FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00AY/LSC/2021/0153**
HMCTS code (paper, video, audio)	**:**	**V: CVPREMOTE**
Property	**:**	**Corben Mews, 46-48 Clyston Street, London SW8 4TA**
Applicants	**:**	**(1) Alexandra Adam and 14 other leaseholders as set out in a schedule to the application; (2) Click Above Corben Mews Ltd**
Representative	**:**	**Mr Daniel Bromilow (Counsel); Gregsons Solicitors**
Respondent	**:**	**Assethold Limited**
Representative	**:**	**Mr Richard Granby (Counsel); Scott Cohen Solicitors Limited**
Type of application	**:**	**For the determination of the liability to pay service charges under section 27A of the Landlord and Tenant Act 1985**
Tribunal members	**:**	**Judge Nicola Rushton QC** **Mrs Alison Flynn MA MRICS**
Venue	**:**	**10 Alfred Place, London WC1E 7LR**
Date of hearing	**:**	**16 July & 7 October 2021**
Date of decision	**:**	**~~15 November 2021~~ Amended 3 December 2021**

DECISION Amended under the slip rule

Amended pursuant to rule 50 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, following receipt of representations from both parties. This correction does not affect the substantive decision of the

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tribunal.

<u>Covid-19 pandemic: description of hearing</u>

This has been a remote video hearing which has been consented to by the parties. The form of remote hearing was V: CVPREMOTE. 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 the tribunal was referred to were in a main bundle of 1059 pages; a supplementary bundle of 120 pages (received for the second day); and a bundle of guidance documents of 167, the contents of all of which we have noted. The order made is described at the start of these reasons.

<u>Decisions of the tribunal</u>

(1) The tribunal determines that:

a. The service charges asserted by the Respondent in relation to a "waking watch" in 2021 are not payable by the Applicants, since they have not been reasonably incurred.

b. The proposed costs for a "waking watch" and/or for communal fire alarm works would not be reasonably incurred on the basis contended for by the Respondent.

c. In any event, no valid demands for service charges have been served by the Respondent, in respect of the costs which are the subject of this application.

(2) The tribunal makes the further determinations as set out under the various headings in this Decision.

(3) The tribunal makes an order under section 20C of the Landlord and Tenant Act 1985 that none of the Respondent's costs of the tribunal proceedings may be passed to any of the Applicants through any service charge.

(4) The tribunal determines that the Respondent shall pay the Applicant Tenants £300 within 28 days of this Decision, in respect of the reimbursement of the tribunal fees paid by them.

<u>The application</u>

1. This application relates to a property known as Corben Mews, 46-48 Clyston Street, London SW8 4TA ("**the Property**"). The Property is a converted modern development which was originally 14 flats. More recently a further floor has been added with two penthouse flats, which are owned by Click Above Corben Mews Ltd ("**Click**").

2. The Applicants are the tenants of the 14 flats ("**the Tenants**"), plus Click. They seek a determination pursuant to s.27A of the Landlord and Tenant Act 1985 ("**the 1985 Act**") as whether service charges for the costs of a waking watch and proposed fire protection works, said to have been demanded for the 2021 year, are payable by them to the Respondent freeholder ("**Assethold**"). There are disputes between the parties as to whether those costs were/ would be reasonably incurred, whether the waking watch has been carried out to a reasonable standard, and whether the alleged service charges have been properly demanded. The application also refers to associated management charges, although these are not strictly speaking covered by a s.27A application.

3. The waking watch has been operating since 15 March 2021, consisting of 2 men, one for each block, and is continuing. The claimed cost is about £25,200 - £28,000 per month including VAT.

4. Assethold has also purported to serve demands for estimated future expenditure in the form of a "Repair fund if needed" of £150,000 per block plus an Estate "Repair fund if needed" of £3,000 for the whole Property.

5. The application was issued on 19 April 2021 by the tenants of the 14 flats.

6. An application was made by Click by email to be joined as a further Applicant, which was considered by the tribunal on the first day of the hearing. The application was not opposed by Assethold's counsel. The tribunal ordered that Click be joined as an Applicant, as the leasehold owner of the (residential) penthouse flats and so a party with an interest in the outcome of the application.

7. Directions were issued by Judge Hamilton-Farey on 10 May 2021 (varied as to dates on 11 and 19 May 2021 by Judge Vance). Those directions have mainly been complied with by the parties.

8. The Applicants' statement of case included a large number of issues. Both parties' counsel made it clear at the start of the hearing that the parties wished the tribunal to resolve the issue of whether the costs of the waking watch had been reasonably incurred, and whether the proposed fire alarm works were reasonably necessary and the proposed costs reasonable, even if the tribunal did conclude that the service charges had not been properly demanded.

9. No application for assessment of the reasonableness of administration charges (in the form of management charges) was before this tribunal and so this issue has not been resolved by it. Insofar as administration charges have been claimed as a percentage of service charges which are

determined not to have been reasonable, it is unlikely that any such administration charges can have been reasonable either. However, the tribunal's present determination is not intended to prevent either party from issuing or pursuing a further application for the determination of the reasonableness of administration charges or for the determination of the reasonableness of service charges relating to works to resolve defects in the structure of the Property which are creating fire safety hazards.

10. Extracts from the relevant legislation are set out in an appendix to this decision.

The hearing

11. The hearing took place remotely by CVP over 2 days, 16 July 2021 and 7 October 2021.

12. The Tenants were represented at the hearing by counsel, Mr Bromilow and Assethold was represented by counsel, Mr Granby. Prior to the hearing both counsel sent skeleton arguments which were received by the tribunal, and Mr Bromilow sent a supplementary skeleton prior to the second day. The tribunal is grateful to both counsel for their detailed oral submissions and helpful skeletons.

13. Ms Alexandra Adam, a tenant of flat 3 and also a solicitor at Gregsons, acted and attended on behalf of the Applicants. Also in attendance were Lorraine Scott and Rachel Kofi of Scott Cohen, solicitors for Assethold, and Mr Ronni Gurvits on behalf of Assethold's managing agents Eagerstates Ltd. Assethold and Eagerstates have the same registered office, and common directors and shareholders. No representative of Click attended the first day of the hearing, but Lydia White of Click attended on the second day.

14. A large number of the Tenants also attended for all or part of the hearing: on the first day, Mr Thomas (flat 1); Mr and Mrs Mehta (flat 2); Ms Nethersole (flat 3); Ms Jewitt (flat 5); Ms Ripley (flat 6); Ms Lu Wang (flat 9); Mr Barden (flat 12); and Ms Dowden (flat 13). On the second day, Mr Thomas (flat 1); Mr Mehta (flat 2); Ms Flint (flat 7); Ms Lu Wang & Mr O'Brien (flat 9); Mr Horwood (flat 10); Mr Barden (flat 12); and Ms Dowden (flat 13).

15. In summary, the Applicants' case was that the waking watch was wholly unnecessary, but had also been carried out incompetently. They also objected to the proposed upgraded fire alarm system as being unnecessary as a proposed interim measure; alternatively they had obtained a much more modest quote for a more limited alarm system, which they said would be sufficient.

16. In instituting the waking watch, Assethold relied upon the contents of an External Wall Assessment ("**EWA**") dated 15 March 2021 prepared for Eagerstates by Hydrock ("**the Hydrock Report**"), which had concluded that there was an "intolerable" risk to life of the occupants from fire, in the external wall system.

17. The Applicants made a full frontal attack on the correctness of the Hydrock Report, supported by reports dated 18 March 2021 and 14 June 2021 from Christopher Evans of Safety Consulting Partnership Ltd ("**SCP**"), together with further comments from Mr Evans dated 13 July 2021 (the latter objected to by Assethold on the first day as being too late). The Applicants also relied on several other reports, detailed further below, including earlier ones from different individuals at Hydrock itself, which had concluded that the risk from fire was low.

18. Mr Evans attended the first day of the hearing, and Mr Bromilow sought permission to call live expert evidence from him in support of the Applicants' case that the waking watch was unnecessary. Mr Granby opposed that application on the basis that no permission had been granted for live expert evidence and no or insufficient warning had been given that the Applicants wished to call Mr Evans; alternatively he submitted that the case be adjourned to give the Respondents an opportunity to call evidence from one of the authors of the Hydrock Report as well.

19. Having heard submissions from both parties, the tribunal determined that it would permit oral expert evidence to be given by both Mr Evans and also by one of the authors of the Hydrock Report, but on a future date to which the hearing would be reconvened. The tribunal determined that it would continue to hear evidence from all of the factual witnesses on the first day.

20. The reason for its decision was that there was clearly a stark difference of opinion between the experts, as set out in their reports, as to the nature of the fire risk at the Property and the need for a waking watch, which it would be difficult for the tribunal to resolve without hearing live evidence from those experts. It was an issue on which a substantial amount of money turned (over £100,000 to July 2021 and increasing) and while it was not ideal for there to be a further delay, this was the fairest approach. In those circumstances the tribunal also gave permission for the further July 2021 comments from Mr Evans to go into evidence, and for Hydrock to respond further prior to the reconvened hearing if they wished to do so.

21. The tribunal therefore heard evidence on the first day from two of the Tenants, Lily Nethersole and Lu Wang and from Mr Gurvits on behalf of Assethold, all of whom were cross-examined and answered questions from the tribunal. All the witnesses filed statements, on which they

relied. The Applicants also rely on a statement from Ms Adam, who was not required to be cross-examined.

22. The oral evidence of Lily Nethersole and Lu Wang was relatively brief and was directed to the competence of the waking watch. The tribunal's conclusion was that both witnesses were honest and credible and were seeking to assist the tribunal to the best of their ability, and it accepts their evidence.

23. Mr Gurvits was a much less satisfactory witness; many of his answers in cross examination were evasive or inherently lacked credibility. Further details are given below where this is material to the tribunal's conclusions.

24. On the second day, 7 October 2021, the tribunal heard oral evidence from Mr Evans and also from Mr Ruirui Sun, who was one of the authors of the Hydrock Report. Both experts were cross-examined and also answered questions from the tribunal. The tribunal's conclusions as to the evidence of the expert witnesses are set out fully below, but in summary it considered that while both witnesses were honest and apparently had relevant expertise, Mr Evans' evidence was more impressive, in that his conclusions were better reasoned and supported by evidence, whereas Mr Sun struggled to provide adequate justifications for many of the key conclusions in the Hydrock Report. Where the experts differ, the tribunal has therefore preferred the evidence of Mr Evans.

25. Further reference is made below to particular aspects of the evidence and the parties' submissions where relevant.

The Property

26. The 14 original flats are laid out in 2 blocks in an L-shape. Block A contains 6 flats and block B contains 8 flats. The blocks are not interconnected. Each block has an entrance door, and each has one staircase to access the upper floors. There would therefore be one exit from the upper floors in the event of a fire.

27. The first 3 storeys were the original building, which was then converted for residential use with a fourth storey added. A more recent fifth storey contains the penthouse flats. The overall height of the Property is less than 18m.

28. The majority of the exterior of the Property is zinc sheeting, brickwork or render. There is a small amount of wood panelling around the entrance door to Block B.

Issues

29. On the first day of the hearing, the parties' representatives invited the tribunal to prioritise resolution of the following issues, as it was said that there were probably too many outstanding issues for the time available on that day:

(i) Whether the waking watch costs were reasonably incurred or whether it was unnecessary (s.19(1)(a) of the 1985 Act);

(ii) If the waking watch costs were reasonably incurred, whether they were provided to a reasonable standard (s.19(1)(b) of the 1985 Act);

(iii) Whether the demands sent by Assethold were valid service charge demands:

a. insofar as they related to incurred expenditure; and

b. insofar as they were estimates of future expenditure;

(iv) If there was time, whether the proposed fire alarm costs were reasonable.

Given the reconvene to a second day, the tribunal has been able to deal with the issues which were live on this application, but this determination is not intended to prevent either party pursuing a further application in relation to issues not covered by this one.

30. There is a dispute between the parties as to how the tribunal should approach the issue of reasonableness: in essence Mr Granby's position was that the proper question is whether Assethold acted reasonably in relying on and implementing the recommendations in the Hydrock Report, and then whether continuing the waking watch at some point became unreasonable. Mr Bromilow's position was that it is for the tribunal to determine whether the costs of the waking watch and/or other recommended measures were/would be reasonably incurred, applying an objective test, and Assethold took the risk that the Hydrock Report was wrong and/or that the measures recommended by Hydrock were unreasonable.

31. The tribunal will address this issue when considering whether the costs of the waking watch were reasonably incurred.

<u>The service charge provisions and validity of demands</u>

32. The tribunal has had sight of two specimen leases, of flats 3 and 10, which are in very similar terms. It assumes that the leases of the other 12 flats are in the same terms. (Also in the bundle was a copy of the

Lease of Airspace to Click, which envisages that new long leases will be granted to tenants of the penthouse flats on similar terms as to repair obligations and payment of service charges as are in the leases of the 14 flats.) Assethold has the usual repair and maintenance covenants at clause 6 of the leases, subject to the Tenants paying the service charges under clause 5. There is no dispute that clause 6 could potentially cover fire safety works.

33. Clause 4(6) of the lease provides that the tenant is to pay Assethold a stated percentage of Assethold's costs of complying with its repair and maintenance covenants, in arrears in accordance with clause 5 of the lease. Clauses 5(1) and (2) provide that the tenant is to pay Assethold £500 p.a. as a maintenance charge on account of its expenditure in carrying out its repairing obligations under clause 6, annually on the same day as the rent. Clause 5(4)(d) permits Assethold to increase the sum to be paid on account as a maintenance charge by the average of the excess contribution for the previous year, and to charge this on a quarterly basis.

34. Clause 5(3) provides for a balancing payment to be paid if Assethold's expenditure "*in any accounting period of twelve months*" exceeds the sum paid on account, in which case a certificate of the excess will be served on the Tenants, supported by audited accounts. Clause 5(4)(a) provides that the said 12-month accounting period is to be computed from the commencement of the landlord's accounting period from time to time. In the past, Assethold's accounting period has run from ~~26~~ December to ~~25~~ December (as in past service charge accounts, certified by Martin & Heller, in the bundle). There is a dispute between the parties as to the precise dates of the year ends in December 2019 and December 2020, which it is not necessary to resolve for the purposes of this decision. The Tenants' position is that the year must have ended on the date of Martin & Heller's signature of the accounts in each case (being 2 December 2019 and 7 December 2020); Assethold's position is that the year ended on 25 December, as stated in the heading of those certifications and that no further costs were incurred between the date of signature and the 25th of each year. There are other extant proceedings between the parties relating to the validity of service charge demands for the years ending December 2019 and December 2020 and, for the avoidance of doubt, this tribunal makes no finding as to the validity or otherwise of the certification or demands for service charges in relation to those earlier years.

35. Mr Granby accepted in his skeleton and orally that Assethold is not entitled to raise ad hoc demands for service charges incurred, as Assethold purported to do between March and June 2021. He also accepted that the service charge arrangements in the leases do not entitle Assethold to demand interim service charges based on estimates of future expenditure. However he argues that Assethold has changed the end of its financial year to 1 June 2021, and was therefore entitled to produce accounts and raise service charge demands at least for the

period ~~26~~ December 2020 to 1 June 2021. Assethold claims to have done this in its demands to the Tenants dated 1 June 2021, which are in the bundle.

36. The tribunal considers that this submission is inconsistent with clause 5(4)(a), which requires a 12-month service charge accounting period to be calculated from the commencement of the landlord's accounting period. It considers that the best interpretation of this provision, where Assethold has changed its year end to 1 June, is that it requires a 12-month service charge accounting period to be calculated in the future from 2 June 2022, but does not permit Assethold to create an artificially truncated service charge accounting period of less than 12 months. Since Assethold has changed its financial year, there will have to be one extended service charge accounting period from ~~26~~ December 2020 to 1 June 2022.

37. The tribunal accepts the submission of Mr Bromilow, not contested by Mr Granby, that there is no provision under this lease for Assethold to raise demands for estimated future service charges. Assethold can only demand an on-account maintenance charge based on the balancing payment from the previous year. Accordingly, it would only be possible for Assethold to demand service charges for the waking watch and/or installation of an alarm system (assuming they were reasonably incurred) through a balancing payment calculated in accordance with clause 5(3), after the end of the service charge accounting period in which such costs were incurred.

38. The service charge demands which were purportedly served by Assethold on 1 June 2021 therefore fail to comply with the requirements of the leases in at least two respects: they clearly incorporate estimated future costs as well as past costs, and even the incurred costs do not represent expenditure said to have been incurred by Assethold in a service charge accounting period of 12 months (or, as it will now have to be, 18 months) commencing in ~~on 26~~ December 2020 (the precise date will depend on the resolution of the other proceedings concerning the earlier service charge years). The demands were also not supported by any audited accounts.

39. Given there is no power to raise demands for estimated future service charges, the estimated "Repair fund if needed" of £150,000 per block and Estate "Repair fund if needed" of £3,000 could not be payable through service charges even if valid demands had been served.

40. Accordingly, whatever the tribunal's conclusion may be as to the reasonableness of the service charges in dispute, they have not been properly demanded in accordance with the terms of the lease. The tribunal has nevertheless proceeded to determine the reasonableness of the service charges in dispute, since it has heard full evidence and argument on the matter and as requested by the parties.

<u>Fire safety at the Property</u>

41. A curious feature of this case is that Assethold has been incurring huge costs of a waking watch, since March 2021, even though this has only been recommended as an interim measure pending the carrying out of repairs which would be far less expensive than the waking watch itself. An impasse has been reached between the Tenants and Assethold, whereby Assethold has simply continued to incur the cost of the waking watch, rather than progressing any cheaper or permanent alternative. This is not a promising starting point from which to reach the conclusion that those costs were reasonably incurred.

42. In assessing whether the costs of the waking watch have been reasonably incurred the tribunal also considers that the Hydrock Report has to be seen in the context of other fire safety assessments at the Property, especially those obtained for Assethold/Eagerstates.

43. The bundle included two detailed Health Safety and Fire Risk Assessments dated 3 October 2019, carried out for Eagerstates (on behalf of Assethold), one on Block A and one on Block B, by Robert Steel of 4site Consulting Limited. These were comprehensive assessments of the fire safety of the Property as a whole, intended to identify fire safety Non-compliances and Hazards and categorise them as priority 1 (to be dealt with immediately) or priority 2 or 3 (plan to deal with as required, with a timescale for completion). Mr Gurvits was the contact for these reports.

44. Mr Steel concluded that there were no priority 1 hazards in Block B (or A). However he identified priority 2 hazards in the electrical cupboards and the 3rd floor riser cupboard in Block B, where there were breaches in compartmentation with no fire stopping installed. The action required was to employ a contractor to instal fire stopping. A further priority 2 hazard was there there was some timber panelling installed externally which did not appear to meet current standards of fire resistance. The action required was to employ a contractor to survey it and carry out remedial work. Other priority 2 hazards were also identified, especially concerning fire doors, and there were also extensive failures to provide records of various inspections and tests. It was a very detailed report, but none of the hazards were more serious than a priority 2.

45. In cross examination Mr Bromilow asked Mr Gurvits about a notice of intention to carry out works which had been sent to the Tenants on 3 March 2020 and which appeared fairly obviously to include works recommended in the 4site report. Mr Gurvits was asked if this notice was based on the 4site report. Mr Gurvits' answers were evasive: initially he said he could not recall this accurately; then he denied this was based on the 4site report, even though the notice referred expressly to works "*highlighted on a recent Fire Risk Assessment report*". He

then agreed that it was based on the 4site report. When asked why it had taken 4 and a half months to serve a notice to remedy the problems identified by 4site, Mr Gurvits said there had been a delay in obtaining quotes, and he could not send a notice until he had obtained at least one quote.

46. When Mr Bromilow asked if the works in the notice had now been done, Mr Gurvits replied that he could not comment as he did not have the information in front of him, then saying that he imagined that if the works were required, they would have been done. There was no evidence before the tribunal that these works have been done, and given the waking watch is continuing, the obvious conclusion is that they have not been done but Mr Gurvits was unwilling to acknowledge this. In submissions, both counsel proceeded on the assumption that these works had not been done. Given that the need for these fire safety works was one of the key issues before the tribunal, Mr Gurvits should have been in a position to say definitively whether or not he had arranged for the works to be done, and therefore the tribunal considers his answers to have been unsatisfactory and evasive.

47. Mr Gurvits was then taken by Mr Bromilow to a further Fire Risk Assessment Report, this time from Crescent Safety dated 20 January 2021, also addressed to Eagerstates. This report identified the same issues with the fire door smoke seals and breaches of compartmentation in the risers and electrical cupboards that 4site had identified, but which had still not been remedied. One of the required remedies was that the compartmentation breaches were sealed. Mr Gurvits then accepted that it appeared that those works had not been done, and had still not been done as at July 2021, even though he had been told by Crescent in January 2021 that these compartmentation breaches created high risks. There was also evidence that Eagerstates had been told by the London Fire Brigade that these repair works still needed to be done.

48. In addition to these reports, there was also an earlier report before the tribunal from Hydrock, prepared by different individuals, which reached quite different conclusions from the 2021 Hydrock Report, even though there had apparently been no material change in circumstances. On 17 February 2020 in a Technical Fire Safety Design Note, Kimon Pantelides of Hydrock reached the conclusion that the wall systems "*are suitable for the building when considering its height and use and will not present a significant risk to occupants in the event of a fire*". Within the bundle there was also a draft fire safety design note from September 2020, which reached the same conclusion. This is directly contrary to the conclusions reached in the 2021 Hydrock Report.

49. There is also an EWA in the bundle which was prepared by CHPK Fire Engineering for Click as part of its building works. CHPK concluded,

after an examination of 4 wall types, that two would be very unlikely to result in fire spreading either within the cavity or across the surface of the wall, and two would be unlikely to result in the same. Overall they concluded at para. 6 that "*the risk to the health and safety of the occupants of the residential parts of Corben Mews from fire spread over or within the external walls of the building is currently TOLERABLE.*" The risk which was identified related to the construction of the balconies, which the tribunal understands has been changed to less combustible materials in any event.

50. The 2021 Hydrock Report is an EWA, not a comprehensive fire risk assessment. The conclusion that the external wall system presented an "intolerable" risk of fire to occupants was said to be based on four of the wall construction types at the Property not achieving the "limited combustibility" criterion.

51. "Intolerable" is the highest risk rating which can be applied. The conclusion appeared on the face of it to have been based on the application of a standard risk assessment matrix, where one assesses the likelihood of fire along a range from low to high, cross-referenced with potential consequences ranging from slight harm to extreme harm. In that matrix, the conclusion of "intolerable" risk is satisfied only where both likelihood and potential consequences are at their maximum, i.e. a high likelihood of extreme harm. One would therefore expect to see that Hydrock had reached such an assessment of high likelihood and extreme harm, if their conclusion that the risk was "intolerable" was to be internally consistent.

52. In fact, as Mr Sun accepted, even within his report likelihood had been assessed as medium, with harm as extreme. When asked why the risk had therefore been assessed as "intolerable" and not as "substantial", as the matrix would indicate for this combination, Mr Sun said they had felt they needed to emphasise to the client the need to do something urgent. They had therefore increased the overall stated risk level to "intolerable", even though this did not follow the matrix. He suggested that since this was an EWA and not a general fire risk assessment, they did not need to accurately apply the matrix.

53. However, the tribunal considers that in choosing to alter the conclusion as to risk in this manner, the authors of the Hydrock Report overstated the risk in a way which was not supported even by their own reasoning. This does undermine the conclusions in the report overall as to risk, and meant that Mr Sun found himself in the position of seeking to defend the report's recommendations by after-the-event justification.

54. It is difficult to tell from the Hydrock Report itself the evidential basis on which the conclusion of an "intolerable" risk was reached. At paragraph 1.1, it is stated that the purpose of the report is to assess the risk of fire spread within the external wall system. Paragraph 5 of the

report simply states: "*As all the wall types present a fire-risk and do not form part of a tested system, it is considered appropriate to carry out a fire risk assessment based on this arrangement. Hydrock has used a recognised fire risk assessment method entailing five steps*: [followed by the matrix approach, wrongly applied as set out above]".

55. Paragraph 5.3 of the report stated: "*The external wall system, [as] has been clearly articulated within Section 4 of this report are noted to consist of materials that do not achieve Euroclass A2 or better. Should a fire spread to the external wall, the materials could promote fire spread across the external walls of the build1ng affecting the safety of residents.*"

56. The Hydrock Report gave three alternatives for recommended "Interim Measures", until remedial works were completed: (a) extension of an automatic fire detection (alarm) system; (b) a waking watch with a manual system which would operate all apartment alarms simultaneously; (c) a waking watch including alerting residents by knocking on their doors. It is the third which Assethold say they have implemented. In section 7 the Hydrock Report set out what appeared to be extensive proposals for necessary remedial measures, including replacing combustible material in wall cavities.

57. However Mr Sun also accepted in cross examination that while the various wall systems might have had combustible insulation material in the cavity, this was encased in non-combustible materials (with the exception of one small area near the Block B door where there was some wooden cladding on the outside). This was why the CHPK Report had concluded the fire risk was low. Mr Sun said that he disagreed with this conclusion, he said because if a breach did occur which allowed fire into the cavity, that it could then spread. However this did not explain why there was a risk of fire getting into the cavity or of then escaping from it through another breach elsewhere. It is also notable that the authors of the Hydrock Report did not actually carry out combustibility tests on the insulating material, and that they relied substantially on photographs of the wall construction supplied to them, rather than on their own direct internal examinations.

58. The impression given by the Hydrock Report, and in particular the part of paragraph 5.3 quoted above and the recommended remedial measures, was that the whole of the wall system was unsafe because the cavities contained insulating material which was potentially combustible even it if was wholly contained.

59. In contrast, in oral evidence, Mr Sun relied much more specifically on the fact that there was a breach from the riser cupboard to part of the external wall cavity and associated lack of firestopping, creating a risk of fire spreading into the cavity. However, as Mr Sun agreed, this was a problem which could be easily and quickly fixed (although of course Mr

Gurvits had failed to arrange for it to be fixed over an extended period). Mr Sun said that the reason he had concluded there was such a high fire risk was that the riser cupboard was next to the only staircase providing access to the upper floors in Block B. He agreed that if the riser cupboard issue was fixed, and the cavity restored to its proper sealed condition, then the risk level would be significantly reduced.

60. Mr Sun also said he was unable to comment on whether two wardens were needed for the waking watch and that he had not been aware of the proposal to upgrade the fire alarm system and was not in a position to comment if it was an adequate system.

61. Turning to the review of the Hydrock Report which was carried out by Mr Evans of SCP on 18 March 2021, the tribunal had the benefit of Hydrock's comments on that review and also Mr Evans' responses to those comments. Mr Evans conducted a visual inspection at the site and, in relation to the wall types, confirmed that they all had non-combustible inner and outer faces, except that EW02 in Block B was combustible wood panelling fixed onto non-combustible concrete block work. As mentioned, this was only to be found adjacent to the Block B entrance.

62. Mr Evans noted that there was no evidence that all of the internal insulation was combustible; some of it was, but to a great extent, Hydrock had simply assumed that it was. In relation to wall type EW04, Hydrock had assumed from a photograph supplied by the client that there were no cavity barriers around [window] openings, but Mr Evans commented this was not visible in the photographs and Hydrock had not carried out the intrusive investigation which would have allowed them to reach that conclusion.

63. In relation to Hydrock's conclusion that all wall types were not comprised of materials which complied with limited combustibility criteria, Mr Evans noted that this was a building under 18m, and the external wall construction and materials did comply with current building regulations for a building under 18m. In their comments on this, Hydrock responded that in the government "Advice for Building Owners of Multi-Storey, Multi-occupied Residential Buildings" issued on 20 January 2020, concern was expressed that consideration was not being sufficiently given to Requirement B4 of Schedule 1 to the Building Regulations that "*the external walls of the building shall adequately resist the spread of fire over the walls and from one building to another, having regard to the height, use and location of the building. The need to assess and manage the risk of external fire spread applies to buildings of any height*". Hydrock said in their comments that compliance with Approved Document B, especially as guidance was less specific for buildings under 18m, should not be equated with compliance with Building Regulations without further risk assessment. However Mr Sun accepted in evidence that the Hydrock Report did not

specifically deal with how either the height or occupancy of the Property affected the conclusions as to risk of external fire spread.

64. The tribunal considers that by applying to this building, which was under 18m, without proper explanation, limited combustibility criteria which relate to buildings over 18m, paragraph 5.3 of the Hydrock Report creates the misleading impression that the external wall system is “non-compliant” and so represents a heightened fire risk. While the January 2020 guidance requires assessment and management of the risk of external fire spread on buildings below 18m, it does not follow that this is to be done by applying the same criteria as apply to buildings over 18m.

65. In relation to wall type EW04 (found in the penthouses), Mr Evans advised that the risk of fire spreading into these external walls was extremely low because there was a sprinkler system in each room of the penthouses. In relation to wall type EW02 with wood cladding, near the Block B entrance, Mr Evans advised that there was only a low risk of fire occurring in this area and that the risk could be addressed by treating the wooden cladding with fire retardant coating or by replacing it.

66. The conclusion of the SCP report as regards the external walls was that:

“*Based on our findings, the risk of spread of fire at Corben Mews is considered low, and a waking watch is not considered necessary. The external facade of the buildings external walls does not have significant amounts of combustible materials and the wood panelling is recessed and small in area, and there is no risk of spread of fire to any other area of the external walls to the building*.

The outer and internal materials used in the external walls are all non-combustible and in most case fire-rated, and the only confirmed combustible materials, apart from the small area of wood cladding is some confirmed combustible cavity insulation and some assumed cavity insulation. All of the internal insulations are protected by outer and inner fire rated materials so there is low risk of spread of fire via the outer/inner walls to the inner cavity insulation....

Hydrock advised the external walls present an intolerable risk to occupants due to the materials not achieving "limited combustibility", but we have confirmed that the majority of the external wall materials are non-combustible, and only the wood cladding poses a low risk of combustion, while all other combustible materials are sealed internally behind outer/inner non-combustible materials within cavity voids, and the risk of fire spread across the external walls is considered very low.”

67. In cross examination Mr Evans confirmed that his view was that the earlier 2020 Hydrock report was correct and the 2021 Hydrock Report was wrong. He agreed that work was needed to the riser cupboard, as previously advised (e.g. in the 4site report) to make the structure fully compliant. He accepted that if a fire were to occur within the riser cupboard, there was currently the possibility of it spreading into the cavity void, but since there were only water pipes (and no gas pipes), this was unlikely. In relation to the use of combustible insulation sealed within a cavity wall, Mr Evans said that under building regulations, this was permitted for buildings under 18m, but not for those over that height. He said the risk of fire spread within those cavities was low (even if the insulation was combustible) because it was contained within 2 panels of non-combustible material. Also Hydrock had not established that the insulation was combustible by testing.

68. As to risk, Mr Evans' conclusion was that the likelihood of fire was low, except for the riser cupboard problem, which would increase this to medium. The risk of harm was slight to moderate but no higher because a fire would need to burn for 15 minutes or more and it was highly likely someone would have noticed a fire within that time. Therefore there was a tolerable risk overall.

69. Mr Evans said that the compartmentation problem with the riser cupboard would be simple project to rebuild. He had obtained an estimate for the necessary works from contractors, which was that it would take about 5 days at a cost of £5,000, involving removing and rebuilding the cupboard, putting a fire stop in the cavity and then rebuilding around the pipework and cabling. He had prepared a tender in August 2021, which was in the supplementary bundle, for all the fire safety works required at the Property, to rectify the problems originally identified by 4site in 2019 (fire doors and riser cupboard). To totally repair all the items identified would cost about £28,000, of which £5,000 related to the riser cupboard.

70. The tribunal notes that formal quotations to carry out the fire repair works have not been obtained by either party, but it takes notice of the approximate figures provided by Mr Evans in the context of assessing whether it would have been reasonable to carry out those works to address permanently any fire safety issues, and bearing in mind that it would be the landlord's and not be the Tenants' obligation to obtain such a quote.

71. The Tenants also offered in July 2021 to have those works carried out at their expense, but Assethold has refused to agree to this.

72. In relation to the alarm system, if the repairs were carried out, then Mr Evans said no further communal alarm system would be necessary.

73. The Tenants say in any event that the reasonable cost of a new alarm system would be £9,029 +VAT, in line with a quote from Black & Gold Fire Safety which they have obtained, and that the quote for £23,809 + VAT obtained by Eagerstates from BML Group Ltd is excessively high.

74. The tribunal accepts the evidence of Mr Evans that since this was a building under 18m, and any combustible material in the walls was contained between two non-combustible leaves (save for one small area of external wood cladding), the risk of a fire spreading was relatively low, and could be reduced still further by (a) rebuilding the riser cupboard and (b) treating the wood panelling with a fire retardant coating or replacing it. These works would be low cost (by many orders of magnitude) compared to operating a waking watch. Furthermore, the tribunal accepts that if these works were carried out then an interim alarm system would not be needed either.

75. The tribunal has concluded that the authors of the Hydrock Report have dramatically overstated the risk of fire at the Property, in stating that the risk is "intolerable", because among other things they have (a) overstated the risk of fire spreading through cavities in the external walls, essentially through simply assuming that there would be breaches of the walls allowing fire ingress, when breaches did not exist except in the riser cupboard; (b) made assumptions as to the combustibility of insulation which had not been tested; (c) treated regulations applicable to buildings over 18m in height as if they directly applied to a building under 18m; and (d) misapplied the risk matrix, apparently from a desire to bring home to Eagerstates the need to carry out repair works. That report was therefore wrong in its conclusions as to risk and so as to necessary steps.

76. Our conclusion is supported by the significant number of other reports which concluded, in circumstances not materially different to the Hydrock Report, that there was a low risk of fire through the external walls. Neither the recommendation of a waking watch, nor the recommendation of an interim alarm system can therefore be supported as reasonable. Furthermore, given that Mr Sun himself accepted that the risk could be substantially reduced by repairing the riser cupboard, these could not in any event be reasonable interim recommendations where the problem could be resolved permanently so much more cheaply.

<u>The legal framework</u>

77. By section 19(1)(a) of the 1985 Act, the costs of the waking watch can only be taken into account in determining the amount of a service charge payable for any period in 2021 to the extent that they have been reasonably incurred by Assethold. Only the costs of the waking watch have been incurred – no costs have been incurred for any fire alarm system, or for repair works to the riser cupboard or fire doors.

78. Following the decision of the Court of Appeal in *Waaler v. Hounslow London Borough Council* [2017] EWCA Civ 45, whether costs have been "reasonably incurred" is to be determined by reference to an objective standard of reasonableness, not by the lower standard of rationality. The focus of the enquiry is not simply a question of the reasonableness of the landlord's decision-making process, but also one of outcome. Where there was more than one reasonable course of action, the landlord did not have to choose the cheapest, and there is a margin of appreciation to be allowed to the landlord in choosing. The Court of Appeal approved the decision in *Forcelux Ltd v Sweetman* [2001] 2 EGLR 173 which had treated this as a two-stage process: first, whether the landlord's process was reasonable and second whether the amount actually charged, i.e. the outcome, was reasonable.

79. The tribunal considers that Mr Granby's submission that it is sufficient if Assethold acted reasonably in relying on the Hydrock Report to institute – and continue for many months - the waking watch, only addresses the first part of the *Waaler* test, and not the second.

80. As to the first part of this test, the tribunal considers that Assethold acted reasonably in obtaining the EWA from Hydrock, a reputable company for these purposes. However, when Assethold/Eagerstates received a report from Hydrock whose conclusions were radically different from the earlier Hydrock Report and from other reports of which it was aware, conclusions which its own surveyors JMC queried, the most sensible response would have been to instruct a second opinion from another fire safety expert. Mr Gurvits offered this to the tenants, but only on the basis that they paid for such a second report, and when they would not do so, he refused to arrange for Assethold to obtain such a further report. In failing to instruct a second report itself, the tribunal concludes that Assethold probably failed to act reasonably.

81. As to the second part of this test, in any event the outcome must also be reasonable. Since the tribunal has concluded that the Hydrock Report was incorrect and its recommendations were not in fact objectively justifiable, it follows that the outcome, i.e. incurring the costs of a waking watch which was recommended by that report, was not reasonable. The tribunal accepts the submission of Mr Bromilow that those costs were unnecessary, and that unnecessary costs will not have been reasonably incurred. This is not a case where the landlord has selected one of a range of reasonable outcomes; rather it has opted for an outcome which was unnecessary because it was based on flawed advice. The tribunal further accepts the submission of Mr Bromilow that this is a risk that the landlord carries, since the test is whether the outcome can be objectively justified as reasonable, in the same way that it cannot necessarily recover all the costs of works which prove not to have been carried out to a reasonable standard by contractors (pursuant to s.19(1)(b)).

82. If Mr Gurvits had instructed a second opinion, at Assethold's expense, the likelihood must be that he would have been advised that the risk was low; that any expenditure on a waking watch or interim fire system was unnecessary and the riser cupboard should be rebuilt to address the compartmentation problem there, which would have saved Assethold incurring the unnecessary expense of a waking watch. To have refused to take that step, because the Tenants would not pay for it, and instead incurred the much greater expense of the waking watch for an apparently indefinite period of time (since Assethold has still taken no steps to resolve the underlying problem with the riser cupboard), appears irrational.

83. Ms Adam's (unchallenged) evidence in her witness statement is that Eagerstates has a practice of charging 10-15% of all gross costs, plus VAT, as a management fee. The most obvious explanation for Assethold's apparently irrational behaviour therefore appears to be that Eagerstates was expecting to earn a 10-15% management fee from the Tenants on all of these costs, on the assumption that the Tenants would have to pay the waking watch charges.

84. Accordingly, the tribunal's conclusion is that none of the costs of the waking watch have been reasonably incurred. It also concludes that the costs of an interim alarm system would also not be reasonably incurred, since they were also contingent on the conclusion in the Hydrock Report that the risk of fire was "intolerable". In those circumstances it is unnecessary to consider whether Assethold's proposed costs were unreasonable in amount.

85. If the tribunal is wrong, and it would have been reasonable to incur the costs of implementing the recommendations of the Hydrock Report as to a waking watch, then in any event the tribunal considers that it would only have been reasonable to have operated a waking watch for a short period of no more than one month, while works to permanently remedy the problems with the riser cupboard and treat the wood cladding were carried out. On any view therefore, costs of a waking watch for more than one month would not have been reasonably incurred.

<u>Quality of the waking watch</u>

86. In those circumstances it is unnecessary to proceed to consider whether the waking watch was delivered to a reasonable standard, for the purposes of s.19(1)(b) of the 1985 Act. Having heard evidence on this issue, however, the tribunal will also record its conclusions on this point, which were:

    (i) Since the issues with the riser cupboard were only in Block B, it could not have been reasonable to incur the cost of

a waking watch for Block A. Accordingly, a reasonable amount would have been the cost of one and not two wardens;

(ii) On the evidence of the tenants, and the photographic and video evidence which the tribunal saw (including pictures of fire doors propped open; wardens asleep or outside in a car; and apparently dangerous electric fires), the service was not delivered to a reasonable standard and the tribunal would only have allowed 50% of the amount actually charged to Assethold for one warden.

Application under s.20C and refund of fees

87. In their application form the Tenants applied for an order under section 20C of the 1985 Act. Taking into account the fact that the Tenants have been the successful parties on this application, the tribunal determines that it is just and equitable for an order to be made under section 20C of the 1985 Act, so that Assethold may not pass any of its costs incurred in connection with the proceedings before the tribunal, through the service charge.

88. Taking into account the determinations as set out above, the tribunal also makes an order on its own initiative for the refund by Assethold of the fees paid by the Tenants in respect of the application and hearing[1]. The tribunal orders Assethold to refund the £300 fees paid by the Tenants within 28 days of the date of this decision.

89. For the purposes of any application for permission to appeal, time is to run from the date on which this amended decision is sent to the parties.

Name: Judge N Rushton QC **Date:** ~~15 November 2021~~ 3 December 2021

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

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 regional office which has been dealing with the case.

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

[1] The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013

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

The application for permission to appeal must identify the decision of the tribunal to which it relates (i.e. 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.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).

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.

(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 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 tribunal or the Upper Tribunal, 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 a county court;

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

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

(c) in the case of proceedings before the Upper Tribunal, 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 a 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 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).

Schedule 11, paragraph 5A

(1) A tenant of a dwelling in England may apply to the relevant court or tribunal for an order reducing or extinguishing the tenant's liability to pay a particular administration charge in respect of litigation costs.

(2) The relevant court or tribunal may make whatever order on the application it considers to be just and equitable.

(3) In this paragraph—

(a) "litigation costs" means costs incurred, or to be incurred, by the landlord in connection with proceedings of a kind mentioned in the table, and

(b) “the relevant court or tribunal” means the court or tribunal mentioned in the table in relation to those proceedings.

Proceedings to which costs relate	“The relevant court or tribunal”
Court proceedings	The court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, the county court
First-tier Tribunal proceedings	The First-tier Tribunal
Upper Tribunal proceedings	The Upper Tribunal
Arbitration proceedings	The arbitral tribunal or, if the application is made after the proceedings are concluded, the county court.