FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00AM/LSC/2020/0071**
HMCTS code (paper, video, audio)	**:**	**V: VIDEO**
Property	**:**	**Basement Flat and Flat 120A, 120 Nevill Road, London N16 0SX**
Applicants	**:**	**Ms Denise Douieb (Basement Flat)** **Ms G Mouque (Flat 120A)**
Representative	**:**	**In person**
Respondent	**:**	**Sarum Properties**
Representative	**:**	**Mr Paul Taylor, of Remus Management**
Type of Application	**:**	**For the determination of the reasonableness of and the liability to pay service charges/ administration charges**
Tribunal Members	**:**	**Tribunal Judge Prof R Percival** **Mr Andrew Lewicki BSc (Hons), MBEng, FRICS**
Date and venue of Hearing	**:**	**14 December 2020** **Remote**
Date of Decision	**:**	**26 March 2021**

DECISION

Covid-19 pandemic: description of hearing

This has been a remote video hearing which has been consented to by the parties. The form of remote hearing was video, using CVP. A face-to-face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. The documents that are referred to are in a bundle of 176 pages, the contents of which have been noted.

The application

1. The Applicant seeks a determination pursuant to section 27A of the Landlord and Tenant Act 1985 ("the 1985 Act") as to the amount of service charges payable by the Applicant in respect of the service charge years from 1 October 2010 to 30 September 2019.

2. The relevant legal provisions are set out in the Appendix to this decision.

The property

3. The properties comprise the two flats into which the house at 120 Nevill was divided, apparently in 1988. It is a mid-terrace, three storey Victorian house.

4. The basement flat is a three bedroom maisonette over two floors, which includes the rear garden and a small front garden. The flat known as 120A Nevill Road is a one bedroom flat, occupying the first floor.

The lease

5. Ms Douieb acquired the leasehold interest of the basement flat in 1997. Ms Mouque acquired her interest in flat 120A in 1988.

6. From 28 June 2019, Ms Douieb has held a new, extended lease on the basement flat.

7. The directions, issued following a telephone case management conference on 18 August 2020, required that a copy of the original lease of the basement flat be provided, with a schedule of any relevant variations in the lease for flat 120A. We have been provided with both of the leases of the basement flat, and four pages from that for flat 120A, which, it appears, constitute the divergences between the flats.

8. The lease for the basement flat was made in September 1988. By clause 2(2)(a), the lessee covenants to pay on demand two thirds of various costs, including the following:

> "(i) the cost of insuring and keeping insured throughout the term hereby created the Building against loss or damage by fire storm and tempest and (if possible) aircraft and explosion and such other risks normally covered under a comprehensive insurance policy as the Landlord shall determine".
>
> "(iii) the cost of maintaining repairing and redecorating and renewing
>
> (A) the structure of the Building including the main walls drains roofs foundations chimney stacks gutters and rainwater pipes
>
> (B) …
>
> (C) the reasonable fees of the Landlord's managing agents (if any) for the collection on behalf of the Landlord of the rents and maintenance of the flats in the Building and for the general management of the Building"

9. Clause 2(2)(b) goes on to set out the mechanics of the charge. The amount of the contribution described in clause 2(2)(a) is to be, by clause 2(2)(b)(i)

> "ascertained and certified by the Landlord or the Landlord's managing agent … once a year on the Thirtieth day of September in each year for the preceding year (hereinafter referred to as 'the Landlord's financial year')".

The lease then makes provision for the payment of a fixed fee of £100 in respect of the first year, and then that the lessee

> "thereafter shall on the thirty first day of March and the Thirtieth day of September in each year pay to the Landlord the said sum or such greater sum as calculated in accordance with Clause 2(2)(b)(ii) hereof and shall on demand pay the balance (if any) ascertained and certified as aforesaid)."

10. Clause 2(2)(b)(ii) goes on specify that

> "the expenditure incurred by the Landlord in any financial year may if the Landlord or the Landlord's managing agent … think fit include not only the actual expenditure incurred during the Landlord's financial year but also such reasonable provision for anticipated future expenditure of a periodic or recurring nature as the Landlord or the Landlord's managing agent shall in their sole discretion allocate to the financial year in question as being fair and reasonable in the circumstances PROVIDED that" the sums are expended on the purposes set out in clause 2(2)(a).

11. By clause 2(2)(b)(iii), overpayments are to be held to the account of the lessee.

12. The landlord covenants by clause 4(2) to "maintain repair redecorate and renew (a) the structure …"; and by clause (4) to keep the building insured against the risks set out in clause 2(2)(a)(i).

13. The extent of the demise is specified in the first schedule as "All that flat on the basement and ground floors of the Building together with the front and rear gardens showed edged in red on the plan…". A right of way over the area coloured brown on the lease plan is granted by the fourth paragraph of the second schedule. Although the colour on our copy was indistinct, this appeared to relate to a small area immediately inside the entrance to the front garden, from which the stairs to the flat go down, on the right. The same area serves a short path to the stairs leading to the front door of flat 120A. Although we do not have a lease plan for flat 120A, it appears that similar provision is made. In both cases, the right of way over this area is expressed as subject to an obligation to contribute to the cost of its repair and maintenance. We do not have the provisions in the lease of flat 120A setting out the demise, but it was not contested that the front path beyond the small area coloured brown was demised.

14. The cover of the bundle shows a photograph of this area, with measurements stating it is 1 metre 2 centimetres by 1 metre 42 centimetres.

15. The new lease carries over the obligations of each party from the old lease (clause 5).

16. The extracts from the lease of flat 120A show that the service charge obligation is to pay a third contribution. The obligations in respect of repair and maintenance is effectively the same, although ordered somewhat differently.

17. The lease includes a right of way over the steps to the basement to access the gas meter (it appears, as paragraph 4 to the second schedule, although the relevant heading is missing from the extract in the bundle).

The issues and the hearing

18. The hearing took place remotely using CVP. The applicants represented themselves. The respondent was represented by Mr Taylor, the associate director, property management of Remus Management, the managing agents. He was accompanied by Mr Redfern, the property manager responsible for the property.

19. At the start of the hearing, the Tribunal indicated, with the agreement of the parties, that we would deal with the respondent's application relating to statutory limitation and/or agreement by payment of the service charges paid as a preliminary issue.

20. In accordance with the directions, a Scott schedule had been prepared. Rather than consider each issue on a year-by-year basis, it was agreed with the parties at the start of the hearing that the better way to proceed was to consider each issue in turn. Initially, we had intended to return to the Scott schedule at the end of the hearing. In the event, the time taken to consider the issues made that impractical, and the parties agreed that it was unnecessary to do so.

21. The issues identified by the parties were the reasonableness and/or payability under the service charge of the following:

    (i) Preliminary issue on limitation/agreement by payment,

    (ii) Building insurance,

    (iii) Reinstatement value survey,

    (iv) Estimated service charge budgets and reserve fund,

    (v) General repairs,

    (vi) Risk assessments,

    (vii) Annual management fees and other professional fees,

    (viii) Contractor paid prematurely, and

    (ix) Orders under Section 20C of the 1985 Act/Commonhold and Leasehold Reform Act 2002, schedule 11, paragraph 5A

22. During the hearing, the Tribunal indicated that, in respect of some elements of the evidence, the Tribunal may feel required to have regard to our knowledge of building management and allied matters (principally, that of our professional member), this being of the nature of general background knowledge, in respect of which specific pieces of evidence could not be identified. Both parties agreed that we should do so.

Preliminary issue: limitation/agreement

23. Mr Taylor argued that the Tribunal should not consider service charge years earlier than six years ago. He referred us to the Respondent's

statement in the bundle which argues "[s]uch a late challenge to charges already accepted by way of payment … is within the scope of the 6 year limitation and is deemed to be frivolous". Mr Taylor cited the Limitation Acts, section 27A(4) of the 1985 Act and *Cain v London Borough of Islington* [2015] UKUT 542, [2016] L & T R 13. He directed us to a quotation in the Respondent's statement from paragraph [14] of that case (see below).

24. In response, and partly in answer to questions from the Tribunal, the Applicants said that they had both raised issues and complaints about the service charges going back (at least) for the nine years in issue. They had paid the charges "under duress". They had correspondence, and records of telephone calls going back that far, but had not produced them in the bundle as they had not appreciated that they might be relevant.

25. Mr Redfern gave evidence that the Applicants had been in communication with him about the service charges throughout his period of engagement with the property, which started five years ago. He agreed that they had consistently questioned the service charges. He could not speak for the time before that.

26. The Applicants were unable to address us on limitation, apart from Ms Douieb's observation that she was unaware that statutory limitation applied and had seen nothing in relation to it on the application form.

27. Following a brief adjournment, we told the parties that we rejected the application, and would give reasons in our decision, which we do hereunder.

28. Limitation, and whether payment constitutes agreement or admission for the purposes of section 27A(4), are separate issues. The principal force of the Respondent's application, we consider, was really directed at the latter. However, the application was also put in terms of statutory limitation and it is, we assume, from that regime that the Applicant drew the six year period before which, Mr Taylor argued, a challenge to the service charges paid should not be entertained by the Tribunal.

29. In respect of limitation, we respectfully agree with the statement of the law in Woodfall's Landlord and Tenant, that "[t]he Limitation Act 1980 does not apply to applications under s.27A" (paragraph 7.192.1). Woodfall cites *Cain* for that proposition. We are aware that the contrary position has been argued (see for instance Tanfield Chambers, *Service Charges and Management*, 4th edition, paragraphs 32-02 to 32-04).

30. In *Cain*, HHJ Gerald (referring to both sections 8 and 19 of the Limitation Act 1980), said, at paragraph [34]:

> "The application to the F-tT is a claim for determination as to the reasonableness of the service charge made under s.27A of the 1985 Act. It is not a claim to recover rent or arrears or service charge (both brought by the landlord) or damages in respect thereof (brought by the tenant). If successful, it would result in a determination as to the reasonableness of the amounts claimed and nothing more."

31. This view expressed by the Upper Tribunal is general in its application, and in our view clearly supports the proposition attributed to the case in Woodfall.

32. The Respondent argues that the service charges (longer ago than six years) were agreed or admitted by the tenants (section 27A(4)(a)), and accordingly the Tribunal does not have jurisdiction to determine those matters. While, in this form, the submission conflates limitation and agreement, we nonetheless consider agreement/admission as a freestanding point.

33. In support of its submission that payment of the service charge amounts to agreement or admission, the Respondent quotes paragraph of the same case of *Cain*, at paragraph [14]:

> "An agreement or admission may be express, or implied or inferred from the facts and circumstances. In either situation the agreement or admission must be clear, the finding being based upon the objectively ascertained intention of the tenant which may be express or implied or inferred from the conduct of the tenant—usually an act or a series of acts or inaction in the face of specific circumstances or even mere inaction over a long period of time or a combination of the two."

34. In context, HHJ Gerald was in fact considering section 27A(5), which provides that a leaseholder is "not to be taken to have agreed or admitted any matter by reason only of having made any payment". He went on to say (at paragraph [17]) that the effect of sub-section (5)

> "is to preclude any … finding [of an agreement] 'by reason *only of* [the tenant] having made *any payment* (italics supplied). The reference to the making of 'any payment', and 'only' such payment, indicates that whilst the making of a single payment on its own, or without more, will never be sufficient to found the finding of agreement or admission, the making of multiple payments even of different amounts necessarily over a period of time (because that is how service charges work) may suffice. Putting it another way, the making of a single payment on its own, or without more, will never be sufficient; there must always be other circumstances from

> which agreement or admission can be implied or inferred. And those circumstances may be a series of unqualified payments over a period of time which, depending upon the circumstances, could be quite short, it always being a question of fact and degree in every case."

35. This statement in *Cain* appears to us to require us to construe the expression "any payment" in the statute as meaning "a single payment", the judgment being binding authority on the Tribunal. However, as HHJ Gerald states, it is a "series of *unqualified* payments" (italics added) that "may" constitute agreement or admission.

36. In this case, the Appellants assert that, while they made payment, they contested the payments throughout the relevant period, and thus that the payments were not unqualified. The evidence of the Respondent is that they contested the payments during the period of which the Respondent's property manager has knowledge. There is no reason to disbelieve the oral evidence of the Applicants that they did contest the service charges throughout the period covered by the application. The Respondent did not invite us to disregard the oral evidence of the Applicants on the basis that they had not provided documentary evidence in the bundle, and we do not think it would be right to do so. Neither party is legally represented. The Respondent's submissions on this issue were legally confused, and nothing in the way in which the Respondent made its case would have alerted the unrepresented Applicants to the significance of documentary evidence that they contested the earlier service charges.

37. *Decision*: The Applicants are not disbarred by virtue of either statutory limitation, or agreement or admission, from contesting the reasonableness and/or payablity of service charges relating to any of the service charge years covered by the application.

Building insurance

38. The Respondent is responsible for insuring the building in the terms set out in paragraph [8] above.

39. The Applicants argued that the costs for insurance had become excessive. They state that, going back to 1990/1991, the cost was reasonable at £336.60, but that since then they had increased to an unreasonable degree. The insurance element of the charge had increased to £703.47 by 2018.

40. The Applicants pointed to various elements in the description by the insurer of the cover that were not relevant to their flat, including that cover included matters like masts, swimming pools and so forth that were irrelevant to them. Specific to the building was cover for £27,000 for the contents of the communal area, which was clearly irrelevant,

given the minimal "communal area" at the gate. Further, there were discrepancies between the cost of the insurance provided and that billed to them.

41. In part, increases in insurance costs were related to terrorism cover, the Appellants' argued. This was unnecessary, as the incidence of terrorism was very low, and not likely to affect an ordinary house, such as 120 Nevill Road.

42. The Appellants adverted to the requirement in the directions that they should seek to provide like-for-like alternative quotations if challenging the insurance component of the service charge. The problem, they told us, was that it was impossible for them to do so, because insurers would not quote for them, as leaseholders, to provide insurance that fell to the freeholder. When asked how we might assess what a reasonable charge would be, they invited the Tribunal to use our expertise to assess a "rough justice" estimate. The Applicants did provide a figure they considered reasonable in the Scott schedule (£400 a year, rising to £425 for the last two years).

43. The Respondent explained that the insurance was organised by Sarum Properties Ltd, a specialist agent concerned in arranging and billing for insurance on behalf of freeholders. Sarum directly invoiced for the insurance. We were referred to a statement by a director of Sarum, Mr Folkesson, contained in the Respondent's response to the Applicants' statement of case, at page 66 of the second section of the bundle.

44. Insurance was provided by a block policy covering Remus' clients. The policy was marketed annually and quotations sought from a number of insurers. While the policy covers a wide range of properties, the premium for each building is individually calculated with regard to the reinstatement costs of the building. A table is provided indicating that the premium for the policy in respect of 120 Nevill Road has gone up and down over years. Increases were the result of reinstatement cost inflation and the introduction of, and increases in, Insurance Premium Tax since its introduction.

45. There were some apparent discrepancies in the way that the insurance charges were presented, but that was a result of a mismatch between the date the insurance ran from and the date of the service charge year at 120 Nevill Road.

46. As to terrorism cover, Mr Folkesson states that Sarum take the view that a covenant of the kind found in these leases requires the Respondent to take out terrorism cover through the Pool Re company reinsurance scheme backed by the UK Government. The result of the this need, which Mr Folkesson attributes to the effects of the market failure in reinsurance as a result of the bombing of the Baltic Exchange in 1992, has been to increase the insurance billed to 120 Nevill Road by

between £150 and £220 a year, as the building is in a zone assessed as the second most at risk of terrorism damage.

47. As a matter of construction, we are satisfied that the references to irrelevant features covered by insurance in the document identified by the Appellants (masts, swimming pools etc) are not relevant to the cost of the insurance at 120 Nevill Road. Rather, that document specifies features which are capable of cover under the block policy. When the cost of premium for a particular building is assessed, therefore, they will be included. That does not mean that the policy assumes, and includes the cost of, those features where they are not present.

48. We accept the Respondent's argument that, while the communal areas contents cover was specific to 120 Nevill Road, it was a free extension, and so had no effect on the insurance component of the service charge. That this is so is apparent from the invoice included in the bundle. We should add that it appeared in the Applicants' reply that they had accepted the Respondent's arguments in relation to both the irrelevant features and the communal areas contents, but both points were argued orally before us.

49. We also accept that it is reasonable for the insurance to include terrorism cover. *Qdime Ltd v Bath Buildings (Swindon) Management Company and Others* [2014] UKUT 0261 (LC), [2014] 3 E.G.L.R. 18 is authority for the proposition that an obligation to cover explosions includes an obligation to cover explosions as a result of terrorism (see paragraph [31]). We accept the argument made by Mr Folkesson (which we slightly recast) that coverage for explosions outside the Pool Re reinsurance system, which is expressly only concerned with terrorism risks, would not cover explosions caused by terrorism, and thus would amount to a breach of covenant by the Respondent.

50. The Applicants argued that *Qdime* is to be distinguished because the lease in that case specified that the risks to be insured were those "in accordance with the Council of Mortgage Lenders recommendations", unlike the leases here. We reject this argument. The point in *Qdime* was that the CML recommendations were that explosions should be covered (without specific reference to terrorism). The requirement to cover explosions appears in its own terms in these leases.

51. It appears to the Tribunal that Mr Folkesson's explanation of the discrepancies in the charging relied on by the Applicants may be correct, but in any event, we do not consider that what appear to be minor variations in the year to year figures could persuade us that, overall, the charges were not reasonable, and payable.

52. The Applicants invited us to consider *Cos Services Ltd v Nicholson* [2017] UKUT 382 (LC), [2018] L & TR 5, and we have done so. In our case, although Mr Folkesson did outline the process used by Sarum to

market test for the policy, the Respondents did not rely principally on this process to justify the reasonableness of the charges (arguably, the approach identified in *Avon Estates (London) Ltd v Sinclair Gardens Investments (Kensington) Ltd* [2013] UKUT 264 (LC) which HHJ Bridge found in *Cos Services* not to properly reflect the approach to reasonableness set out in the now well known, then new case of *Waaler v Hounslow* [2017] EWCA Civ 45, [2017] 1 WLR 2817). In this case, by contrast, the Respondent sought to argue that the outcome was reasonable having regard to specific explanations for increases.

53. Considered in the round, we cannot conclude that the insurance charges are unreasonable. We accept the point made by the Applicants about the difficulty of obtaining quotations where they have no insurable interest. But as we indicate above, we have accepted the Respondent's arguments in respect of specific items raised by the Applicants. And considered in the "rough justice" sense proposed by the Applicants, we cannot see that, once the factors relied upon by the Respondent are taken into account, the charges appear to be unreasonable.

54. *Decision*: The costs of building insurance as charged under the service charge are reasonable, and payable under the leases.

Reinstatement value survey

55. In 2013-14, a charge of £438 was made for a reinstatement valuation for insurance purposes. There having been no structural alterations, the Applicants argued, there was no need for a survey by an independent surveyor. A desk based assessment would have sufficed. In any event, a surveyor inspects in detail when external redecorations were due, and "this is when a review of the physical circumstances" of the building should take place. There was no need to duplicate the process.

56. The Respondent argued that such a survey by a surveyor was required by RICS between three and five years, and they had conducted them as a matter of course every five years. The Applicant pointed to a statement by the landlord, Remus' client, that RICS only required such a survey every seven or eight years. Mr Taylor, for the Respondent, said that that was a mistake as a statement of the RICS recommendation, but the *policy* of the landlord was to now only conduct these surveys at that time interval for smaller properties, that that decision had been taken about 18 months ago, and that it would now be implemented.

57. Reinstatement surveys were completely different from a survey to consider redecoration, and the two could not be combined, argued the Respondent.

58. We do not think it could be unreasonable to undertake these surveys at the recommended interval, and there was no persuasive evidence from

the Applicant that this was not the case. The extension of the period voluntarily by the Respondent would save the Applicants money in due course, but did not require us to conclude that the shorter period was not reasonable.

59. We accept the Respondent's argument as to the nature of the two surveys.

60. *Decision*: the charge for reinstatement surveys was reasonably incurred.

Estimated service charge budgets and the reserve fund

61. The lease makes provision in effect for a reserve fund, in that the clause 2(2)(b)(ii) (see paragraph [10] above) allows for the annual collection of "such reasonable provision for anticipated future expenditure of a periodic or recurring nature as the Landlord or the Landlord's managing agent shall in their sole discretion allocate to the financial year in question as being fair and reasonable".

62. The Applicants argue that too much is accumulated in the form of a reserve fund, in the light of the size and nature of the building. The Applicants also pointed to the fact that interest on the built-up fund was previously added, but this had not taken place during the period that Remus had been managing the property.

63. The Respondent replies that the reserve fund is accumulated in expectation of a five year cycle of external redecoration and, where necessary, repair. The Respondent considers that such a cycle represents good practice, although the redecoration/repair cycle is not specified in the lease. They calculated the amount necessary by reference to the expenditure incurred at the last cycle plus a 5% increase each year. Thus, the funds collected in each new cycle would be 25% greater than that expended at the conclusion of the previous cycle (subject to due allowance for any expenditure not expected to be repeated at the end of the current cycle).

64. As to the interest, Mr Taylor, for the Respondent, said that the interest on the trust account was generally very low. If, he said, the cost of running the account was less than the interest, then it would be credited, but in general the interest was used to pay for administration.

65. In principle, we conclude that the Respondent's approach to building up an appropriate reserve to cover the costs of cyclical redecoration and repair is a reasonable one. Further, that this approach was (broadly) applied in practice was demonstrated by the service charge invoices we were taken to. Mr Taylor added that they now had a new banking system as a result of which interest would be automatically added. Dealing with interest had previously been a paper exercise.

66. The Applicants did not specifically argue that the annual uplift of 5% was inappropriate, and did not provide us with an alternative figure. Applying our general knowledge of building cost inflation in recent years, such a figure is unlikely to be outwith the reasonable range of estimates, even if it could be said to be at the higher end of the range for more recent years. In any event, if it does prove to have been an over-estimate, the funds will remain in the fund to the benefit of the leaseholders.

67. The Applicants did not identify a particular remedy that they sought in connection with the non-payment of interests. It may be that Mr Taylor is correct that the amounts have been small. We did not understand Mr Taylor to argue that the interest belonged to the managing agent, but he did indicate that it had been used to pay for the administration of the account. We are not in a position to make a specific finding under this head in relation to the interest, but we do take account of its use to pay administrative costs in in relation to management fees at paragraph [93] and following below.

68. *Decision*: The service charge demands relating to the effective building up of a reserve fund (as per clause 2(2)(b)(ii) of the lease) were reasonable.

General repairs

69. In the years from 2010/11, the demands were, for successive service charge years, for £360, £300, £378, then at £500 in each year, until 2019/2020, when the sum demanded was reduced to £350.

70. The Applicants argued that general repairs are only infrequently required to be performed, and, as they originally indicated in their statement in support, should be limited to £250 annually. Orally, the Applicants drew our attention to the fact that the reduction in the last year under consideration took place after this application was made. The week before the hearing, we were told, the demand was again reduced, to £120.

71. The Respondent argued that the £500 figure was a budget figure, and prudent insofar as it could not be known what would be required to be spent in that year.

72. The Applicants' evidence initially was that the consistent overpayment for general repairs was paid into the reserve fund. The Respondent said that the reason that the charge had been reduced (ie in 2018/19) was that it was now (and would continue to be) the policy to credit back unspent moneys demanded under this heading. The Applicants, as we understood it, did not contest this.

73. The Scott schedule indicates that in every year, from 2010/11 to 2018/19, actual expenditure was zero, save for 2011/12, when expenditure was £300 (£174 on gutter clearance and £126 on the investigation of a roof leak) and 2018/19, when £180 was spent on the repair of a gate.

74. It is reasonable for the Respondent to make appropriate provision for general repairs on the basis of future uncertainty about possible expenditure under this head. However, to persistently charge up to £500 when, in seven out of the nine years covered by this application, expenditure was zero, shows no attempt to learn from experience and modulate the demand accordingly. Demands should not have continued to be made at the level they were, and it was unreasonable to do so.

75. The Applicants suggest a payment of £250 per year for these expenses would have been reasonable. We agree. If expenditure does exceed that in a future year, then a balancing charge may be made at the end of the year.

76. Our jurisdiction is confined to determining whether a service charge is reasonable. In this context, that requires us to consider whether the decision made by the Respondent, when setting the budget in advance, was reasonable, not whether, looking back, it turned out the reasonable in retrospect. It would, perhaps, have been preferable if the Respondent had adopted the policy of crediting over-payment on general repairs from the outset, but that is not a basis upon which we can make our decision.

77. It would be pointless to make a finding in respect of 2011/12, when the budgeted figure was, in fact, spent. The same is true in respect of 2018/19, at which point the Respondent did start to credit underspend (with the associated impact on the demand for 2019/20). However, in respect of the other service charge years, we conclude that a general repairs service charge demand of £250 would be reasonable.

78. *Decision*: In respect of the service charge years 2010/11 and 2012/13 to 2017/18, the service charge demands referable to general repairs were not reasonable. In each of those years, a reasonable demand would have been £250.

Risk assessments

79. The Applicants argued that the number and intensity of assessments were excessive. They referred to two categories of risk assessment – those relation to health and safety, and that relating to asbestos. They drew attention again to the very minimal nature of the "communal area", which we have outlined in paragraphs [13] and [14] above. The Applicants referred to the template used for the health and safety

report, which, they observed, was clearly designed for a large block or an estate.

80. Further, they argued that any health and safety related matter could adequately be dealt with by the building manager as part of his twice-yearly external visual inspections of the property.

81. There was some suggestion in the papers that the Applicants contested whether these risk assessments were payable under the lease, but this argument was not pursued before us.

82. The Scott schedule shows that charges were made for health and safety risk assessments in 2010/11, 2012/13, 2014/15, 2016/17, 2018/19. An entry is also listed for 2017/18, but it appears that the Appellants did not contest that no charge was made that year. In some years, the Respondent had reduced the charge payable. An asbestos survey was charged for in 2013/14.

83. The Respondent said that their policy had been to undertake health and safety inspections every 18 months. Recently, they had, taking account of complaints by the Applicants, varied that to every two years. The evidence was that the department internal to Remus who, it appeared, had a final say over the issue, would not agree to a longer time frame than that.

84. The reports did not relate only to the small square referred to by the Applicants. It also covered the parts of the building not demised, and the arrangements for ingress and egress.

85. As to the position with respect to asbestos reports, the Respondent's evidence was that in 2008, a chartered surveyor undertook a visual inspection of the house, and concluded that there was no sign of asbestos. In 2013/14, as a result of a change in the categorisation by the HSE of the necessity for such inspections, they decided to re-inspect all properties built before 1991. That explained the assessment charged in that year. As no asbestos had been found in a sample taken, it appears, from the "communal area", there was no need to commission further asbestos reports.

86. We reject the Applicants argument that the building manager could do all that was necessary during his twice-yearly inspections. The qualifications of a property manager and that of a health and safety inspector were not the same.

87. However, we consider that the requirement for health and safety reports every 18 months or every two years flies in the face of common sense, having regard to the nature of the property.

88. We were told, in effect, that the person with responsibility for health and safety at Remus would not permit a longer time period between reports than two years. So it seems that Remus is following a rigid policy set internally, which is not appropriate in the context of this specific property. As the Applicants point out, the communal area for which the Respondent is responsible is negligible (and we note that the main section in the RICS Service Charge Residential Management Code on health and safety risk assessments concentrates on common parts). The means of ingress and egress do not change. If they did, or there were to be a change to the non-demised parts of the property, or if work were necessary upon them, and there was some reason to suppose there might be health and safety issues, then ad hoc arrangements for a health and safety report could be made. While we agree that the property manager cannot undertake a health and safety report, he or she could certainly, on a site-specific basis, determine when one might be necessary, in addition to proportionate periodic inspections.

89. Our conclusion is that health and safety reports of such frequency are not within the reasonable range of responses to this particular property. In coming to this conclusion, we have taken account of all the evidence before us, but our conclusion is based on our overall assessment of the outcome – the current frequency of inspections and reports in the light of the characteristics of the property – and not merely the view we have taken of the Respondent's process.

90. It is not for us to specify a particular period which would be reasonable. The RICS Code recommends "periodic" assessments, but does not specify a period. However, we consider that two inspections and reports during this period would have been reasonable.

91. We accept that it was - perhaps only just – within the reasonable range for the Respondent to undertake the asbestos report on a one-off basis, as a means of securing a high level of certainty as to the absence of asbestos. As the Respondent indicates, a repeat will not be necessary.

92. *Decision*: The number and frequency of health and safety inspections and reports undertaken was not reasonable, and the costs of them taken together were not reasonably incurred. It would have been reasonable to have undertaken two such inspections and reports during this period. The service charges referable to the expenditure on inspections and reports are limited accordingly. In order to calculate the cost of the two inspections and reports that would have been reasonable, the Respondent should take the mean of the invoiced sums (ie not including discounts) and multiply that by two.

Annual management fees and professional fees relating to the cyclical works

93. The Applicants argued that the management fees were excessive having regard to the management necessary given the size and complexity of

the property. If one adds up the annual management fee, the accountancy fee, the out of hours service and the bank charges, the total fee in 2018/19 was £900.

94. In 2018/19, the relevant figures were £733.50 for the annual management fee, £122.40 for accountancy fees, £4.00 bank charges and £38.40 for out of hours calls. In 2010/11, the equivalents were £495.81 annual management, £108 accountancy and the same for bank charges. There is no entry for an out of hours service. The charge for that in the following year was £24.

95. The Respondent explained that their (current) per unit management fee in 2020 was "about" £350 a year plus VAT. The charge for accountancy encompassed two distinct functions. These were the service charge accounts, which were produced internally, and external audit.

96. A copy of the management contract had not been supplied. We were told that the property manager visited the property twice a year and conducted an external inspection of the property.

97. Our view is that the per unit sum, both current and immediately past, is within the normal, and we would say reasonable, band for managing agents in London for this type of property (see paragraph [22] above).

98. It is, however, towards the upper end of that bracket. In such circumstances, we question the extent of routine additional charges.

99. In particular, at the higher end of the reasonable band of charges, we would expect the annual budget and the service charge accounts to be drawn up by the managing agent. We would also expect an appropriate out of hours service to be provided. We note here that the interest accruing to the reserve fund account was, for most of the relevant period, also devoted to the Remus' expenses.

100. So we consider that, at this level of management unit fee, these additional charges are not reasonably incurred. This remains the case regardless of the contractual arrangement between Remus and the freeholder.

101. The out of hours service charge should accordingly be discounted.

102. We do not have any documentary evidence as to the break-down of the accountancy charge between the internal production of budgets and service charge accounts and external auditing. The Respondent did tell us, however, in the context of the fee for 2018/19, that is, £122.40, that about £60 was attributable to the external audit fee. In the interests of

simplicity, we will, therefore, assume that throughout half of the charge under this heading is attributable to auditing.

103. In addition, the Applicants contended that the fees charged in respect of management etc of the cyclical work contract which features in the service charge demands for 2014/15, 2015/16 and 2016/17 were excessive.

104. The budget for the works was (excluding VAT) £13,650. In fact, because it was not necessary to draw on a contingency fee, the final cost was £11,129. The Applicants objected to the following fees, by reference to items in the Scott schedule (with their suggestions in brackets):
2014/15: Surveyor's report: £924 and s 20 costs £474 (total of £750);
2015/16: Surveyor's fee £1,500 (£750); Project management £900.90 (£450)
2016/17: Surveyor's fees and contract administration: £1,637.10 (£800)

105. The extent of the charges and the way in which they were calculated was not immediately clear to the Tribunal. We were not greatly assisted by the Respondent's approach to the Scott schedule, its comments consisting largely of a simple statement that the expenditure was permitted under specified clauses in the lease.

106. In its reply, the Respondent said that the project management fee was based on 11% of the contract sum, so estimated at £1.501.50 (excluding VAT). The explanation continued "A chartered surveyor attends site to complete the pre contract meeting, interim visits and the close down meeting, at £715.00 + VAT this equates to 6.5 hours at £110.00 per hour". Immediately before that passage, the Respondent refers to a five yearly condition report, which is "essentially … an MOT for the property". It appears that this relates to the surveyor's report charged at £924 in 2014/15.

107. We have only been provided with limited invoices in relation to these charges. Such as we have are from Ellis, Sloane and Co, a surveyors' firm in Salisbury. They are for £474 (including VAT) as the fee for work on the section 20 consultation, dated 29 May 2015 and for half of a fee of £1,501.50, described as in respect of "Project Management to pre-contract stage (including tenders, cost analysis and preparation of contract documents)", dated 31 April 2016. The sum is £750.75, or £900.90 with VAT. A further invoice from the same firm, dated 31 September 2016, charges £715 (£858 with VAT) for "Project supervision to practical completion certificate". There is finally a further invoice dated 30 November 2016 for £649.25 (£779.10 with VAT). This is expressed as the other half of the fee in the invoice dated 31 April 2016, for project management fees, but based on the outturn rather than budgeted figure for the work.

108. Comparing these invoices with the explanation given by the Respondent, the surveyor's report referred to in the Scott schedule for 2014/15 and charged at £924 is the five yearly "MOT" condition survey, and the £474 charged for organising the section 20 consultation is prior to the charging for the administration of the major works contract itself.

109. The two payments of (inclusive of VAT) £900.90 (31 April 2016) and £779 (30.11.16) constitute the two "halves" of the project management fee, calculated as 11% of the project cost (but calculated by reference to, respectively, the budgeted figure and the out-turn).

110. If we compare these figures with those in the Scott schedule, at least on the face of it, there appears to be double-counting by the Applicants, which was not appreciated and pointed out by the Respondents (but see below at paragraph [116]).

111. Returning to the Scott schedule-based concerns of the Applicants, in 2015/16, the surveyor's fee of £1,500 appears to show the overall project management fee, of which the £900.90 separately entered in fact comprises the first part (the larger "half"). The sum of £1,637.10 which appears as an entry in 2016/17 appears to be the sum of the second part (the smaller "half") of the overall project management fee and the free standing fee of £858 (£715 before VAT) referred to in the Respondent's explanation.

112. As is evident from the above, which we only clarified (to the extent it is clarified) after the conclusion of hearing, the position was unclear on the face of the papers. Although the Tribunal sought clarification from the Respondent of the basis of the professional fees concerned during the hearing, in retrospect the position was not significantly clarified.

113. We turn to the reasonableness of these fees. First, the Applicant's challenge to the fees as a matter of substance is of limited specificity. The Applicant's statement asserts that the inspection (for the "MOT" report) took one hour on a day in April 2015, as witnessed by Ms Mouque, and used a template report. We were told that Remus use their own in-house surveyors (we assume, where Ellis, Sloane and Co were not instructed), and that they charged on the basis of £110 per hour, with half an hour travel time. We have not been provided with a copy of the report. Taking a broad approach to the nature of a report of this kind, we consider that this fee is excessive. Applying our general knowledge (see paragraph [22]), we conclude that a fee of no more than £550 would be reasonable.

114. There is no specified challenge to the fee for the section 20 consultation, which the Applicants acknowledge was undertaken. We do not think we can conclude that the £395 before VAT is unreasonable for such a service.

115. A project management fee of 11% is within the reasonable range, and we note that the calculation was made in the end on the lower, out-turn figure for the project. However, in the first place, it is not evident why the firm invoiced the additional sum of £715 plus VAT, as on the face of it the services performed should have been included in the overall project management fee. Secondly, if that sum is added, then the overall percentage of the out-turn cost for project management is 19%. We consider that that is not within the reasonable range. The additional fees were not reasonably incurred.

116. It is clear from our account of the professional fees and the relationship between the Scott schedule, the Respondent's explanation and the invoices, in the light of the paucity of the documentary material available to the Tribunal, that we cannot be as clear as we would wish as to what the real position was in respect of the costs incurred and the corresponding service charge demands. Should either party, in the light of this analysis, consider that we have made factual errors, then it is open to that party to apply for a review of this decision under rule 55 of the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013.

117. *Decision*: (1) The annual management fee would be reasonably incurred were it to include the preparation of budgets and service charge accounts and an appropriate out of hours service; but it is not if those services are the subject of separate fees. Accordingly half of the sum of the accountancy fees and the full amount of the fee for the out of hours service should be excluded from the sums recoverable under the service charge. (2) The cost of the five-yearly condition survey was excessive. A fee of £550, including VAT, would have been reasonably incurred. The invoice for £715, that is £858 including VAT, dated 31 September 2016 was not reasonably incurred. In all other respects, the fees referred to above were reasonably incurred.

Premature payment of the contractor for the major works

118. The Applicants sought to show that Remus has wrongly and prematurely authorised payment of the contractor for the major works in 2016.

119. We asked the Applicants in the hearing what, if we agreed with them, effect that would have on a service charge. The answer was that if there had been inappropriate behaviour or financial irregularity, we should find that the management fee for that year had not been reasonably incurred.

120. We consider that to do so would be in reality a punitive measure rather than a determination of the reasonableness of a service charge. We therefore decline to come to a conclusion on this issue.

121. *Application for orders under Section 20C of the 1985 Act/Commonhold and Leasehold Reform Act 2002, schedule 11, paragraph 5A*

122. The Applicant applies for orders under section 20C of the 1985 Act that the costs incurred by the landlord in proceedings before the Tribunal are not to be taken into account in determining the amount of any service charge payable by the Applicant and under paragraph 5A of schedule 11 to the 2002 Act that any obligation to pay as an administration charge the litigation costs – that is, the costs of these proceedings to the landlord – should be extinguished.

123. An application under section 20C is to be determined on the basis of what is just and equitable in all the circumstances (*Tenants of Langford Court v Doren Ltd* (LRX/37/2000). The approach must be the same under paragraph 5A, which was enacted to ensure that a parallel jurisdiction existed in relation to administration charges to that conferred by section 20C.

124. Such orders are an interference with the landlord's contractual rights, and must never be made as a matter of course. We should take into account the effect of the order on others affected, including the landlord: *Re SCMLLA (Freehold) Ltd* [2014] UKUT 58 (LC); *Conway v Jam Factory Freehold Ltd [2013] UKUT 592 (LC); [2014] 1 EGLR 111*.

125. The success or failure of a party to the proceedings is not determinative. Comparative success is, however, a significant matter in weighing up what is just and equitable in the circumstances.

126. Neither party has been wholly successful before us, but, in broadly financial terms, the Respondent has had more success than the Applicants. While we accept that the application was properly made, we do not consider that in these circumstances it would be right to shut the Respondent out of what would otherwise be its contractual rights under the leases.

127. We emphasise that any costs that are imposed on the Applicants via either a service charge or an administration charge must nonetheless be reasonable in amount, and payable under the lease. It is open to the Applicants to make an application under section 27A of the 1985 Act if they so wish.

128. Finally, we have not heard argument as to whether the costs of these proceedings are recoverable, under either route, under these leases, and we make no determination as to that question, which remains open should it be litigated.

Rights of appeal

129. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) then a written application for permission must be made to the First-tier Tribunal at the London regional office.

130. The application for permission to appeal must arrive at the office within 28 days after the Tribunal sends written reasons for the decision to the person making the application.

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

132. The application for permission to appeal must identify the decision of the Tribunal to which it relates, give the date, the property and the case number; state the grounds of appeal; and state the result the party making the application is seeking.

Name: Tribunal Judge Professor Richard Percival **Date:** 26 March 2021

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 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.

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.

(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 of an application under subsection (1) or (3).

(7) The jurisdiction conferred on the appropriate tribunal in respect of any matter by virtue of this section is in addition to any jurisdiction of a court in respect of the matter.

Section 20

(1) Where this section applies to any qualifying works or qualifying long term agreement, the relevant contributions of tenants are limited in accordance with subsection (6) or (7) (or both) unless the consultation requirements have been either—

(a) complied with in relation to the works or agreement, or

(b) dispensed with in relation to the works or agreement by (or on appeal from) the appropriate tribunal.

(2) In this section "relevant contribution", in relation to a tenant and any works or agreement, is the amount which he may be required under the terms of his lease to contribute (by the payment of service charges) to relevant costs incurred on carrying out the works or under the agreement.

(3) This section applies to qualifying works if relevant costs incurred on carrying out the works exceed an appropriate amount.

(4) The Secretary of State may by regulations provide that this section applies to a qualifying long term agreement—

(a) if relevant costs incurred under the agreement exceed an appropriate amount, or

(b) if relevant costs incurred under the agreement during a period prescribed by the regulations exceed an appropriate amount.

(5) An appropriate amount is an amount set by regulations made by the Secretary of State; and the regulations may make provision for either or both of the following to be an appropriate amount—

(a) an amount prescribed by, or determined in accordance with, the regulations, and

(b) an amount which results in the relevant contribution of any one or more tenants being an amount prescribed by, or determined in accordance with, the regulations.

(6) Where an appropriate amount is set by virtue of paragraph (a) of subsection (5), the amount of the relevant costs incurred on carrying out the works or under the agreement which may be taken into account in

determining the relevant contributions of tenants is limited to the appropriate amount.

(7) Where an appropriate amount is set by virtue of paragraph (b) of that subsection, the amount of the relevant contribution of the tenant, or each of the tenants, whose relevant contribution would otherwise exceed the amount prescribed by, or determined in accordance with, the regulations is limited to the amount so prescribed or determined.

Section 20ZA

(1) Where an application is made to the 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.

Section 20B

(1) If any of the relevant costs taken into account in determining the amount of any service charge were incurred more than 18 months before a demand for payment of the service charge is served on the tenant, then (subject to subsection (2)), the tenant shall not be liable to pay so much of the service charge as reflects the costs so incurred.

(2) Subsection (1) shall not apply if, within the period of 18 months beginning with the date when the relevant costs in question were incurred, the tenant was notified in writing that those costs had been incurred and that he would subsequently be required under the terms of his lease to contribute to them by the payment of a service charge.

Section 20C

(1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court , residential property tribunal2 or leasehold valuation tribunal or the First-tier Tribunal3 , or the Upper Tribunal4 , or in connection with arbitration proceedings, are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.

(2) The application shall be made—

(a) in the case of court proceedings, to the court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to the county court ;

(aa) in the case of proceedings before a residential property tribunal, to a leasehold valuation tribunal;

(b) in the case of proceedings before a leasehold valuation tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any leasehold valuation tribunal;

(ba) in the case of proceedings before the First-tier Tribunal, to the tribunal;

(c) in the case of proceedings before the Upper Tribunal4 , to the tribunal;

(d) in the case of arbitration proceedings, to the arbitral tribunal or, if the application is made after the proceedings are concluded, to the county court.

(3) The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.

Commonhold and Leasehold Reform Act 2002

Schedule 11, paragraph 1

(1) In this Part of this Schedule "administration charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent which is payable, directly or indirectly—

(a) for or in connection with the grant of approvals under his lease, or applications for such approvals,

(b) for or in connection with the provision of information or documents by or on behalf of the landlord or a person who is party to his lease otherwise than as landlord or tenant,

(c) in respect of a failure by the tenant to make a payment by the due date to the landlord or a person who is party to his lease otherwise than as landlord or tenant, or

(d) in connection with a breach (or alleged breach) of a covenant or condition in his lease.

(2) But an amount payable by the tenant of a dwelling the rent of which is registered under Part 4 of the Rent Act 1977 (c. 42) is not an administration charge, unless the amount registered is entered as a variable amount in pursuance of section 71(4) of that Act.

(3) In this Part of this Schedule "variable administration charge" means an administration charge payable by a tenant which is neither—

(a) specified in his lease, nor

(b) calculated in accordance with a formula specified in his lease.

(4) An order amending sub-paragraph (1) may be made by the appropriate national authority.

Schedule 11, paragraph 2

A variable administration charge is payable only to the extent that the amount of the charge is reasonable.

Schedule 11, paragraph 5

(1) An application may be made to the appropriate tribunal for a determination whether an administration 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) Sub-paragraph (1) applies whether or not any payment has been made.

(3) The jurisdiction conferred on [the appropriate tribunal]1 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).