding debt.

59. We consider that it is possible that the Respondent's account of events is correct. However, having carefully considered and weighed up the evidence, the Tribunal is not satisfied that his account is likely on the balance of probabilities.

60. It is unclear why the Respondent's solicitor or his administrative staff would have exhibited to the Respondent's witness statement a letter sent to the solicitor over four years earlier, before these proceedings were issued. If the solicitor or his administrative staff had gone back to the 2015 e-mails, it should have been apparent to them that two versions of the letter were sent in 2015. It is unclear why the Respondent's solicitor did not exhibit the version of the letter provided to him with the Acknowledgement of Service and the Respondent himself should have checked the exhibits to his own witness statement. As stated above, the Respondent accepts that he wrote Doc 1 on the exhibit.

61. At the conclusion of the hearing, the Respondent produced an e-mail sent to his solicitor at 12.17 hours on 9 May 2015 enclosing the first version of the letter. He has provided a certificate of posting timed at 12.53 hours on 9 May 2015, that is 36 minutes later. This would leave little time for the solicitor to e-mail the Respondent 15 to 20 minutes after receipt of the draft letter, for corrections to be made, for a further telephone call to the solicitor, for the Respondent to go to the Post Office, and for the Post Office to finish processing his order.

62. The Respondent states that his solicitor told him that his signature on the cheque and on the letter should be the same but it is not clear how his solicitor saw the cheque or why the Respondent would have shown the cheque to his solicitor.

63. The Respondent relies upon what he says are staple markings on the cheque but we accept Mr Madge-Wyld's submission that we should not place weight on markings on a photocopy when we have not had sight of the original, and the absence of expert evidence. Envelopes differ in size and weight and, in our view, the weight of the envelope containing the cheque is insufficient to establish whether there was anything in the envelope in addition to the cheque.

64. The Respondent made general assertions that correspondence other than the Offer Letter is missing from the Applicant's database. He did not, however, put to Mr Ali or Mr Mitchell that a specific item of correspondence which they would expect to appear on the database was missing. The evidence of Mr Ali and Mr Mitchell was consistent and credible and they made appropriate concessions concerning what they

were and were not able to remember. We accept their evidence concerning the Applicant's procedures on the balance of probabilities.

65. The Respondent drew attention to the fact that no one from the Applicant's Finance Team was available to give evidence concerning the presentation of the cheque and the record in the cheque book. He questioned whether this was because the Applicant did not wish to reveal that Nneka Olaleye, the person to whom he had addressed the Offer Letter, had presented the cheque.

66. As stated above, the Applicant accepts that the cheque was presented. It is the Tribunal's understanding that Nneka Olaleye does not work in the Finance Team. Accordingly, on Mr Mitchell's evidence, she would not have banked the cheque. Conversely, if she did work in the Finance Team and had banked the cheque, a letter concerning a service charge dispute would not have been referred to her by the post room staff.

67. In all the circumstances, we accept that the Respondent's account is possible but we are not satisfied that it meets the threshold of "likely on the balance of probabilities", which is the legal test we have to apply.

68. On the basis of Mr Ali and Mr Mitchell's evidence, we find as a fact on the balance of probabilities that the Offer Letter was not enclosed together with the cheque and that the Offer Letter was not received by the Applicant. Accordingly, presenting the cheque cannot potentially amount to acceptance by the Applicant of any terms set out in the Offer Letter. We accept Mr Madge-Wyld's submission that the Applicant's solicitors' position in later declining to return the sum of £250, which had been already attributed towards the Respondent's arrears, is not evidence of an intention to accept the Respondent's offer.

69. Having found as a fact on the balance of probabilities that the Offer Letter was not received by the Applicant, it is not necessary for the Tribunal to consider whether the Offer Letter is equivocal or any other arguments advanced by the Applicant as to why the presentation of the cheque following receipt of the Offer Letter would not have compromised the Applicant's claim in any event.

The consultation issue

70. Section 20 of the Landlord and Tenant Act 1985 ("the 1985 Act") provides for the limitation of service charges in the event that statutory consultation requirements are not met. Only £250 can be recovered from a tenant unless the consultation requirements have either been complied with or dispensed with. The consultation requirements are set out in the Service Charges (Consultation Requirements) (England) Regulations 2003 ("the 2003 Regulations").

71. On 27 June 2007, the Applicant served the Respondent with a notice of its intention to enter into a qualifying long-term agreement in accordance with paragraph 1, schedule 2 of the 2003 Regulations. On 31 March 2009, the Applicant notified the Respondent of its proposal to enter into a qualifying long-term agreement in accordance with Paragraph 5, Schedule 2 of the 2003 Regulations. A summary of the observations made by the tenants and the Applicant's responses were included in the Applicant's letter of 31 March 2009. The Applicant subsequently entered into a qualifying long-term agreement.

72. On 29 July 2010, the Applicant served the Respondent with a notice of its intention to carry out qualifying works under the qualifying long-term agreement in accordance with Paragraph 1, Schedule 3 of the 2003 Regulations.

73. On 22 September 2010, the Applicant wrote to the Respondent, after it had received observations in response to its notice of intention stating:

"Thank you for your letter dated 26 August 2010.

Please accept my apologies for not responding sooner.

As previously advised where Poplar HARCA has to comply with EU Regulations in respect of procuring a project i.e. putting a Notice in the Official Journal of European Union, where this takes place there is no opportunity for leaseholders to nominate a contractor.

I can confirm that the tender received from Apollo is the lowest and is under our budget allowance.

With regards to viewing the tender returns please contact me on the telephone number or e-mail below to make an appointment."

74. The Respondent confirmed that he had received this letter. The sum claimed by the Applicant in these proceedings solely relates to the major work which was undertaken in 2010 to 2011. Accordingly, the relevant consultation is the consultation concerning this major work. The Tribunal was referred to the Respondent's observations concerning lift works but the subject matter of this claim does not include a charge in respect of these lift works.

75. In his closing submissions, the Respondent submitted that his observations had been ignored; that his concern was the difference between what had been promised and what had been delivered; and that the notice of intention had provided insufficient detail of the proposed work.

76. The Respondent referred the Tribunal to evidence that the Applicant itself accepts that its consultation was inadequate, in particular an e-mail from Stephen Stride, Chief Executive, dated 3 July 2013 which states (emphasis supplied):

"…I have met with Paul Dooley, who heads up our regeneration team, to discuss the consultation process at Devons.

Paul demonstrated that a number of consultation events had taken place together with the regular meetings with the Estate Board however Paul also noted that ***we had not always fully consulted on all matters.***

The consultations at Devons comprised both presentations to the Estate Board, a number of residents' 'drop-ins' and also door knocking exercises.

We understand that we can improve in the area of consultation *and on future project[s] our internal Client Team will be working closely with our Regeneration Team to ensure a detailed consultation plan is agreed prior to works commencing. The Plan will then be monitored and regular reports provided to the Estate Board. We also propose to make more use of computer generated images as presenting technical plans in some instances does not make consultation clear.*

In the future you can expect a detailed consultation plan prepared up front detailing what elements of the project will be consulted on and agreed with the Estate Board and clearer more user friendly presentation material."

77. In addition, the Tribunal was referred to a Devons Estate Board Report dated 14 May 2013 in which it is stated (the Respondent's emphasis added):

"Consultation solely on the installation of the URS was not carried out *but it has always been part of the masterplan of for the estate. The Council's planning department would have carried out statutory consultation as part of the planning submission."*

78. The Tribunal was also referred to a Devons Estate Board Report dated June 2013 in which it is again stated that consultation solely on the installations of URS's was not carried out and that "specific consultation" was not carried out concerning brickwork and rendering to brickwork.

79. Mr Madge-Wyld submitted that consultation in the context of such comments was not a reference to the statutory consultation of long

lessees pursuant to the 2003 Regulations. He stated that the Applicant is regulated by the Regulator for Social Housing, that it has wider obligations than to carry out a statutory consultation, and that it aims to foster good relations with all residents. Accordingly, Mr Madge-Wyld contends that it cannot be extrapolated from these comments that the statutory consultation process pursuant to section 20 of the 1985 Act was not carried out. As stated above, the Block is occupied by both long leaseholders and social housing tenants.

80. It is only if it is established on the balance of probabilities that the statutory consultation process has not been followed that the sum which can be recovered from the Respondent will be limited to £250. As part of his closing submissions, the Respondent produced a flow chart demonstrating various ways in which he considered that the consultation process had been wanting. He also stated that a "blue" schedule setting out the final costings was not produced until 25 November 2019 and referred to e-mail correspondence. However, he did not focus on the 2003 Regulations and did not rely upon any particular paragraph of the 2003 Regulations as having been breached.

81. As regards the Respondent's observations, by its letter dated 22 September 2010, the Applicant replied to the Respondent's observations concerning the major works which form the subject matter of these proceedings.

82. The notice of intention dated 29 July 2010 describes the proposed works in the following terms:

"The works to be carried out under the agreement are as follows:

- *Roof repair/renewal and associated works*
- *Rainwater goods – guttering/downpipes/drainage*
- *Brickwork repairs/renewals/renewals (block & estate common areas)*
- *Works to landlord services – electrical/water/drainage/risers*
- *Window renewal (where applicable)*
- *Door entry repair/renewal*
- *Common block and externals redecoration*
- *Communal TV aerial upgrade*
- *Estate repairs – boundary /wall /courtyards /road /fences /lighting / playgrounds*
- *Asbestos removal as necessary from common parts*
- *Chute repairs/URS installation*
- *Overhauling communal balustrades"*

83. By paragraph 1(2)(a) of Schedule 3 of the 2003 Regulations, the notice of intention:

"shall describe, in general terms, the works proposed to be carried out…"

84. We are satisfied that the description of the proposed work in the notice of intention is sufficiently detailed to meet this requirement in respect of the work which forms the subject matter of the Applicant's claim. We note that the URS installation is expressly listed. In our view, the reference to "Brickwork repairs/renewals/renewals (bloc & estate common areas)" is sufficient to cover the work to the brickwork, including the rendering to the brickwork. The Respondent has not, in any event, been charged for the rendering work. Any challenges to the quality of the work for which the Respondent has been charged fall to be considered below.

85. In all the circumstances, we are not satisfied on the balance of probabilities that any element of the statutory consultation process which is provided for in the 2003 Regulations has not been complied with.

The reasonableness issue

86. By section 27A of the 1985 Act, the Tribunal has jurisdiction to determine the amount of service charges which are payable by the Respondent.

87. Section 19 of the 1984 Act includes provision that: *"Relevant costs shall be taken into account in determining the amount of a service charge payable for a period … where they are incurred on the carrying out of works, only if … the works are of a reasonable standard; and the amount payable shall be limited accordingly."*

88. The Respondent contends that the service charges in respect of the major work which form the subject matter of these proceedings should be reduced by 80% because the work was not carried out to a reasonable standard. The Applicant contends that there should be no reduction.

89. The Respondent relies upon the written expert report of Mr Chris Mahoney BSc MRICS of Cloud Surveyors Limited which is dated 20 November 2019. Mr Mahoney's report was prepared following an inspection which took place on 4 November 2019. Mr Mahoney was not called to give oral evidence.

90. The Applicant relies upon the written expert report of Mr Clive Peters BSc MRICS which is dated 20 March 2020. Mr Peters is the Applicant's Head of Asset Investment and his report was prepared following an inspection which took place on 19 March 2020. Mr Peters was called to give oral evidence.

91. The Applicant also called Mr Timothy Russel Warden, a Senior Building Surveyor, to give evidence of fact. The Tribunal has had regard to the photographs provided by Mr Warden. Mr Warden confirmed that these photographs cover everything that he considers to be factually relevant.

92. The Respondent sought to question Mr Warden as to his opinion concerning the major work. As was explained at the hearing, the Tribunal does not place any weight on Mr Warden's opinion because the Applicant does not have permission to rely upon Mr Warden as an expert. It is for the Tribunal to determine whether or not the work was carried out to a reasonable standard.

93. In his report, Mr Mahoney lists 17 issues. At the time of Mr Mahoney's instruction, the Respondent was intending to pursue a Counterclaim and Mr Mahoney covers issues which go beyond the scope of the major work which forms the subject matter of these proceedings.

94. Item 1 in Mr Mahoney's report concerns the fence to the Respondent's rear garden. The Tribunal is not satisfied on the evidence that this item relates to the major work.

95. At item 2, Mr Mahoney records that paint has been left on the Respondent's rear doorstep. The Respondent states that this was the result of poor workmanship during the major work. Mr Peters does not dispute that the paint needs to be cleaned off but describes the issue as "minor". In giving oral evidence, he accepted that the Applicant's contractors left paint on the rear doorstop. We accept the Respondent's case that the relevant work was not carried out to a reasonable standard.

96. Item 3 primarily concerns work which was not carried out (the front door and door frame not replaced) in respect of which there has been no charge to potentially be reduced by the Tribunal. Mr Peters refers in his report to an allegation that the door and door frame were damaged during the course of the major works. Mr Mahoney does not, however, state that the door or door frame were damaged by the Applicant's contractors. Having considered all the evidence, the Tribunal is not satisfied on the balance of probabilities that the door and/or door frame were damaged during the course of the major works.

97. At item 4, Mr Mahoney describes damage to the Respondent's front entrance/hall carpet caused by external cleaning techniques. Mr Peters was unable to verify whether this was correct. Careless high-speed washing could force water inside around the edges of a door and we accept Mr Mahoney's evidence on this point.

98. At item 5, Mr Mahoney describes the remains of paint or other substances on the brickwork. The Respondent contends that this was the result of poor workmanship during the major work. Mr Peters states that this staining can be cleaned off with an approved brick cleaning solution. Mr Peters also notes the presence of obsolete scaffold tie holes and recommends that these be made good with coloured mortar to match the surrounding brickwork. We accept the Respondent's case that the relevant work was not carried out to a reasonable standard.

99. Items 6 to 8 concern work which was not carried out, in respect of which there is no charge to potentially reduce. We accept Mr Peters evidence that the major work did not include the renewal of windows and doors to long leasehold properties.

100. At item 9, Mr Mahoney concludes that rear garden paving slabs were broken during the major works and the Tribunal heard that the damage was caused by the Applicant's scaffolders. Mr Peters stated that he was unable to verify this and that the configuration of the broken paving slabs indicates that not all breakages are related to the scaffolding works. We accept the Respondent's case that the relevant work was not carried out to a reasonable standard, whilst also accepting Mr Peters' evidence that not all of the damage can be attributed to the scaffolding works.

101. At item 10, Mr Mahoney states that the rendering is poor and that the cleaning of brickwork has been abrasive. Mr Peters accepts that the Applicant's jet washing caused some minor damage to brickwork. When giving oral evidence, Mr Peters accepted that the join in the render had not been finished in a good way. We accept the Respondent's case that the relevant work was not carried out to a reasonable standard. The Respondent has not been charged for the rendering but, in our view, the unsatisfactory quality of this work is indicative of poor supervision and management.

102. Items 11 concerns work which was not carried out, in respect of which there is no charge to potentially reduce.

103. At item 12, Mr Mahoney states that the space to the end of the block has been soft landscaped but he does not give any expert opinion that this work was not carried out to a reasonable standard. We are not satisfied on the balance of probabilities that the soft landscaping was defective. Further, the Respondent does not appear to have been charged for this item.

104. The Tribunal is not satisfied that there has been any charge to the Respondent in respect of items 13 and 15 as part of the major works.

105. At item 14, Mr Mahoney has provided a photograph of a drain cover which may be blocked by debris but which does not appear of itself to be defective.

106. At item 16, Mr Mahoney provides a photograph of brackets which were not removed by the Applicant's contractors when a ladder was relocated. Mr Peters accepts that these brackets were used to support a roof access ladder and were not removed. In giving oral evidence, Mr Peters stated that the brackets should have been removed when the work was carried out but that to remove them at this stage would cause more damage to the brickwork.

107. At item 17, Mr Mahoney comments that the summary of costs requires clarifying against the actual costs. The actual costs have since been provided.

108. In giving oral evidence, Mr Peters said that "the block is still holding up fairly well" but he agreed that "certain elements of the work could have been done better".

109. Mr Peters was unable to respond to a suggestion on the part of the Respondent that a downpipe had been cut in half and exposed during the major work because he had had no notice of the allegation. Mr Mahoney does not give expert evidence concerning this item and we are not satisfied on the balance of probabilities that the damage occurred during the major works.

110. It is not in dispute that the Applicant released the retention on or about 25 October 2012, as recorded in a document headed "Final Account Devon's Estate, Externals Contract 3".

111. Mr Mahoney's report covers some matters which are outside the Respondent's demise and Mr Madge-Wyld submits that his report must therefore be taken to cover the whole Block. Mr Madge-Wyld states that it must be assumed that all defective work to the Block is recorded in Mr Mahoney's report. The Respondent disputes this and states that Mr Mahoney's report was prepared with his proposed Counterclaim in mind and that Mr Mahoney was not instructed to inspect the entire Block.

112. In our opinion as an expert Tribunal, Mr Mahoney's report is focussed on the Respondent's Property and on issues in the vicinity and/or which particularly trouble the Respondent and does not cover the whole Block. We accept the Respondent's account of Mr Mahoney's instructions. There is no suggestion that Mr Mahoney has, for example, inspected the roof of the Block. Had Mr Mahoney carried out an inspection of the entire Block, we would expect him to refer to the major works and to the Block more widely.

113. It appears from the Applicant's schedule that there are 11 long leasehold properties at Ashcombe House. Mr Peters gave evidence that the Applicant did not replace the windows and doors to any of the leasehold properties but Mr Mahoney only refers to the Applicant's failure to replace the windows and doors to the Respondent's Property. If Mr Mahoney's report had covered the entire Block, we would have expected him to comment on the failure to replace the windows and doors of the ten other leasehold properties.

114. In our view, when considered as a whole, the splashed paint, brickwork damaged by unnecessarily abrasive jet washing, jet washing forcing water inside around the edges of a door, paving stones damaged by scaffolding, poor finish to the rendering, and failure to remove ladder brackets shows a level of carelessness which is unlikely on the balance of probabilities to be limited solely to areas of the Block focussed upon in Mr Mahoney's report.

115. Mr Mahoney has inspected a sample of the work carried out and, in our opinion as an expert Tribunal, contractors who exhibit this level of inattentiveness are very likely to have been careless elsewhere. However, in the absence of an inspection of the entire Block, we consider that we must be cautious in the inference that we draw from the sample as to the standard of the work as a whole. We also accept Mr Peters' evidence that there was no structural damage.

116. The overheads will include the cost of supervision. The issues listed above and the release of the retention, when there were clearly a number of items still to be to be resolved by the contractors, in our view demonstrates on the balance of probabilities that the supervision and management of the project as a whole was not carried out to a reasonable standard. However, in our view the defects are essentially snagging works and there is no evidence that the 80% (or a significant proportion of the work) was not carried out to a reasonable standard.

117. Having carefully considered the evidence, including the photographs, and having weighed up the factors set out above, we find that the charges in respect of the major work to the Block should be reduced by 5%. Accordingly, of the sum of £24,430.73 which is claimed by the Applicant in respect of major works, the Tribunal finds that £23,209.19 is payable by the Respondent.

Determinations of the Court

118. It was agreed at the conclusion of the hearing that any application concerning costs and/or any representations concerning interest shall be filed and served within 21 days of the date of this decision.

Name: Judge N Hawkes **Date:** 1 October 2021

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 tribunal office which has been dealing with the case.

2. The application for permission to appeal must arrive at the Regional tribunal 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. All applications for permission to appeal will be considered on the papers

5. Any application to stay the effect of the decision must be made at the same time as the application for permission to appeal.

Appealing against the County Court decision

1. A written application for permission must be made to the court at the Regional tribunal office which has been dealing with the case.

2. The date that the judgment is sent to the parties is the hand-down date.

3. From the date when the judgment is sent to the parties (the hand-down date), the consideration of any application for permission to appeal is hereby adjourned for 28 days.

4. The application for permission to appeal must arrive at the Regional tribunal office within 28 days after the date this decision is sent to the parties.

5. The application for permission to appeal must state the grounds of appeal, and state the result the party making the application is seeking. All applications for permission to appeal will be considered on the papers.

6. If an application is made for permission to appeal and that application is refused, and a party wants to pursue an appeal, then the time to do so will be extended and that party must file an Appellant's Notice at the appropriate County Court (not Tribunal) office within 14 days after the date the refusal of permission decision is sent to the parties.

7. Any application to stay the effect of the order must be made at the same time as the application for permission to appeal.

Appealing against the decisions of the tribunal and the County Court

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