12236

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	CHI/00HN/LSC/2016/0085 CHI/00HN/LDC/2016/0041
Property	:	Admirals Walk, West Cliff Road, Bournemouth BH2 5HH
Applicant	:	Admirals Walk 2000 Ltd
Representative	:	Napier Management Services Limited
Respondent	:	All Lessees
Representative	:	
Type of Application	:	Liability to pay service charges
Tribunal Member(s)	:	Mr D Banfield FRICS Judge Tildesley OBE
Date of Hearing	:	15 March 2017
Date of Decision	:	26 April 2017

DECISION

The Tribunal grants dispensation from the consultation requirements of S.20 Landlord and Tenant Act 1985 on the condition that £20,413 inc. VAT is not placed on the service charge.

The Tribunal disallows the following amounts from the service charge;

DKP contract	**£129,423 inc. VAT**
Ibex contract	**£61,239 inc. VAT**

Background

1. This is not the first application the Tribunal has determined with regard to this property the most relevant to the current matter being the Tribunal's decision dated 22 July 2015 (CHI/00HN/LSC/2015/0024) when the members of the present Tribunal approved expenditure of £549,000 plus VAT in respect of the replacement of balcony rails in stainless steel and £242,954 plus VAT for re-waterproofing the balcony slabs. The total approved cost inclusive of VAT was therefore £950,345.

2. The application before us is the result of the final costs of carrying out these works being in the region of £1.6m.

3. The Applicant (the Landlord) has made two applications to the Tribunal:

- Determination of the lessee's liability to pay a service charge in 2017 relating to the additional costs of the major works, pursuant to section 27A Landlord and Tenant Act 1985 ("the Act"
- Request for dispensation from the consultation requirements provided for by section 20 of the Act in relation to the works giving rise to the additional costs. i.e. DKP and Ibex.

Background

4. On 27 September 2016 the Tribunal directed that the applications were to be heard together and set out a timetable for the submission of statements of case leading to a hearing. On 9 December 2016 the Tribunal issued directions to ascertain the views of the lessees.

5. Responses were received from 58 leaseholders 33 of whom objected and on 18 January 2017 the Tribunal made further directions indicating the date of the hearing and that the Tribunal would restrict its consideration to the two applications: dispensation with consultation and the reasonableness of the service charges. The Tribunal would not consider parking, breach of trust or any other matters outside the scope of the two applications.

6. Attached to the Directions was a form for leaseholders to indicate whether they wished; to attend the hearing, have a statement read by the Tribunal, to appoint a representative and to have a copy of the bundle.

7. Some 29 forms were returned representing 32 flats. 8 Lessees indicated that they would attend the hearing and a further 8 indicated that whilst they would not attend the hearing they wished to submit a statement to the Tribunal.

8. All the statements have been read by the Tribunal and those matters relevant to this determination have been taken into consideration whether or not specific reference is made thereto.

9. The majority of the statements objected to the S.27A application and some objected to the S.20ZA application.

10. The property is well known to the members of this Tribunal and all concerned and briefly comprises a 14 storey concrete framed block built in the 1960s containing some 121 flats of varying dimensions. It is set in its own grounds with both surface and underground parking areas. Upper floor flats have access to balconies cantilevered off the main frame with a reinforced concrete floor slab originally into which steel stanchions were set supporting railings around the perimeter. It is the works involved in waterproofing the slabs and replacing the railings that are the subject of these applications.

11. The Tribunal did not carry out a further inspection.

12. The Applicant has prepared the hearing bundle which now comprises some 406 pages. Where pages are referred to in this determination they will be shown by [x].

13. A variety of figures appear throughout the bundle and in effort to clarify the final sums which the Tribunal are considering the table below sets out the sums contained in the Original S.20 Notice [118], the revision [129] and the "Final Breakdowns". Fees payable to Greenward Associates and to DKP for cleaning the stainless steel balustrades are not included.

C&D	242,954.00	242,954.00	251,705.58	[120]
DKP	549,000.00	549,000.00	848,768.97	[119]
PM painting	76,500.00	0		
Napier	13,000.00	13,000.00	13,000.00	
Contingency	50,000.00	50,000.00		
Ibex painting		44,000.00	41,107.07	[396]
Ibex Access			170,109.07	[397]
Ibex conc			3,757.33	[122]
Total ex VAT	931,454.00	898,954.00	1,328,448.02	
VAT	186,290.80	179,790.80	265,689.60	
Total ex Fees	1,117,744.80	1,078,744.80	1,594,137.62	

14. We have examined the copy of the account ledger [393-394] and Supplier Ledger reports [398, 399 and 402] and are satisfied that

the totals shown accord with the "Certified to Date" amounts shown on the Final accounts when VAT is added but excluding the retentions which are outstanding. We cannot, however, reconcile the division of Ibex costs between painting, access and concrete repairs. The overall total is, however, correct.

15. The Tribunal will therefore base its determination on the amounts referred to as "Final Breakdown" the total of which excluding fees and stainless steel cleaning is £1,594,137.62.

16. The increase in costs shown in the Final Breakdown is as follows;

C&D	242,954.00	8,751.58		251,705.58	8,751.58	[120]
DKP	549,000.00	30,136.97	269,632.00	848,768.97	299,768.97	[119]
Ibex quotations						
Painting	39,400.00	1,707.07		41,107.07	1,707.07	[396]
Access	44,750.00			170,109.07	125,359.07	[397]
Concrete	0.00			3,757.33	3,757.33	[122]
Napier	13,000.00			13,000.00	0.00	
Total ex VAT	889,104.00	40,595.62	269,632.00	1,328,448.02	439,344.02	
VAT	177,820.80	8,119.12	53,926.40	265,689.60	87,868.80	
Total	1,066,924.80	48,714.74	323,558.40	1,594,137.62	527,212.82	

17. Although the Tribunal has two applications before it much of the evidence is relevant to both applications and no attempt has therefore been made to separate it.

18. Other than being listed in Napier's ledger report [400] the fees paid to Mr Green have not been referred to. From evidence given at the hearing it would appear that the amount of these fees is subject to discussions between the Board and Mr Green and as such it would be inappropriate for the Tribunal to make a determination.

The Hearing and Evidence

19. The majority of those Lessees who indicated that they would attend the hearing did so together with some others. Dr Cooper represented 10 other lessees and Mr Dixon represented the Residents' Association as well as himself and Mr Bell. Other Lessees spoke on their own behalf or submitted statements.

20. Mrs Aileen Lacey-Payne represented the Applicant and called Mr Green of Greenward Associates to give evidence.

21. The contract was let under three separate contracts; C&D Roofing for waterproofing, DKP engineering for replacement of the balustrades and Ibex for health and safety, access and decoration works. Mr Green acted as Contract Administrator and no Main Contractor was involved.

22. DKP had a JCT Intermediate contract and was to commence in November 2015 with a completion at the end of April 2016. [74]

23. Investigations had been carried out on four trial balconies (one shared and two singles) and no problems had been discovered.

24. In oral evidence and in his witness statement Mr Green explained that he had relied on the report from the previous surveyor that referred to the balconies as being "solid poured slabs", the design of the balcony rails had followed the examination of the trial balconies and the design was based on the reasonable assumption that the remaining balconies were of similar construction. However soon after work started on site in February 2016 and the surface finish had been removed it was found that some of the concrete slabs were not solid to the edge and that timber used for shuttering had been left in situ. Whilst in some balconies the timbers were 18mm thick, in others they were 75mm. The timbers were located where the balustrade bases were designed to be fixed and modifications to the metalwork already fabricated, therefore, had to be made to enable a safe fixing to be achieved.

25. In answer to Mr Dixon Mr Green explained that the timber found was not the usual shuttering planks which were narrow enough to be worked around but were substantial timbers which clearly should have been removed at the time of the original construction.

26. Mr Green said that they also found that some balconies had more than one layer of tiles which caused delays in stripping the balconies back to the slab. Instead of the one day allowed by the contractor some were taking four days to remove all the debris.

27. Once the surface tiles and asphalt finish had been removed it was also found that the surface revealed was neither level nor square resulting in the need for the fixings for each stanchion to be tailor made to suit.

28. In response to the suggestion that he should have carried out investigations on all or at least a greater number of balconies he said it was not feasible to do so. The investigations involved the removal of balustrades and floor finishes and therefore put the balcony out of use until reinstated. Such continuing denial of use was not, he considered, acceptable.

29. Problems also arose with the safe working of operatives on the balconies. It had originally been envisaged that operatives could

secure themselves to eye bolts fixed either side of the balcony doors. This had not proved possible as the fixings into the concrete panels proved unable to pass a pull test and were easily pulled out. [95]

30. In order to avoid delays in what was an urgent programme occasioned by the insurer's requirements and a need to provide access for lessees to their balconies alternative means of providing safe working had to be provided without delay. Ibex Technical Access was asked to assist by providing Health and Safety cover for the operatives working on the balconies.

31. The safety arrangements were agreed at the first site meeting between contractors and the contract administrator and the quotation for 2 men for 50 days obtained on 14 October 2015. [136-137]

32. If this option had not been taken work would have ceased whilst a fresh S.20 consultation took place at a cost in excess of £25,000 per week in contract delays. Ibex's estimated costs were cross checked with Sussex Rope Access [129] and proved competitive. The alternative of fully scaffolding the building at a cost in excess of £650,000 plus VAT was not considered a viable alternative particularly in that it would be some 3 months or so before it was in place.

33. The programme of works as designed was that each "stack" of balconies would be worked on in order with each trade following on from the one before. The need for rope access meant that work should start at the bottom working upwards with the fitting of the balcony rail to the top floor flat being the last task to be undertaken.

34. Ibex's initial estimate of £34,000 [136-137] was based on 50 days at their rate of £695 and was exclusive of VAT. The estimated time was arrived at on the assumption that their operatives would work on one "stack" of balconies at a time with their supporting ropes taken off secure fixings at roof level. This however proved not to be possible. First of all the roof level fixings proved inadequate leading to the use of a less flexible anchoring system which took time to move.

35. Additional works required to the balconies caused delays and there were difficulties with some lessees in gaining access to the balconies through their flats with the resultant disruption to the programme of works.

36. The resultant delays are documented in the Extension of Time certificates issued to DKP. [130 – 135]

37. The Tribunal noted that of the 23 weeks claimed lessee delays amounting to 7 days were specifically identified [131 and 132] with further unspecified delays forming part of 7 weeks 4 days [130 and

133] Construction and other problems accounted for a further 74 days.[131,132 and 134]

38. In answer to Mr Dixon's comment that until August 2016 lessees were being thanked for providing access Mr Green said that it was right to thank those lessees who co-operated but that did not diminish the problems caused by those who did not.

39. It was accepted that on some occasions contractors failed to visit flats as previously arranged. However, over-running at a previous flat or a need to alter the sequence of works did occur and sometimes the change of programme was not communicated to the flat owner.

40. Where access was not possible for whatever reason the programme was disrupted and in order to maintain progress operatives were forced to work on more than one "stack" of balconies as they became available which in turn meant that additional teams of Ibex operatives were needed and that their rope fixings needed to be moved more often. All this took extra time which led to the granting of various extensions of time to the contract and as a result the programmed completion date of April 2016 was not met.

41. Mrs Lacey-Payne confirmed that the access costs of £10,000 contained within the DKP contract had been deducted as the work was now being carried out by Ibex.

42. An undated briefing document highlighting the difficulties and the proposed solution was sent to the Board [6] and the leaseholders were appraised by the briefing reports provided throughout the contract. [9 - 67]

43. The Tribunal noted that the 8 March 2016 briefing report referred to having to re-design the fixings [32] and that due to bad weather the programme was a few days behind. [33]

44. In the site minutes of 15 April 2016 [142] reference was made to completion now expected in the first week of July.

45. The 22 April briefing report [41] said that it was hoped to bring some work forward and the minor issues encountered had been quickly dealt with. [44]

46. The 12 May 2016 briefing report referred to the stripping work being ahead of programme and referred to the concrete repairs found to be required.[48]

47. At a board meeting on 25 May 2016 the Board were advised that there was an overspend of approximately £100,000 but that after allowing for the contingency of £50,000 and the saving on

decorating costs of £32,500 the net increase was £17,500 and would not, therefore, require an additional levy from the lessees.

48. The site meeting minutes of 9 June reported that "most of the balconies would be completed by the first week of July. [149]

49. The 16 June briefing report referred to the poor condition of the concrete and metalwork and explained how the unexpected conditions encountered together with access problems and weather could cause delays. Work was said to be "progressing well".

50. The site meeting minutes of 11 July reported that it was hoped that works would be fully completed by the 2nd week in August. [154]

51. At a board meeting on 22 July 2016 Mr Green referred to the delays and overspend incurred and the Board decided to make an application to the Tribunal for dispensation and to raise a further levy from the lessees.

52. The site meeting minutes of 12 August referred to completion at the beginning of September. [159]

53. The 18 August briefing report said the project was almost finished and referred again to the problems that had occurred. [61]

54. A further briefing document was prepared for the Board following its meeting on 22 August 2016 [71] explaining the delays and providing a question and answer document circulated to the leaseholders [77] part of which were details of the amounts paid to each contractor. [83-87]

55. The report referred to the overspend first being reported in May which at that time amounted to £32,000 of additional work and £120,000 of delays. Delays had increased however and were now at £210,000 for DKP and £83,250 for Ibex, a total overspend of £327,144.30 ex VAT.

56. On 23 August 2016 Napiers wrote to the lessees explaining the delays and enclosing an invoice for their share of the additional costs.

57. On 12 September 2016 the Board wrote to the lessees advising that independent experts would report on the situation and enclosing a Q&A [163] including the up to date financial position with each contract. [171-175]

58. The experts report referred to was provided by Walker Management [374 -389] and dated 27 February 2017. It reviews the manner in which the works have been conducted and makes a number of findings which are referred to at paragraph 91 below.

59. On 19 September the tenants' briefing report referred to the project finally reaching its conclusion and referred to three final elements outstanding.[65]

60. Mr Green took the view that the duration of the project could not have been foreseen due to the issues of stripping tiles, fixing the new metalwork, the state of the concrete and that all balconies were a little different.[4]

61. Mr Dixon said that the lessees were "innocent parties" in the matter and that an overspend of £563,000 had been allowed to occur. At a general meeting on 9 April 2016 the lessees were told it was a fixed price contract, that £392,000 had been spent to date when a large proportion of the balustrade installation remained to be done and that there was £310,000 in reserve. By the end of August the whole budget had been spent.

62. Mr Green explained that "fixed price" related to the specification provided to the contractor and did not include additional work found to be necessary and not capable of discovery at the time the contract was entered into. He said that the metalwork was fabricated early on in the contract and this formed a large proportion of the total expenditure. "Labour is cheap" and the cost of installation was a smaller percentage of total costs.

63. Asked on what information the specification had been prepared Mrs Lacey-Payne referred to the BCB condition survey which condemned some of the stanchions as unsafe and which had led to the previous proceedings before the Tribunal.

64. Information was provided as to the sizes of 5 typical balconies but information as to the condition of the sub-bases was not available until the surface was stripped off.

65. The same information went to each of the contractors who quoted for the work and, in answer to Mr Dixon's suggestion that the tender was not competitive Mrs Lacey-Payne said she did not consider it odd that the quotes received were very close to each other.

66. Mrs Shelton referred to the "excuse" of delays and that one of the worst culprits for not providing access was a Board member.

67. In answer to Mrs Cooper's view that the work should have been carried out in stages. Mr Green said that this had been the plan until the insurers required the work to be completed by June 2016 making this approach impossible.

68. Mr Robert of Flat 87 asked what the costs would have been if all of the problems had been known at the start of the contract to which Mr Green responded that he had spoken to DKP and C&D who

estimated an additional £200,000 and £50,000 respectively to the costs already charged.

69. Dr Cooper questioned the choice of the trial balconies and that more quotations should have been sought for the stanchions to which Mr Green said that 3 contractors had been approached but 2 refused to quote. Dr Cooper also questioned whether the PM Solutions cost in the first S.20 was correct when the Ibex quote was so much less.

70. Dr Cooper said that the access cost included in the DKP contract was £125,410 details of which were in the bundle. With the consent of the Tribunal he later provided the page number [97] which is part of the Applicant's statement of case. The sum referred to is shown as the Ibex safety access overspend plus VAT [123] and also notes that with regard to the "Original costs included in DKP quote" No such cost is provided.

71. Both Dr and Mrs Cooper questioned the cost of cancelling the contracts once the problems were identified and Mr Green explained that the contractors were entitled to receive their overheads and profit as "loss of chance"

72. Mrs Lacey Payne said that the lessees had been kept informed of the problems encountered by way of the Tenant's briefings.

73. Dr Cooper questioned why three contracts were undertaken rather than a single contractor as mentioned in the Walker Report. Mr Green said that if a main contractor had been appointed the addition of their profit element would have increased costs by £80,000 or so. He went on to say that he disagreed with a large part of the findings of the report which had fundamental errors and followed a brief site visit and one and a half hour interview.

74. Mr Alan Hudson (Board Member) of Flat 25 acknowledged that the findings of the Walker report were disputed by Mr Green.

75. Mr Murphy (Board Member) said that the report did not say that the works could have been achieved more cheaply.

76. The question as to whether C&D roofing was correctly insured was raised and it was accepted that whilst not covered in April 2015 cover was subsequently obtained.

77. Dr Cooper said that the Board did not consult the lessees and refused to recognise the Residents' Association.

78. In answer to The Tribunal Mr Green explained that painting was carried out by Ibex with two operatives using a rope.

79. The access cost was for Ibex to provide Health and Safety cover only and comprised two and sometimes three operatives who stand on

the edge of the balcony supervising those working and who are in turn attached to safety lines.

80. The original system had been intended to be a "Fall Arrest System" whereby operatives were anchored to a fixed point that did not allow them to get to the edge of the balcony. The fixed point were the eye bolts that had failed the pull test and therefore had to be abandoned.

81. This system had been used satisfactorily on balcony 13 and the Porters tower had been tested before and proved suitable. However when the door frames were drilled they wouldn't take the strain of the fixings for the eye bolts.

82. In support of the Section 27A application Mrs Lacey-Payne said that the final costs should be determined as reasonable. Mr Green's costs were under discussion and so far he had billed 5% of the original contract sums.

83. When Mrs Lacey-Payne became aware of the overspend she asked Mr Green to go back to the contractors to attempt to renegotiate. However the time frame had to be met and with the balconies stripped they had no choice but to continue. The contractors have said that if they had been asked to quote for the job as it had turned out to be their costs would have been higher. As it is they have made no profit and have "taken a hit"

84. Mr Dixon said that there was no real competition in placing the contracts and that essential risk management had not been done. The trial balconies were not in strategic positions and the explanations given for the delays were confused and inconsistent. RICS guidelines refer to most buildings being unique with differences in construction and Mr Green should have been aware of the likely difficulties such a project would face.

85. Ibex did not have a contract and the Board were unaware of the extent of the escalating costs. The lessees were unaware until they received the invoice on 22 August 2016. There were £2.4 m of special levies, puddles on the balconies and problems of governance. Whilst he agreed that some flexibility was required, a 10 or 20% increase may be reasonable, 50% was not.

86. Dr Cooper said in the light of the Walker report he didn't trust Mr Green, that they should have had a single contractor and that DKP should bear the extra access costs. None of the extras should be paid and if contractors wished to sue then so be it.

87. With regard to the use of Reserves Mrs Lacey-Payne referred to the expenditure plan prepared in 2014 [404] and the explanatory summary [403] She said that at 10 March 2017 there was a balance of £38,644.90 but that after collection of moneys due from lessees

the reserves would be £340/350,000 out of which outstanding sums due to C&D of £81,510 had to be paid leaving a balance in the region of £270,000.

88. Mr Dixon in referring to the 5th Schedule of the new lease said that it was silent on whether the special levy should be ring fenced. He noted that the figure in the notes to the accounts for the balustrade [405] was not the same as used elsewhere. He questions whether the use of Reserve funds is legal and at the AGM he still believed there was £310,000 in the fund.

89. Mr Dixon considered that reserves were to pay for future works and not to "bail out" an existing project.

90. Mr Robert pointed out that the alternative to a special levy was a cash call on shareholders where each of the 109 members would pay an equal share rather than the proportions specified in their leases. Mrs Cooper agreed that this was beneficial to those with the larger flats but was unfair on those with only a small balcony.

The Walker Report

91. Walker Management Construction Consultants were appointed by the Board to carry out a review of the project. They visited the site in September 2016 and issued emailed overviews in October and December. On 17 February 2017 they visited the site and met with Mrs Lacey-Payne and Mr Green. A draft report was prepared and sent to Mr Green for comment. These comments are identified in the report now finalised and dated 27 February 2017.[374-389] Mr Green is highly critical of the manner in which the report was undertaken and its findings which he expresses in an email dated 13 March 2017.
92. The report concludes that:-

    a. The letting of three separate packages to three separate contractors was a fundamental weakness of the project.
    b. There was an apparent lack of effective cost control as the works progressed and the lack of Cost Reporting has resulted in residents not being fully aware of the additional costs.
    c. The works have not been managed and coordinated as well as they should have been .
    d. Some of the EOTs issued are not justifiable and their validity is challenged.
    e. By issuing unjustifiable EOTs the possibility of charging contractors liquidated damages is eliminated.
    f. The Loss and Expense claims include incorrect calculations and an expensive weekly rate that is difficult to justify.

93. In support of these findings the report refers to:-

    a. An acceptance that the use of three contractors may reduce the cost.

b. 3 trial balconies were adequate but it may have been prudent to choose one higher up.
c. The contract period was based on a ground floor balcony that does not take into account working at heights.
d. The provision of access can be very difficult and needs careful management.
e. Changing from the lifeline and eye bolt system would lead to delays.
f. There does not appear to have been an up to date formal log recording non-access to flats which is needed in order to grant an EOT.
g. DKP is based in Wales and worked Monday lunchtime to Friday lunchtime staying in hotels between times. They sometimes worked to 7pm making an effective 4.5 day working week. Walkers question whether using a Welsh based company working less than a full week and with travelling and lodging costs was appropriate.
h. Daily records and contractors records of visits are required to back up an EOT claim.
i. The "contract sum" on the payment certificates change when they should remain the same. There is no other form of cost reporting.
j. The four DKP Contract Instructions seen had insufficient information. The fifth Contract Instruction was not made available.
k. Why is there an increase in price of £5,700 indicated in Contract Instruction 1 when the quotation is mid 2014 and the commencement of fabrication in October 2014? (The Tribunal suggests these dates should be in 2015).
l. Incorrect calculation and inadmissibility of some of EOT certificates.
m. Reasons for EOTs not split into separate categories.
n. DKP's Loss and Expense claims excessive, hotel costs high, should be £13,644.46 not £15,000 per week.
o. DKP have justified figures but difficult to reconcile with significantly cheaper rates from Ibex, another Welsh firm.
p. Maintenance required for Stainless steel unclear
q. With regard to the existence of balcony ponding correction of falls on balconies was included at Section B3.2.02 of the C&D specification not as advised by Napier that only waterproofing was included.
r. Uncertainty as to works undertaken to ground floor and six first floor balconies.

Written Submissions

94. Due to the lateness of the hour the Tribunal agreed that Dr Cooper would make his further submissions in writing following which the Applicants could reply.

95. Dr Cooper's submission covers area outside the limited remit of this Tribunal as set out in paragraph 5 above. For completeness however they are referred to only briefly as the Tribunal will not be including such matters in their decision.

96. The Applicant has responded and their comments are shown in italics after each section.

97. Dr Cooper says the contracts were won at artificially low prices costs then being added to bring them up to a more profitable figure by for example giving an artificially short time for carrying out the work.

98. *No evidence of low prices and this was a sealed tender.*

99. Dr Cooper refers to the lack of assistance and encouragement the Residents' Association receives from the Board.

100. *Offers have been made to assist AWRA in circulating letters etc. Not relevant to this application.*

101. Dr Cooper reviews the history of the project from 2009 onwards and points out that after all the expenditure some balconies have ponding towards the patio doors due to the apparent lack of level of the concrete slabs. If as Mr Green states at Section 4.10 of the Walker Report the work carried out is completely different to that specified he should have gone back to the Board.

102. *The balustrading works has previously been established at Tribunal. The ponding shows the waterproofing is now working and will be dealt with as part of snagging. Going back to the Board was an option however delay costs during the consultation period would have to be paid to the contractors at £200,000 for an 8 week period.*

103. The project should have been in the hands of a single contractor. Mr Green was not independent from either Napiers or the contractors having worked with them before and relying on Napiers for work. Neither the Directors, Napiers nor the contract administrator had the necessary skills and financial control was non-existent. A financial review was only ordered when the overspend reached £400,000.

104. *Greenwards have carried out a huge amount of work at Admirals Walk with no issues with the standard of contract management. Use of a main contractor would have had a large impact on costs and would not have prevented the extension of time given. Greenwards are not linked to Napiers and are only one of nine managing agents worked for. The amount of testing was appropriate and it is unusual to find the differences in construction that this building has. A timeline for when the Board and lessees were made aware is at 95-100 of the bundle.*

105. Despite the DKP contract running from November 2015 to 29 April 2016 work did not commence on site until the beginning of February. With the contractor only working four days a week the time allowed was insufficient leading to more than 20 weeks being certified as extensions of time. The tender price was artificially low in order to win the contract. The landlord erroneously appointed Napiers to manage the building who in turn appointed Greenwards; a gross error of judgement.

106. *The contract period included time for fabrication and it was expected that several balconies would be worked on at the same time. Napiers act under instruction from the democratically elected Board. Greenwards were appointed by the Board. Napiers are not qualified to undertake surveying work. Checks were made before appointing Greenwards.*

107. The DKP contract for £549,000 included all rope access. Shortly afterwards Ibex were appointed without competitive tender to provide the rope access in place of DKP. The costs soon escalated from the initial £44,750. Napiers must have known from the start that the payments they were processing would exceed the original tender price of £1.17m.

108. The Board claim to have only been aware of the overspend in May 2016.

109. *The timeline is at pages 95-100 of the bundle. At the end of May the Board were advised of an overspend of £100K plus VAT*

110. There are discrepancies between the first submission to the Tribunal and the second and whilst some invoices are provided the dates have been removed.

111. *Not aware of any contradictions.*

112. Until the second submission there was no mention of the use of £399,695 from the Reserve Fund the reduction in which lowers the value of their properties.

113. The expenditure from the reserve fund is explained at page 403 of the bundle.

114. *The timeline is at pages 95-100 of the bundle.*

115. The overspend in the Walker report is £550,000 whereas that reported by the Applicant is £398,506. He believes it to be higher at £587,000.

116. *The figures are final.*

117. There are many good reasons why they have not paid the levy.

118. *The lease states levies should be paid after 21 days.*

119. Contrary to Mrs Lacey-Payne's assertions the Lessees have not been kept informed of the increasing costs of the project and the use of the Reserve Fund.

120. *Explained on page 403 of the bundle.*

121. Dr Cooper doubts the honesty of some of the replies given by Mrs Lacey-Payne in previous cases. It is likely that she receives commission from the various companies.

122. *Untrue, legal advice being taken on slanderous comments.*

123. The information regarding the benefits and maintenance of stainless steel has been misleading and incorrect. The cleaning demonstration did not stop work on site and an extension of time should not have been given.

124. *Stainless steel does not corrode. Dr Cooper and Walkers have spoken to the British Stainless Steel Association. Correctly specified stainless steel will last for years.*

125. C&D operated under various company names, invoices had the wrong VAT number and they did not have insurance whilst on site.

126. *Hearsay evidence. Did not arise on their contractor checks.*

127. The hotel costs claimed by DKP are excessive as is the claimed salary cost. Many of the claims for extensions of time are clearly fictitious.

128. *The room rate costs have been confirmed with the hotel owner.*

129. Whilst the Walker report refers to the directors as amateurs Mr Hudson is an experienced property solicitor and Mr Murphy a property developer. Their aspirations for the building are at odds with many of the lessees.

130. *Irrelevant and untrue.*

131. Dr Cooper refers to Avon House as an example of mismanagement involving Napiers and Mr Green.

132. *Untrue and irrelevant.*

133. Dr Cooper says the Walker report does not address the commercial relationships between Napiers, Mr Green and the Board and cannot therefore be relied upon for the determination of liabilities.

134. *Napiers employ several other surveying practices.*

135. The Report is silent on the formal contract responsibilities under the JCT and identifies the lack of control.

136. *Greenwards are a separate entity providing independent advice.*

137. There is inconsistency in Mr Green's account as to the number of and location of the trial balconies. The number tested was inadequate and provided for a large potential for error.

138. *Walkers quotes the wrong balcony numbers. They were 90,28 and 38. Flat 13 was carried out the year before. There were 3 slabs all on different floors.*

139. With regard to the S.20ZA application Dr Cooper refers to DKP's tender document where they refer to anchor points being located in either slab or wall or building. No evidence has been given that anchor points were tested in those locations and found unsuitable.

140. Instead Ibex were appointed without competitive tender at a cost of £34,750 based on 50 days at £695 per day. However this escalates to £149,259.07 when the work continued for another 50 days. The reason for the excess is given as additional operatives being needed but this should have been known when their tender was submitted.

141. The amount paid to DKP should be reduced by £125,410 as referred to in the Applicant's submission and the leaseholders should not bear any of the cost.

142. Dr Cooper goes on to make other points on the history of the project and the attitude of the Board none of which will assist the Tribunal in determining the application before us.

Statutory Framework

The statutory provisions are found in the appendix to this decision.

Discussion and Decision

143. We are concerned with the reasonableness of the costs in relation to the overspend on the DKP contract and the reasonableness of the final costs for Ibex. Our consideration is governed by S.19 Landlord and Tenant Act 1985.

144. We are not concerned with the relationship between the Board and leaseholders in their capacity as shareholders and the question as to

who should pay for any shortfall if not borne by the service charge is outside our jurisdiction.

145. From the evidence we have heard during the hearing and in the written submissions it is clear that there is considerable distrust between some of the Leaseholders on the one hand and the Board and its professional advisers on the other. This distrust has not helped the manner in which this project has been conducted and it has inevitably influenced the evidence that has been put before the Tribunal.

146. The Applicant has submitted in evidence the Walker report which was commissioned by the Board as an independent stand alone report into the conduct of the works. The report has not been challenged by the parties and the Tribunal places weight upon it. We are mindful that Mr Green disagrees with aspects of the report but we are not determining disputes between Mr Green and the Applicant simply the Applicant and the Respondents.

147. As was made clear in the Tribunal's Directions of 18 January 2017 the Tribunal would restrict its consideration to the two applications: dispensation with consultation and the reasonableness of the service charges only. Whilst the Tribunal has given considerable leeway to the parties in allowing the breadth of evidence that they have submitted this decision is only in respect of the two applications under consideration and is made solely on the evidence relating to these matters.

148. The Tribunal's starting point is its decision of 22 July 2015 which approved the works the subject of these applications. Attempts have been made to re-run some of the arguments put before that Tribunal but the Tribunal's decision was not appealed and this application does not give the parties a further opportunity. In particular the Tribunal will not consider arguments regarding the tendering process for the works.

149. The issue for the Tribunal is whether the works were properly consulted upon, whether sufficient investigations were conducted prior to specifying the works, whether the approach taken by not appointing a main contractor was reasonable, what action should have been taken when the intended access arrangements proved impractical and whether the costs have been controlled adequately. As already explained the Tribunal will not be determining Mr Green's costs.

150. The principal arguments of each side are that the Landlord considers the overspend was unavoidable due to unforeseen events whereas the Tenants believe that better planning and cost control would have mitigated the increase in costs.

151. Turning now to the investigations carried out prior to specifying the works the Tribunal has various areas of concern. Firstly whether sufficient thought had been given to working on a high rise building which by its very nature required careful planning to deal with the problems associated with working at height. Secondly the means of access and in particular the use of eye bolts and a fall safe system and thirdly whether the condition of the balconies was sufficiently investigated.

152. We are not satisfied that the findings, following investigations carried out on low level balconies, were necessarily applicable to those at higher level. The condition of the slabs at the higher more exposed levels may not reflect those further down the building. The provision of access whilst no doubt considered became more critical the higher up the building the work was located. The Tribunal finds that to determine the length of time to be allowed to complete a balcony based on a ground floor location could not provide an accurate assessment applicable to the more elevated locations.

153. Seemingly no problems with fixings had been encountered in the past and indeed the work to Flat 13 had been completed using a fall safe system. Nevertheless we have heard that this method was soon abandoned due to the state of the concrete panels either side of the patio doors leading to the appointment of Ibex.

154. We are told that in their tender document DKP referred to providing anchoring points to slab, wall or building. No evidence of any attempts to provide these alternative anchoring points has been submitted and we are simply told that the only alternative was to seek the assistance of Ibex, a company introduced by DKP.

155. This was a high rise building where access arrangements were fundamental to carrying out the work safely and efficiently. Where the proposed method of working relied on the use of anchoring points it was essential that sufficient tests were carried out to establish that the method was suitable. The Tribunal finds this did not happen and an allowance will be made below to reflect the additional costs incurred. In assessing the allowance we also note that we have seen no documentary evidence as to the tests carried out on the eye bolts or investigations of other means of access considered before appointing Ibex.

156. We have not seen the tender document and are therefore unaware whether the means of access was specified by the Applicant or proposed by the contractor. Either way however it was up to the Applicant to satisfy themselves that the contract could be fulfilled.

157. With regard to the amount of allowance from the DKP contract for omitting the access costs we have not had hard evidence as to the amount save that we are told that it was £10,000 by Mrs Lacey-Payne and Dr Cooper suggest it to be £125,410. Examining page 97

it is quite clear to the Tribunal that Dr Cooper has misread the document and £125,410 is the Ibex cost including VAT and that the "Original costs", whatever they might be, were included in the DKP quote. The Tribunal accept that the reasonable cost of access using the method proposed by DKP can be accepted as £10,000.

158. With regard to the trial balconies there has been some confusion as to their location. It now seems that those tested were on the ground and first floors at Flats 90, 28 and 38 the latter two being shared. Work to Flat 13 was carried out a year ago.

159. We note that the Walker report is satisfied with the number tested but does question whether they should have been in more varied locations. The Tribunal agrees and considers that to rely upon ground and first floor locations was unwise and balconies at the more exposed higher levels should have been chosen and not in adjoining locations where similar conditions might expect to be found.

160. Much has been made of the delays caused by lessees not providing access when required. Clearly this happened and did cause delays and inevitably costs. The proportion of the total is however small as referred to in paragraph 37 above.

161. The reasons for the extensions of time given to DKW are difficult to determine on the information contained in the certificates. The Walker report has made specific criticisms of individual certificates which the Tribunal does not have the evidence to check. The report also refers to the rate of £15,000 per week as unjustified and calculates a lower rate of £13,644.36. Mr Green says that he has checked the hotel costs with the hotelier but this not the point. That the expenditure has taken place is not the issue, it is whether it is reasonable. Compared to the rate charged by Ibex it seems that it is not. Given that the report is unchallenged by the parties we accept that there is likely to be an element of unjustified charges which better cost control by Mr Green would have avoided and for which we make a deduction as shown below.

162. The Tribunal accepts that there was a reasonable expectation that the construction of the balconies would be at least broadly similar and that until the surface covering was removed the condition of the slab where hidden was hard to determine.

163. Increased costs seem to have occurred due to the slabs being out of square and out of level together with the condition of the substrate preventing the method of fixing being as expected all of which required adjustments to be made to the metalwork which, by 25 January 2016 had all been fabricated. [21]

164. The Tribunal is prepared to accept that the existence of substantial timbers in the slab was unexpected. However the lack of level and

squareness should not come as a surprise in any building of this age and type. Likewise the condition of the slab edges and other concrete repairs not hidden by the covering. The lessees were also advised on 21 September 2015 [14] *"The Contractor will carry out a measured survey of your balcony, as each balcony is being made individually for your home"*. As such the Tribunal find that the contractor should have allowed for the variations in size and have had sufficient tolerance built in to enable such variations to be accommodated.

165. Inevitably the adjustments to the design resulted in extensions of time being granted but, due to the lack of detail provided on the certificates the Tribunal are unable to allocate the delays between the various causes.

166. The Tribunal finds that delays occurred due to inadequate investigations into means of access, the condition of the slabs, the lack of financial control by Mr Green and the time allowed for completion of the works and doing the best we can to reflect these additional costs disallow 40% of the extensions of time cost of £323,558 i.e. £129,423 (both inclusive of VAT) of the DKP contract.

167. Turning now to the manner in which Ibex were instructed we accept that the Applicant was in a difficult position. In September the expected access arrangements had failed, the metalwork was being fabricated and the balconies would need to be stripped to keep the contracts on track. Alternative access arrangements were needed. DKP introduced Ibex and on 14 October 2015 a quotation on a day rate basis was made. The accompanying email included a budget cost of £34,000 based on 50 days on site. In January 2016 a revised S.20 notice replaced PM Solutions with Ibex for the painting contract.

168. Work was not due to start on site before 1 February 2016 [22] almost 3 months after Mr Green's discussions with Ibex and giving sufficient time for alternative solutions/competitive quotations to be obtained.

169. The estimate of man days required was woefully inadequate and whilst the eventual costs may not have been significantly less all concerned were led into believing that the appointment of Ibex for painting and access had led to a saving rather than a potential increase.

170. In Mr Green's report to the Board following their meeting of 22 August 2016 he expresses concern that he was not made aware that the painting team would also be charged for if they were used for access, that they have been charged for a full day when the rope team leave by lunchtime, that whilst the contractor requested an additional man the costs implication was not fully explained until

the invoices were received and that he was not told when the number of operatives was increased to six. The method of attaching ropes was changed and Mr Green noted that the daily charge had not been reduced to reflect this. He said that he had attempted to negotiate but the contractor was unwilling to reduce the cost.

171. The Tribunal adopts Mr Green's evidence and in the absence of any further evidence must assume that this remains the position. The scenario painted by Mr Green suggests that he was not in control and that the contractor was calling the shots. He raises what appears to be cases of overcharging but as far as we are aware no reduction was achieved to reflect the situation. Inevitably this lack of control has led to increased costs being incurred. **Again the Tribunal has insufficient information to determine the amount of costs that should be disallowed but doing the best it can it disallows 30% of the total Ibex access costs of £204,131 i.e. £61,239 (both inclusive of VAT).**

172. The Respondents and the Walker report questions whether these works should have been managed by a main contractor. With hindsight this may have resulted in a smoother process but the Tribunal does not accept that it would have inevitably been a less expensive one. Main contractors require a mark-up on the subcontractors costs which will be saved if individual contractors are instructed separately. If the contract runs smoothly without delays then savings can be made. If however in a case such as this delays occur there is less incentive for contractors to seek alternative solutions.

173. Walkers have not suggested that the main contractor option would have in itself meant lower costs and the Tribunal agrees.

174. The Tribunal is concerned with the level of control exercised by Mr Green and the communications with the Board and Lessees. The provision of regular Tenant's reports must be welcomed. However the information contained sometimes seems somewhat inaccurate. On 12 May tenants were told that the stripping works were ahead of programme [47] and no mention made of access problems. By the next report on 16 June delays were reported together with major problems with access [57]. The Tribunal finds it difficult to accept that such a change in circumstances could occur in such a short period.

175. The Board were first made aware of an overspend at the end of May when it had already reached £120,000 -£150,000 [76]. By the next report in August the overspend had reached £327,144.30.

176. From the few site meeting minutes in the bundle a Board member was an occasional attendee and it is possible that this provided an additional means of alerting the Board as to the financial position.

Insufficient evidence has been provided however to determine whether this is the case.

177. With regard to the position of the Reserves the Tribunal accepts that from the evidence given that some of those attending the AGM on 22 October 2016 were left with the impression that there was £300,000 in reserves. We accept the explanation given at page 403 of the bundle which in essence suggests that the reserve figure given did not reflect that all sums had not been received from the leaseholders.

178. The Tribunal takes the view that this is a company governance issue and as such is beyond its jurisdiction.

179. To summarise the Section 27A application the Tribunal allows all of the expenditure shown as Final breakdown at paragraph 13 LESS £129,423 from the DKP contract and £61,239 from the Ibex contract. The sums allowed include VAT but exclude payments to Greenward which it is understood have not been finalised and are not included in the application.

S.20ZA

180. The relevant section of the Act reads as follows:

20ZA Consultation requirements:

(1)Where an application is made to a Leasehold Valuation Tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or qualifying long-term agreement, the Tribunal may make the determination if satisfied that it is reasonable to dispense with the requirements.

181. The matter was examined in some detail by the Supreme Court in the case of Daejan Investments Ltd v Benson. In summary the Supreme Court noted the following

- The main question for the Tribunal when considering how to exercise its jurisdiction in accordance with section 20ZA (1) is the real prejudice to the tenants flowing from the landlord's breach of the consultation requirements.

- The financial consequence to the landlord of not granting a dispensation is not a relevant factor. The nature of the landlord is not a relevant factor.

- Dispensation should not be refused solely because the landlord seriously breached, or departed from, the consultation requirements.

- The Tribunal has power to grant a dispensation as it thinks fit, provided that any terms are appropriate.

- The Tribunal has power to impose a condition that the landlord pays the tenants' reasonable costs (including surveyor and/or legal fees) incurred in connection with the landlord's application under section 20ZA(1).

- The legal burden of proof in relation to dispensation applications is on the landlord. The factual burden of identifying some "relevant" prejudice that they would or might have suffered is on the tenants.

- The court considered that "relevant" prejudice should be given a narrow definition; it means whether non-compliance with the consultation requirements has led the landlord to incur costs in an unreasonable amount or to incur them in the provision of services, or in the carrying out of works, which fell below a reasonable standard, in other words whether the non-compliance has in that sense caused prejudice to the tenant.

- The more serious and/or deliberate the landlord's failure, the more readily a Tribunal would be likely to accept that the tenants had suffered prejudice.

- Once the tenants had shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.

182. The Tribunal consider that the failure to seek alternative quotations when there was sufficient time to do so has unnecessarily prejudiced the Lessees by the lack of any competition in obtaining an estimate and finds that this has most likely led to an increase in the costs.

183. The Tribunal does not include the DKP contract in this finding as there is no evidence that retendering the contract part way through would have been either possible or practical

184. Given the guidelines provided by the Daejan case referred to above the Tribunal needs to determine what loss the lessees have incurred solely by the lack of consultation. Consultation would have allowed alternative methods and contractors to be suggested which would have introduced an element of competition leading to a potentially lower overall cost. In the absence of any evidence the Tribunal does the best it can by determining that this extra cost may be assessed at 10% of the final Ibex access cost of £204,131 i.e. £20,413 (both inclusive of VAT).

185. Subject to the condition that the sum of £20,413 inc. vat is not placed on the service charge the Tribunal grants dispensation from all or any of the consultation requirements of Section 20 Landlord and Tenant Act 1985.

186. An application for an order under Section 20C and for reimbursement of costs by a lessee has been received and Directions will be made shortly to determine the matter on the papers.

D Banfield FRICS
26 April 2017

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office, which has been dealing with the case. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.

2. If the person wishing to appeal does not comply with the 28-day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.

3. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking

Appendix of relevant legislation

Landlord and Tenant Act 1985

18 Meaning of "service charge" and "relevant costs".

(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.

19 Limitation of service charges: reasonableness.

(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 provision 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.

20 Limitation of service charges: consultation requirements

(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.

20 ZA Consultation requirements: supplementary

(1)Where an application is made to [F2the appropriate tribunal] for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or qualifying long term agreement, the tribunal may make the determination if satisfied that it is reasonable to dispense with the requirements.

(2)In section 20 and this section—

"qualifying works" means works on a building or any other premises, and

"qualifying long term agreement" means (subject to subsection (3)) an agreement entered into, by or on behalf of the landlord or a superior landlord, for a term of more than twelve months.

(3)The Secretary of State may by regulations provide that an agreement is not a qualifying long term agreement—

(a)if it is an agreement of a description prescribed by the regulations, or

(b)in any circumstances so prescribed.

(4)In section 20 and this section "the consultation requirements" means requirements prescribed by regulations made by the Secretary of State.

(5)Regulations under subsection (4) may in particular include provision requiring the landlord—

(a)to provide details of proposed works or agreements to tenants or the recognised tenants' association representing them,

(b)to obtain estimates for proposed works or agreements,

(c)to invite tenants or the recognised tenants' association to propose the names of persons from whom the landlord should try to obtain other estimates,

(d)to have regard to observations made by tenants or the recognised tenants' association in relation to proposed works or agreements and estimates, and

(e)to give reasons in prescribed circumstances for carrying out works or entering into agreements.

(6)Regulations under section 20 or this section—

(a)may make provision generally or only in relation to specific cases, and

(b)may make different provision for different purposes.

(7)Regulations under section 20 or this section shall be made by statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of Parliament.

27A Liability to pay service charges: jurisdiction

(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.