12604

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	CHI/00MR/LSC/2017/0096
Property	:	Flat 39, Brunel Court, Nutfield Place, Portsmouth PO1 4JB
Applicant	:	Peter Watt
Representative	:	Paul Watt
Respondent	:	Housing and Care 21
Representative	:	Paul Hutton, Head of Legal Services
Type of Application	:	Transferred Proceedings Liability to pay service charges
Tribunal Member(s)	:	Judge Tildesley OBE
Date and Venue of Hearing	:	Havant Justice Centre 19 December 2017
Date of Decision	:	29 January 2018

DECISION

Decisions of the Tribunal

1. The Tribunal determines that the sum of £700 is payable by the Applicant in respect of his contribution to the reserve fund in each of the years in question namely 2015/16, 2016/17 and 2017/18.

2. The Tribunal determines that the Respondent shall pay the Applicant £200 within 28 days of this Decision, in respect of the reimbursement of the Tribunal hearing fees paid by the Applicant.

3. The Tribunal notes that the Applicant has limited his claim for overpayment to £937.93 which is reflected in the attached judgment.

The Issue

4. The Applicant has a longstanding medical condition and since July 2013 has resided in a leasehold flat under shared ownership at Brunel Court, Portsmouth a residential home with care facilities run by Housing and Care 21. The Applicant is represented by his brother Mr Paul Watt.

5. Brunel Court is a modern development located close to the heart of the historic city of Portsmouth, within easy reach of the main shopping centre. The building was built in 2007 of brick and tile construction with a pitched roof. The development is staffed with a court manager and offers a range of onsite facilities for residents including a communal lounge, laundry, guest room, computer room and two lifts. The property also enjoys enclosed and well maintained gardens.

6. Brunel Court comprises 55 units of living accommodation, 15 of which are long leasehold on shared ownership and 40 are rented flats. There is also a day centre which is run separately from the residential part of the development.

7. The dispute concerned the Applicant's contributions to the reserve fund which increased from £499.20 in 2014/15 to £1,333.33 in 2015/16, remaining at that figure for 2016/17 with a slight decrease to £874.53 in 2017/18.

8. The reason for this increase from 2014/15 was that the Respondent made an accounting mistake in respect of the reserve fund for the owned properties which went unnoticed for a number of years and resulted in a shortfall of funds allocated to the reserve fund. After the error was spotted the Respondent sought to recover the shortfall by increasing the leaseholders' contributions in 2015/16 and in subsequent years.

9. The Applicant objected to contributing towards the shortfall which accrued in the years preceding his purchase of the leasehold in July 2013. The Applicant has calculated the amount in dispute as £937.93.

10. The Applicant's objections were as follows:

a. He should not be responsible for putting right the Respondent's negligence in respect of its financial mismanagement of the reserve fund.

b. The Respondent failed to disclose the shortfall in the reserve account when the Applicant purchased the flat.

c. The Respondent had failed to comply with the requirements under the lease by not providing him with a certificate of the amount the actual expenditure exceeded the estimated service charge in any one year.

11. The Respondent argued that it acted prudently in raising the contributions to the reserve fund in order to meet the planned expenditure on major works after the first 20 years. The Respondent pointed out that failure to maintain a sufficient reserve could expose residents at the time of the carrying out of the works to unreasonable financial hardship.

The Proceedings

12. By an order dated 31 August 2017 District Judge Ball in the County Court at Portsmouth under claim number D3QZ5W25 transferred the case to this Tribunal. Further, by an order dated 24 October 2017 District Judge Ackroyd in the same proceedings varied District Judge Ball's order to the extent that all issues currently before the court and not already transferred to the Tribunal were now allocated to this Tribunal for determination.

13. On 27 October 2017 the Tribunal informed Mr Paul Watt, and Mr Paul Hutton, Head of Legal Services for the Respondent that the claim had been transferred to the Tribunal. This letter enclosed a copy of Judge Agnew's directions dated 25 October 2017.

14. The directions stated that the target date for hearing would be in the two weeks commencing 4 December 2017.

15. On 15 November 2017 the Tribunal informed the parties that a hearing would be held on 19 December 2017 at 10.30am at Havant Justice Centre, which would be preceded by an inspection of the property at 9.30am.

16. On 19 December 2017 the Tribunal inspected the property in the presence of Mr Paul Watt and a member of staff from Housing and Care 21. The staff informed the Tribunal that she was not aware of the planned inspection.

17. Following the Tribunal's inspection Mr Hutton phoned the Tribunal office stating that the Respondent had not received the notification of the hearing for the 19 December 2017 and requested an adjournment. Mr Hutton was asked to put his request in an email which was sent to

the Tribunal at 10.11 hours on 19 December 2017. Mr Hutton acknowledged that the Respondent had received Judge Agnew's directions of 25 October 2017 which gave a target window of 14 days from 4 December 2017 for a hearing. Mr Hutton said he did not think to contact the Tribunal when the window had closed because of his recent experience with the slippage of hearing dates fixed by the Courts.

18. Following receipt of the e-mail Judge Tildesley spoke to Mr Hutton on the phone, and put various options to him, and requested him to send a further email stating clearly the Respondent's position.

19. Mr Hutton duly complied with Judge Tildesley's request. Mr Hutton accepted that the Tribunal took reasonable steps to notify the Respondent of the hearing date, although according to Mr Hutton the Respondent did not receive it. Mr Hutton argued that it was not in the interests of justice to proceed in the Respondent's absence. Mr Hutton said that the case involved complex issues which were not fully represented by the papers. Further if the claim was successful the Respondent would be obliged to return monies held in a sinking fund for anticipated major works, which would then lead to a wholly unsatisfactory position where elderly often vulnerable residents would be called to make significant one-off payments for service charge works. Mr Hutton said that the Respondent would pay the Tribunal fee for a new hearing.

20. Judge Tildesley asked Mr Paul Watt for his view on Mr Hutton's representations. Mr Watt asked for the case to proceed. Mr Watt stated that he had asked the Respondent repeatedly over a year for information on the reserve fund before it was provided in March 2017. Mr Watt said that although the Respondent apologised for not supplying meaningful information in a timely fashion, the Respondent was not prepared to make a refund. Mr Watt pointed out that he obtained judgment in default because the Respondent did not submit a defence to the Claim. Mr Watt stated the Respondent's reason supporting its successful application to set aside the default judgment was that Mr Hutton had filed a defence online but for some unknown reason the defence had not been transferred via the portal to the Court. Mr Watt stated that there was no dispute on the facts, and that all relevant information was before the Tribunal.

21. Judge Tildesley decided to proceed with the case in the Respondent's absence. Judge Tildesley had regard to rule 34 of the Tribunal Procedure Rules 2013. Mr Hutton conceded that the requirements of rule 34 (a) had been met. The dispute, therefore, centred on whether it was in the interests of justice to proceed (Rule 34 b).

22. The Tribunal finds the following:

- The notice of hearing dated 15 November 2017 was sent to the correct address. The Respondent had received previous

correspondence from the Tribunal directed at that address. The Respondent put forward no explanation for the non-receipt of the hearing notice.

- The Respondent was aware that the Tribunal would fix a hearing date in the two weeks from the 4 December 2017. Despite this the Respondent chose to make no enquiries of the Tribunal after the date had passed about why the Respondent had not been informed of a hearing date.
- The Respondent had not complied with the time limit for submitting a defence to the original claim, which the Respondent had put down to an error with the computer software.
- This dispute had been ongoing for over 18 months, and the Respondent was largely responsible for the delay in bringing the dispute to a resolution.
- The Applicant was in a position to proceed and had complied with the directions of the Tribunal.
- Despite the Respondent's protestations to the contrary, the Tribunal was satisfied that there was no significant divergence on the facts of the dispute.
- The Respondent had submitted a detailed defence to the claim.

23. In view of the above findings of fact the Tribunal was satisfied that it was in the interests of justice to proceed in the absence of the Respondent.

24. The Tribunal informed the Respondent of its decision to proceed by e-mail dated 19 December 2017.

25. The Tribunal heard from the Applicant, and gave proper consideration to the Respondent's defence.

The Service Charges Account and the Reserve Fund

26. At the end of each financial year the Respondent supplied a detailed service charge pack. This pack comprised, amongst other documents, "The Total Service Charge Account for the Whole Building" and "Individual Accounts for Different Parts of the Building". The relevant individual account for this application is "The Shared Ownership Account".

27. The Tribunal analysed "The Shared Ownership Accounts" for 2015/16 and 2016/17 against "The Total Service Charge Accounts" for the same years.

28. The Analysis showed that the costs for the Shared Ownership Accounts were 15/55 of the costs of the Total Service Charge in respect of the budget headings of Court Manager Service, Repairs, Utilities for Communal Areas, Gardening, Cleaning, other Costs and Renewal of Communal Services. The costs of the expenditure items, however, under Administration in the Shared Ownership Accounts were not

calculated on the basis of 15/55 proportion of the costs for administration in the Total Service Charge account. In 2015/16, and 2016/17 the leaseholders under shared ownership were liable to pay the whole of the sinking fund (£20,000) recorded in the Total Service Charge account.

29. Following the construction of the building in 2007/08 the Respondent set up a separate reserve fund to meet future contingent liabilities in respect of the replacement of various major items in the building, such as lifts and roofs. The Respondent carried out a stock condition survey to assess the amount that should be allocated to the fund each year from the various constituent parties responsible for the building. The Respondent's target for the reserve fund was to assume a minimum of a £50K buffer on the value of the stock condition survey after 10 years, and preferably after 20 years.

30. The Respondent estimated that an annual contribution of £54,335 to the reserve fund was required to meet the target for the fund. The three contributors to the reserve fund were Leasehold Properties, the Respondent for the rented properties and the Day Centre. The Respondent calculated the respective annual contributions of the three bodies at £10,500 (Leasehold); £28,000 (Housing & Care 21) and £15,835 (Day Centre).

31. The contribution of the leasehold properties whilst representing 21 per cent of the total fund amounted to 15/55 of the combined contribution for Leasehold and Housing & Care 21[1].

32. The Respondent set up the reserve fund in 2007/08 three months into the accounting year resulting in nine months of reserve payments being charged and collected. Unfortunately the Respondent used the nine month charge for subsequent years rather than the 12 month charge. Thus £7,488 was collected for Leasehold Properties for the subsequent rather than the 12 month charge of £10,500. This error was not noticed and £7,488 was recovered for the next six years until 2014/15[2].

33. This meant that the reserve account for Leasehold Properties showed a shortfall of £21,084 at the end of 2014/15 from the target amount for Leasehold Properties. The Respondent chose to recover this shortfall by demanding from the leaseholders an additional contribution of £9,500 to the reserve fund for 2015/16 and 2016/17, and £2,618 for 2017/18. This made a total of £21,618 with each leaseholder contributing £1,441.20.

34. The Applicant has limited his claim to the end of April 2017. He has calculated his contribution to the shortfall as £1,281.21[3]. The Applicant

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[1] £10,500 is 15/55 of [£10,500 + £28,000].

[2] See A4 to the Applicant's case Mr Peach's letter to Mr Paul Watt dated 24 April 2017.

[3] The contribution to the end of April 2017 is 1/15 of £633.33 + £633.33 + £174.53/12 =£1,280

has agreed to pay the sum of £343.29 towards the shortfall. The amount of £343.29 was the sum he would have paid from July 2013 to 31 March 2015 if the Respondent had demanded the correct amount of £10,500 for the years 2013/14 and 2014/15 when he was in occupation. The amount in dispute is £937.93[4] which the Applicant says should have been paid in the years period 1 April 2008 to 30 June 2013 when he was not living at the property.

Consideration

35. The Applicant articulated the dispute in terms of that he should not suffer the consequences of the Respondent's mismanagement of the reserve fund. The Applicant contended that he was required to make contributions for periods when he did not own the property which he said offended principles of fairness and equity.

36. The Tribunal, however, is required to couch the dispute in the context of its jurisdiction. Under section 27A of the 1985 Act the Tribunal has the power to decide all aspects of liability to pay service charges and can interpret the lease where necessary to resolve disputes or uncertainties. The Tribunal can decide by whom, to whom, how much and when a service charge is payable. However, no application can be made in respect of a matter which has been admitted or agreed by a tenant or determined by a Court.

37. By section 19 of the 1985 Act service charges are only payable to the extent that they have been reasonably incurred. The test for payability of contributions to the reserve fund which are estimated sums of likely future expenditure is "no greater amount than is reasonable" (section 19(2) of the 1985 Act).

38. The questions for the Tribunal are two-fold: whether the Applicant was legally bound under the terms of the lease to pay the contributions to the reserve fund for 2015/16, 2016/17 and 2017/18, and if he was what amount is reasonable.

39. The lease is dated 27 November 2007 for a term of 125 years (less 3 days) from the 10 April 2006 and made between Housing 21 of the one part and Pamela Audrie Fox of the other part.

40. Under clause 3(2) of the lease the leaseholder covenants to pay the service charge in accordance with clause 7.

41. Under clause 7(1)(d) service charge means the specified proportions of the service provision.

42. Under clause 7(1)(c) the service provision means the sum computed in accordance with sub clauses(4), (5) and (6) of this clause.

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[4] The correct amount for that period is £1,441,20 - £343.29 = £1,097.91. The Tribunal, however, is limited to the claim made of £937.93

43. Under clause 7(1)(b) specified proportions means the proportions specified in the Particulars which is 1/55th of both the Estate and Communal Facilities service charges

44. Clause 7(2) provides that the leaseholder will pay the service charge during the term by equal payments in advance at the times at which and in manner in which rent is payable under the lease provided always all sums paid to the landlord in respect of that part of the Service Provision as relates to reserve referred to sub-clause (4)(b) hereof shall be held by the Landlord in trust for the Leaseholder until applied towards the matters referred to in sub-clause (5).

45. Clause 7(3) states that the service provision in respect of any account year shall be computed in accordance with sub-clause (4) of this Clause.

46. Clause 7(4) states that the service provision shall consist of a sum comprising

(a) the expenditure estimated by the accountant as likely to be incurred in the account year by the landlord upon the matters specified in sub clause (5) of this clause but
(b) an appropriate amount as a reserve for or towards such of the matters specified in sub-clause (5) as are likely to give rise to expenditure after such account year being matters which are likely to arise either only once during the then unexpired term of the lease or at intervals of more than one year including (without prejudice to the generality of the foregoing) such matters as the decoration of the exterior of the building (the said amount to be computed in such manner as to ensure as far as is reasonably foreseeable that the Service provision shall not fluctuate from year to year) but
(c) reduced by any unexpected reserve already made pursuant to paragraph (b) of this sub-clause in respect of any such expenditure as aforesaid.

47. The Tribunal is satisfied under the terms of the lease the Respondent is entitled to recover as part of the service charge an appropriate amount as a reserve towards the future costs of and incidental to the performance of the landlord's covenants. The Tribunal, however, observes that the reserve is part of the service provision, and that the individual's leaseholder obligation in any one year is limited to 1/55th of the service provision.

48. In the years in question the Respondent required the Applicant to contribute a larger proportion of the reserve fund than 1/55. In 2015/16 and 2016/17 the Applicant's proportion was 1/36 and in 2017/18 the proportion was 1/47. This meant that the Applicant was required to pay £1,333.33 in years 20115/16 and 2016/17 and £874.53 in 2017/18

rather than the sum of £700 if the reserve fund had been calculated under the terms of the lease[5].

49. In essence the Respondent was using the mechanism of the service charge to recover contributions to reserves from the leaseholders that should have been collected in previous years. The Respondent was entitled to do this provided it complied with the terms of lease and the amounts demanded were reasonable. In the Tribunal's view the Respondent failed to comply with the terms of the lease because it demanded in the years in question an amount in excess of the specified proportion of 1/55. The Tribunal concludes that the Respondent was not entitled under the lease to recover this excess amount unless the leaseholder agreed to pay an amount in excess of the 1/55 contribution. In this case Mr Watt has agreed to pay an additional amount of £343.29.

50. In one respect the Tribunal's determination ends with its ruling on the terms of the lease. The Tribunal, however, intends to move onto the second issue of reasonableness.

51. The amount that the Respondent can demand as a reserve towards future expenditure is no greater amount than is reasonable. In order for the Tribunal to be satisfied that the requirements of section 19(2) have been met, the Respondent needs to be able to point to some rational basis for the amount demanded.

52. In this case the Respondent has carried out a stock condition survey to estimate the costs required for the replacement of major items at intervals of 10, 20 and 30 years. The Tribunal understands that the Respondent reviews the stock condition survey every year.

53. The Respondent relied on the initial condition survey to estimate an annual contribution of £54,335 towards the reserve which was made up of £10,500 (leasehold properties), £28,000 (Housing 21) and £15,835 (Day Centre). The Respondent's review of the reserve fund in 2017 indicated that there were sufficient monies in the fund for the next ten years.

54. The Applicant' representative had no quarrel with the Respondents' assumptions for the reserve fund and its necessity to ensure that leaseholders were protected from large one-off service charge payments arising from major works or from unplanned eventualities.

55. The Tribunal considers on the evidence presented that the annual amount of £10,500 as the leaseholders' contribution to the reserve fund, which was £700 per leaseholder represented a reasonable amount.

[5] ATA3 showed that Housing 21 contributed £28,000 to the reserve fund in each of the three years. The total of leaseholders contribution should have been limited to £10,500 in order to ensure compliance with 1/55 contribution.

56. The facts of this case were not primarily about the Respondent's assumptions for the reserve fund. Leaving aside the question of whether the Respondent was compliant with the lease, the case was concerned about the reasonableness of the amounts demanded in 2015/16, 2016/17 and 2017/18 to make up the "shortfall" in the reserves. The Respondent chose to recover the majority of the shortfall in two years which increased the contribution to reserves from £499.20 in 2014/15 to £1,333.33 in 2015/16 an increase of 167 per cent.

57. The Applicant's representative said that this level of increase was not explained at the time by the Respondent. According to the Applicant's representative it took him over a year of repeatedly asking for information including a formal request under the 1985 Act to obtain a sufficient level of detail to understand the charges imposed by the Respondent.

58. In his letter dated 24 April 2017 Mr Peach, Director of Extra Care for the Respondent, apologised to the Applicant's representative for taking so long in providing him with meaningful information. Mr Peach assured Mr Paul Watt this was not done to hide information but it was a result of staff changes. Mr Peach stated that it was imperative that the reserve had sufficient funds in place to cover unplanned eventualities that may arise, and in those circumstances it seemed sensible to increase the contribution. Mr Peach also said that at the same time the shortfall was picked up there was also a large surplus in the service charge resulting in a reduced charge for the following year. In Mr Peach's view it seemed right to increase the reserve fund collection at this time as it would have less impact on residents with their monthly charges. Finally Mr Peach acknowledged the need for consultation to enable the residents to make informed decisions on the reserved fund contribution, and in this respect he said he would ask the member of staff concerned to hold a further consultation meeting ahead of the next formal round of service charge consultations.

59. The Tribunal acknowledges that Mr Peach has provided a rational explanation for the action the Respondent took in relation to the shortfall in the reserves. However, as stated in the Court of Appeal decision in *London Borough of Hounslow v Waaler* [2017] EWCA Civ 45, "Rationality is not the same a reasonableness". The Court of Appeal went on to explain that reasonableness was not simply a question of process: it was also a question of outcome. Further the test of reasonableness was not rigid and in effect allowed the law to respond appropriately to different situations as they arose.

60. Returning to the facts of this case, it was apparent that the Respondent decided unilaterally to replenish the reserve fund as quickly as possible by imposing a substantial increase in the leaseholder's contribution. It would appear that the Respondent gave no thought to the scale of the problem, and whether it required an immediate injection of monies. The accounts at the end of 2014/15 revealed a positive balance of £415K

in the account which was just £21,000 below the target amount for the reserve account in 2014/15. Finally the Respondent did not consult with the leaseholders about its proposals, and had no regard to the financial impact of its proposals on the leaseholders.

61. The Tribunal determines on the facts found in the above paragraph that an increase of 167 per cent in the leaseholder's contribution to the reserve fund was not reasonable.

62. The Tribunal has indicated that £10,500 (£700 each leaseholder) would have been a reasonable amount for the leaseholder's contribution to reserves for 2015/16 which would have restored the level of contribution in accordance with the assumptions made on the creation of the fund, and allowed the Respondents time to weigh up the various options and consult with leaseholders.

Decision

63. The Tribunal determines that the Applicant is liable to pay £700 as his contribution towards the reserves for each year in question.

64. The Applicant is, therefore, entitled to a refund of the overpayments made in respect of his contribution to the reserve fund. The Tribunal notes that the Applicant has limited his claim to £937.93 which is reflected in the judgment[6].

65. The Tribunal observes that the Applicant has paid a £200 hearing fee. The Tribunal has discretion to order the Respondent to reimburse the Applicant with the hearing fee. As the Applicant has been successful with his application the Tribunal intends to make such an order against the Respondent payable within 28 days of the date of this decision.

[6] The amount of overpayment would have been £1,441.19

RIGHTS OF APPEAL

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.

2. 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.

3. 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.

4. 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 (as amended)

Section 18

(1) In the following provisions of this Act "service charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent -
  (a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord's costs of management, and
  (b) the whole or part of which varies or may vary according to the relevant costs.

(2) The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable.

(3) For this purpose -
  (a) "costs" includes overheads, and
  (b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

Section 19

(1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period -
  (a) only to the extent that they are reasonably incurred, and
  (b) where they are incurred on the provisions of services or the carrying out of works, only if the services or works are of a reasonable standard;
and the amount payable shall be limited accordingly.

(2) Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise.

Section 27A

(1) An application may be made to the appropriate 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 the appropriate 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.

(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) Sub-paragraph (1) applies whether or not any payment has been made.

(3) The jurisdiction conferred on the appropriate tribunal in respect of any matter by virtue of sub-paragraph (1) is in addition to any jurisdiction of a court in respect of the matter.

(4) No application under sub-paragraph (1) 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.

(6) An agreement by the tenant of a dwelling (other than a post-dispute arbitration agreement) is void in so far as it purports to provide for a determination—

(a) in a particular manner, or

(b) on particular evidence,

of any question which may be the subject matter of an application under sub-paragraph (1).