FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	CHI/21UC/LSC/2018/0108; and CHI/21UC/LSC/2019/0005
Property	**:**	Flat 3 45 Cavendish Place, Eastbourne, BN21 3HX ("the property")
Applicant	**:**	Mr Mark Anthony Gidley
Representative	**:**	None
Respondent	**:**	Powell & Co (Brighton) Limited
Representative	**:**	Mr Sean Powell, Director
Type of Application	**:**	Liability to pay service charges
Tribunal Members	**:**	Judge HD Lederman Peter Turner Powell FRICS Mr TW Sennett MA FCIEH
Venue of Hearing	**:**	Best Western York House Hotel, Royal Parade, Eastbourne.
Date of Hearing	**:**	26th March 2019
Date of Decision	**:**	10th April 2019

DECISIONS AND REASONS

DECISIONS

CHI/21UC/LSC/2018/0108

1. The Tribunal determines that the amount payable by the Applicant in respect of the works and services charged in the Respondent's invoice dated 19th October 2018 (described as "Section 20 Invoice") is limited to £250.00, as the Respondent did not comply with section 20 of the Landlord and Tenant Act 1985 ("the 1985 Act") and the requirements of the Service Charges (Consultation etc.) (England) Regulations 2003 ("the 2003 Regulations").

2. In addition, the Tribunal determines that the £765.00 of the sums demanded on 19th October 2018 in respect of the management fee *in advance of the works being carried out* was not payable under part I of the Fourth Schedule to the Lease of the property dated 23rd August 2011 ("the Lease") and was not reasonably incurred at that time within section 19 of the 1985 Act.

3. The Tribunal makes no determination upon any of the following issues:

    a. Whether any of the requirements of the 2003 Regulations should be dispensed with under section 20ZA of the 1985 Act;
    b. Whether the £7140.00 demanded in the "Section 20 Invoice" is or will become payable as "maintenance rent" or "maintenance charge" under the provisions of Part 1 of the Fourth Schedule to the Lease after the certificate of the accountant for the service charge year 2018/2019 has been provided.
    c. Whether the sums charged for works in the "Section 20 Invoice" were reasonably incurred or were of a reasonable standard and will become payable will become payable under the provisions of Part 1 of the Fourth Schedule to the Lease after the certificate of the accountant for the service charge year 2018/2019 has been provided.
    d. Whether the sums charged for Management fee in the "Section 20 Invoice" will become payable under the provisions of Part 1 of the Fourth Schedule to the Lease after the certificate of the accountant for the service charge year 2018/2019 has been provided.

    If the Respondent makes successful application for dispensation from compliance with the 2003 Regulations, it is possible that other sums may become payable. That issue is not before the Tribunal.

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4. The £74.81 charged for the cost of the asbestos report dated 13 04 2017 was payable in the service charge year 2017/2018. The cost of that report was reasonably incurred, and the management fees in respect of that report in the service charge year 2017/2018 were reasonably incurred and of a reasonable standard.

Both applications

5. The Tribunal orders that none of the Respondent's costs of the two proceedings relating to the Tribunal applications or the Tribunal proceedings (including legal and management costs) may be passed to the Applicant as relevant costs through any service charge.
6. The Tribunal orders that none of the Respondent's costs of the two Tribunal applications or proceedings shall be charged to the Applicant as an administration charge. This order is made under paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 (as amended) ("the 2002 Act").

7. The Tribunal makes no order in respect of the reimbursement of the Tribunal fees paid by the Applicant.

REASONS

CHI/21UC/LSC/2018/0108 - the Application

8. The Applicant seeks a determination pursuant to Section 27A of the 1985 Act as to the amount of service charges payable by him in respect of on account demands for major works in the service charge years 2018/2019. In the case management conference this application was treated as raising the following issues:

    a. Had a valid demand for payment been issued
    b. Had proper consultation for major works been undertaken
    c. Were the amounts claimed in respect of proposed major works reasonable

9. The service charge year was treated as running from 25th March to 24th March according to the accounts produced by the Respondent's accountants Z Group Limited dated 1st March 2019 provided very shortly before the hearing.

10. In each case the Applicant also seeks an order under section 20C of the 1985 Act preventing the Applicant from recovering the costs incurred in the Tribunal proceedings through the service charge and an order under paragraph 5A of Schedule 11 to the 2002 Act in preventing the legal or litigation costs of these proceedings being charge to him as an administration charge.

11. The relevant legal provisions are set out in the Appendix to this decision or summarised in the course of these Reasons.

Documents and Bundles

12. In these Reasons references to page numbers in [ ] are to the Applicant's hearing bundle at pages [1-123] inclusive. Unfortunately, the Respondent's hearing bundle was not paginated.

13. In addition, Sean Powell the director of the Respondent had not brought to the hearing either the paginated bundles prepared by the Applicant or the Respondent's bundles. He did however have a bundle of the relevant documents which were ordered and collated apparently by his secretary. The difficulty with the Respondent's bundle was ascertained at the outset of the hearing. The Tribunal was astute to ensure Mr Powell had access to every relevant document, if necessary by handing him a copy of the document or letter. The Applicant also passed him documents from time to time during the hearing when there was any uncertainty whether he as looking at the same document.

14. The Tribunal was satisfied the Respondent fully understood the issues and the questions in the course of the hearing. Mr Powell was able on a number of occasions during the hearing to ask for sight of a document when or if he was unsure. He did not express any concern and was able to follow and participate in the proceedings with confidence.

Representation and the protagonists

15. The Applicant was not represented but was accompanied by Mr Richard Da Costa who did not give evidence. The Applicant was not familiar with the law or tribunal procedure. He found it difficult to adjust to the distinction between advancing his case and giving evidence and cross examination. None of this is a criticism of the Applicant who is not a professional landlord or legally qualified. It did mean however that the Tribunal occasionally had to assist him in asking questions of Mr Powell and to direct him to the relevant issues.

16. Mr Sean Powell ("Mr Powell") is a director of the Respondent and of its managing agents Carvalho Concept Limited (company no 6173925) ("CCL"). CCL and the Respondent operate from the same offices in London. During the course of his evidence Mr Powell did not distinguish between the Respondent and CCL. For the purpose of this property both of these companies appeared to be corporate vehicles through which he and Mr Goubel operated their landlord and property management business. Although CCL was described as the Managing Agent in response to Leasehold Property Enquiries (2nd edition 2015) ("the LPE") in October 2017 and in the service charge accounts, some service charge invoices were issued by CCL requiring payment to CCL (see for example the invoice if 13 04 2018 at [60]), ground rent invoices were issued directly by the Respondent (see invoice 05 11 2018 at [67]) and the section 20 invoice was issued directly by the Respondent requiring payment to the Respondent. In particular the section 20 invoice implied that the

Respondent (not CCL) was entitled to payment of the 10% management fee. The Tribunal returns to this issue later.

17. Mr Powell also gave evidence that his group of companies had offices in London and Brighton and owned freeholds in London in the South and in other parts of the country such as the North West. The Respondent (or its associated entities) own freeholds and are professional landlords and investors, also having involvement in Right to Manage Companies. Mr Powell was an articulate and intelligent man who had no difficulty in expressing himself or understanding questions or issues. The Bundle indicated that the Respondent had had access to legal advice in the context of other properties and carried out management and landlord functions (either by itself or with CCL or its associated companies) with the property and many other properties on a full time basis. Mr Powell found no difficulty in expressing his views clearly or disagreeing when he felt that appropriate.

18. The Respondent's pre-hearing correspondence with the Tribunal from Mr Powell in both applications displayed a level of sophistication and familiarity with Tribunal practice and procedure. The Tribunal took this into account when assessing Mr Powell's evidence and the need to make allowances for him whilst giving evidence at the hearing.

19. Mr Powell said that the other director of the Respondent Patrick Goubel ("Mr Goubel") had the primary responsibility for managing and dealing with the property but he was on holiday at the date of the hearing. Mr Powell also said that Mr Goubel's role was to oversee and liaise with contractors in relation to works of the kind which were proposed or carried out at the property. Mr Powell's evidence was that Mr Goubel had day to day responsibility for overseeing the works at the property which had started. Partly for this reason Mr Powell's knowledge of the property and the works was limited. Mr Powell had not visited the property before the inspection at the date of the hearing and was not familiar with the layout or the works. The Tribunal accepted that evidence.

20. The Respondent did not seek an adjournment of the hearing to take account of the unavailability of Mr Goubel. The Respondent had not notified the Tribunal previously that Mr Goubel would be unavailable. The absence of Mr Goubel on holiday did not explain the Respondent's omission to obtain a witness statement from him or any of the Respondent's other staff.

21. Mr Powell said that he and Mr Goubel were each directors of CCL as well as directors of the Respondent. The Tribunal so finds. When asked who would be paid the management fee for the major works after some hesitation Mr Powell indicated that CCL would be paid. Although Mr Powell's witness statements were expressed to be on behalf of the Respondent, when giving evidence he did not distinguish between the Respondent and CCL. Mr Powell's oral evidence about the recipient of the

10% "management fee" was at variance with his evidence in paragraph 7 of the Statement of Case which suggested that the Respondent charged 10% plus VAT for its "involvement". The Tribunal was troubled by this inconsistency which indicated at the very least confusion in Mr Powell's mind as to the identity of the entity performing the services due to be encompassed by the management fee.

22. The service charge accounts for the service charge year ended 24 03 2018 produced to the Tribunal shortly before the hearing described CCL as the Managing Agent for the property and were compiled on the basis that CCL expended funds for service charge for the Building.

23. No documentary confirmation of the terms of the contractual or other relationship between CCL and the Respondent was produced by the Respondent

Structure of these reasons

24. For ease of reference these reasons have been divided into separate headings. Reference to findings under one heading is often relevant to the Tribunal's conclusions under other headings. The omission to cross refer to findings should not be read as meaning that the findings are not relevant to other parts of these reasons.

25. The procedural background to these decisions is to be found in the Tribunal's Directions issued on 11th January 2019 at pages [115-117].

26. Detailed discussion took place at the hearing about the items which were disputed by the Applicant. These reasons record the Tribunal's findings but in the interests of proportionality do not record the entirety of the debate. It should not be assumed the Tribunal ignored or failed to take into account the various arguments raised in different parts of the Applicant's skeleton arguments at [109-110] and [70-73] or correspondence of the written observations and Statements of Case prepared by the Respondent.

27. All determinations are based upon the balance of probabilities (what is more likely than not) and the available evidence which is some respects was incomplete or required assessment by the Tribunal.

The Inspection

28. The Tribunal inspected the property and the exterior of 45 Cavendish Place ("the Building") immediately prior to the hearing. The Applicant and Mr Powell were present during the entirety of the inspection and had the opportunity to draw attention to anything of relevance.

29. The property is a mid-nineteenth century mid-terrace house spread over three floors. There is a separately accessed basement flat. It is divided into four apartments (including the Basement flat).

30. The Tribunal was unable to gain access to the ground floor rear area at ground level. Access to the rear area at ground floor level which was barred by large brick wall. The exterior of the building is rendered. It was not possible to assess the condition of the roof. A bus route serves Cavendish Place which is a mixed area of residential and commercial premises. The building is within a short walk of the sea front and town centre and with local amenities close by. The property comprises a first floor flat accessed from a communal staircase, itself reached by way of a stone staircase from street level. There is a communal front door leading to the upper flats through a communal staircase.

31. Above the basement flat the Building is divided into three flats, one on each floor all sharing the entrance door from the street accessed from a flight of steps at pavement level. The Tribunal did not inspect the interior of the flats within the building apart from the property. The Applicant's flat is entirely self-contained.

32. The Tribunal inspected the external elevations from ground level from the adjacent ground floor area. A good deal of the disrepair at the rear elevation noted in the Vivid Surveyors Limited ("Vivid") specification of May 2018 at [13-41] ("the specification") could be seen from this position. The Tribunal's Surveyor member also had the opportunity to inspect parts of the rear elevation from first floor level by climbing on to scaffold boards accessed from the property. Nothing turned on that inspection from the scaffold boards as the condition and need for the works were not put in issue by the Applicant at hearing.

33. The Inspection confirmed what was evident from the photographs of the rear elevation at pages [28], [29] [30], [31], [32], [33], [34], [35], [36] [37], [38] [39] [40] of the Specification that the rear elevation and in particular the rendered parts, masonry and window frames of the Building had previously been painted. The external metal work had also been painted. (The Specification proceeds on the basis that the window frames and reveals are within the demise of individual Leaseholders and are to be billed by each individual lessee, but sealant works are for the Respondent landlord to be charged to service charge)

34. At the time of the Tribunal's inspection repairs and repainting had not been carried out to any significant degree. Flaking and disrepair to paint and render of some of those parts of the rear elevation visible to the Tribunal was evident.

35. The Applicant was given the opportunity to draw attention to any relevant parts of the property or the Building during the inspection. Access to the basement flat was not available but in the event did not appear to be

relevant to the issues which the tribunal were asked to determine at the hearing.

The Hearing - the issues

36. The Tribunal Judge clarified with both parties that the following were in issue

    a. Whether the Respondent's Notice of Intention relating to the proposed works to the rear elevation dated 1st June 2018 at [11 -49] ("the Notice") incorporating the Specification was posted to the Applicant. (It was common ground the Respondent intended that the the Notice was accompanied by a covering letter from the Respondent dated 1st June 2018 (found towards the end of the Respondent's bundle)
    b. If it was so posted when, did the Notice arrive?
    c. Whether the management fee of £2250.00 plus VAT charged was within the terms of part II of the Fourth Schedule to the Lease
    d. Whether was it within the Respondent 's "reasonable discretion" to charge the full cost of the works as an "on account" payment on 19 10 2018 under Part 1 of Schedule 4 – Applicant's bundle page [95]
    e. Whether the cost of the works charged as an interim or on account basis by invoice of 07 10 2018 ("the section 20 invoice") was reasonably incurred
    f. Should the leak to the rear elevation have been the subject of an insurance claim?

The hearing - the evidence and the relevant background

37. Mr Powell gave the only oral evidence on behalf of the Respondent. It was undisputed that the Respondent acquired the freehold on 09 08 2012: see the official copy of the Land Register at [118] in the bundle for CHI/21UC/LSC/2019/0005.

38. It was common ground the Applicant acquired the lease of the property on or about 19 December 2017 (see page [70]). In preparation for this acquisition, his solicitors served Leasehold Property Enquiries (2nd edition 2015) ("the LPE") parts of which were included in the Applicant's bundle at [4-5]. The response to questions 4.7 and 4.8 prepared by an unidentified person at CCL on 27 10 2017, was to the effect that no "section 20" works were contemplated and that "the external managed areas" (which included the external elevations) were last decorated in 2016.

39. Mr Powell was asked about this response to the LPE. He confirmed that in fact it was only the front elevation to which works were carried out in 2016. He accepted that the response to the LPE which suggested that external decorations were decorated in 2017 was not correct. He explained

that works were carried out upon the prompting of the local authority and before any statutory notices were served.

40. Mr Powell's evidence was that the Respondent was approached by the owner of the basement flat to carry out works to the rear elevation. This was recorded in part of the narrative in the Notice of Intention (second paragraph numbered 2) at [11]. In April 2018 the Respondent instructed Vivid to report. Vivid prepared the Specification in May 2018. No separate report or survey was referred to in evidence. Mr Powell regarded the specification as a report from Vivid. None of this evidence was challenged. The Tribunal accepts this part of Mr Powell's evidence.

41. The Applicant referred to his pre-purchase Homebuyer's Survey report in his skeleton argument of 31 12 2018 at [70-71]. This report had given the external walls a condition rating of 1: see [7-8]. The date of the report was October 2017: see the bundle in the 0005 case. Despite referring to that Homebuyer's surveyor report, the Applicant did not challenge the need for the works outlined in the Specification at the hearing. Nor did he challenge the accuracy of the Specification insofar as it referred to the need for such works. Had it been necessary to do so, the Tribunal would have referred the Applicant to the landlord's repairing and decorating /painting covenants in clause 4(4) and 4(5) of the Lease at [88-89]. These provisions reflects the relatively short cyclical requirement for painting and decorating for 4 years within this Lease, consistent with a coastal climate.

42. As the Applicant *at the hearing* did not dispute the need for the works (some of which could only be accurately specified or ascertained when the scaffold was in place), the Tribunal did not need to investigate the issue of the need for the works. He did not pursue his criticism made in correspondence at an earlier stage that the works were not necessary.

43. Mr Powell accepted that no other major or significant external repair or decorations had taken place since the Respondent acquired the Building in 2012.

44. It emerged from the Tribunal's questions that the Respondent and CCL had not prepared a formal or informal Budget or estimate for expenditure for the Building. No plans or programme for major works including decoration had been discussed prior to the concern expressed by one of the other lessees of the Building (Ms Thomas) complaining about a leak. It was put to Mr Powell that the Service Charge Residential Management Code and additional advice to landlords, leaseholders and agents (3rd edition) ("the Code") recommended a programme of works budgets or estimates: see paragraphs 7.3 and 9.3. His response was to the effect that that the Respondent had not considered the provisions of importance as he considered lessees would not want to be faced with costs of repair or decoration work except when necessary. In any event he said the Respondent's practice was to carry out consultation and listen to the views

of lessees at all of the properties which it owned or managed. He also expressed the view that this Code was for surveyors. It was suggested to him that this Code was the equivalent to the Highway Code of good practice for property management in the context of service charge and residential properties. He expressed the view that the Code was primarily for surveyors or RICS members.

45. The "section 20 invoice" dated 19th October 2018 was served by the Respondent's e-mail of that date albeit with the e-mail containing the incorrect title "Flat 2, 45 Cavendish Place", but with the correct Flat number in the body of the e-mail: see [13]. The invoice and accompanying calculation at [59-60] were expressed to be "due for immediate repayment". It is apparent from the estimates and quotations enclosed with the Respondent's bundle that all the estimates and priced specifications from contractors had been obtained by 12th September 2018.

46. It was common ground payment of the £7140.00 was made by the Applicant to the Respondent on 13 November 2018.

47. The Statement of Case indicated that it was hoped the works would commence in February 2019. Mr Powell's unchallenged evidence was that the works had started in March 2019. At the date of the Tribunal's inspection, it appeared that works had paused. Apart from the scaffolding at the rear elevation, there was no sign that work was being carried out on the day of the Tribunal's inspection.

The Notice

48. A copy of the Notice is at pages [11-12]. The Notice incorporates the specification. There is a different version of the Notice in the Respondent's Bundle, as the date of the Notice in the Respondent's Bundle appears on the second page. This probably reflects the fact that only an electronic copy of the Notice was retained by the Respondent

49. The Respondent was unable to produce a copy of the Notice which contained a signature by Sean Powell as opposed to a place for the signature of Sean Powell. A signature is not a requirement for a Notice under part 2 of the Fourth Schedule to the 2003 Regulations. The Tribunal does not criticise the Respondent for the absence of a manuscript signature or a copy of the same. The absence of a copy of signed notice does however confirm that the copies of the documents (including the copy of the screenshot of the covering letter in the Respondent's bundle) are print outs of electronic copies of documents created on that day. The Respondent was unable to produce a hard copy of the actual covering letter sent to the Applicant with the Notice.

50. The Notice required observations to be made by 4th July 2018 which was stated to be the date when the consultation period ended.

Posting of the Notice of intention

51. Mr Powell frankly accepted that he had not taken any part in the posting addressing or compiling of the envelope said to have enclosed the Notice or the covering letter of 1st June 2018. He said this would have been done by staff such as secretaries in the Respondent's office in London.

52. Mr Powell's evidence about sending and posting of the Notice was not first hand. He had limited knowledge which was derived from the Respondent's documents. He did not adduce any evidence from any of the Respondent's office staff. No witness statements had been obtained from then. It was not suggested by him that the relevant persons were not available or could not have been asked to give evidence. Although not professionally qualified, Mr Powell was an intelligent and experienced individual who had been in the property management and investment business for more than 10 years. He appreciated the significance and importance of a notice of intention in the statutory Consultation process as the Statement of Case prepared on behalf of the Respondent and signed by him on 29th January 2019 ("the Statement of Case") showed.

53. Paragraph 12 of the Statement of Case asserted that the Notice (and other notices to other lessees) were "served by first class post". Much later in the Respondent's unnumbered bundle attached to the Statement of Case there is a screenshot of a computerised list of letters and documents posted on dates ranging from 1st June 2018 to 5th June 2018. Although this is not referred to expressly in his Statement of Case, Mr Powell confirmed that the Respondent instructed its staff to keep the computerised list as a record of what documents were posted and when. There are 4 documents listed as being posted to 45 Cavendish Place on 01 06 2018. None of the addresses are listed in that screenshot. Each of the items posted is described as "section 20 bundle". The class of posting for each was describe as "second". This inconsistency with his evidence in the Statement of Case was put to Mr Powell. He was unable to provide any further information. He did not deny that this bundle including the Notice to the Applicant was recorded as being sent by second class post. He accepted he had no direct knowledge but relied upon the records produced by the Respondent. He did not produce or refer to other records of posting such as franking machines.

54. When asked about the absence of any record of posting of the Notice, Mr Powell's evidence was that that it would be too burdensome for the Respondent to keep such records as the volume of documents sent to all lessees was high.

55. It was put to Mr Powell that 1st June 2018 was a Friday. Even if the bundle had been put in the post on that Friday, with second class post there was a very significant risk that it would not have arrived on the Monday 4th June or even by 5th June 2018. Mr Powell was unable to provide any

further evidence about the date when the Notice would have arrived. He offered his opinion that the Notice would have arrived on 4th June 2018 but was unable to substantiate that by reference to any evidence apart from his assumption that the bundle of document would have been posted on 1st June 2018.

56. The Tribunal turns to consider the Respondent's records of the date and time of creation of the covering letter said to have accompanied the Notice. There is a screenshot of the covering letter said to have been sent to the Applicant on 1st June 2018, with what is said to be the date and time of creation of the letter on the right hand side of the page when the page is viewed in landscape format. This is referred to in paragraph 13 of the Statement of Case. What this record appears to show is that the covering letter was created (or finished) at 12.14 on 1st June 2018.

57. Mr Powell confirmed that the Respondent had no other evidence of the date the letter and bundle was posted. There was no other evidence of the envelope or how it was addressed such as the creation of label, although subsequently a franking machine appears to have been used by the Respondent for other correspondence. Mr Powell confirmed it was not the Respondent's practice to send documents such as the Notice by recorded or special delivery.

58. The Tribunal finds on the balance of probabilities that the Notice and covering letter were posted. The Tribunal cannot be satisfied that the Notice was posted on 1st June 2018 even though the record of the screenshot gives 1st June 2018 as the date of creation of the covering letter. It appears that bundles for all 4 flats were sent at the same time and were described as "large" in the Respondent's records. It is unclear whether they would have fitted into post-box or would have had to have been taken to post office. It is unclear whether they would have been taken to a post-box (if that was done) and whether the Notice was posted before the last post time on 1st June 2018.

59. Subsequently the Applicant said in his e-mail to Mr Powell of 08 November 2018 at [62] that he only received the letter of 1st June 2018 by e-mail on 2nd November 2018. A copy of that e-mail and that letter was not in any of the Bundles before the Tribunal. However, there is reference to such a letter from the Respondent being sent by e-mail to the Applicant in the screenshot of the computer records produced by the Respondent towards the end of its bundle (opposite the copy of the 1st June 2018 letter), referred to in paragraph 14 of the Statement of Case. There was no dispute about the dates or content of the e-mail of 2nd November 2018.

Date of receipt of the Notice by the Applicant

60. The Applicant's case is that he only became aware of the requirement for section 20 work on 22nd September 2018 after returning home to his address in Farnborough from the Eastbourne flat to find the Notice of

Estimates dated 12th September 2018 at [53—54]. That is the effect of his skeleton argument of 31 12 2018 at page [70].

61. The Applicant also refers to his e-mail to Magdalena at the Respondent sent on 07 07 2018 at [50] in which he said "I understand from a conversation with [the tenant] in Flat 1 that she is trying to instigate major rendering work to the back of the house. She advises me that there was a bundle in the post to me and that all occupants of the building would all be expected to contribute to this major work…can you confirm what is happening here please as I see no necessity for this at all". (Tribunal's insertion).

62. The e-mail the Applicant sent on 22nd September 2018 at [56] said that he had just got back from Eastbourne and received the letter of 12th September 2018 and complained that he saw no priority in carrying out the works proposed to "the back of the property" but thought the internal areas needed "attention". The Statement of Estimates and the covering letter sent with it are at [51—53]. The Statement of Estimates referred to a Notice of Intention on 1st June 2018 and a "notice of proposals" dated 4th July 2018. The Applicant's e-mails did not at that stage complain about non-receipt of the earlier notices. They simply say that there was no necessity for external works and also complain about the discrepancy between his homebuyer's surveyor's report and the apparent need for the work.

63. The Tribunal's task on this issue is to assesses the evidence and decide when the Notice was likely to have been received by the Applicant on the balance of probabilities. Mr Powell and the Respondent very carefully and properly did not suggest that the Applicant was deliberately providing an incorrect version of when he received the Notice.

64. The Tribunal finds that on the balance of probabilities the Notice did arrive at the Applicant's Farnborough address on 7th or 8th June 2018, taking account of second class post.

65. The Tribunal is not suggesting for a minute that the Applicant is telling an untruth when he says he first became aware of the Notice when he received the notice of Estimates. The Tribunal finds on balance that it is most likely that the Appellant has misremembered when he received the Notice and the Bundle having regard to the passage of time. In particular, if one examines the Notice of Estimates and the covering letter of 12th September 2018 at [51-55] it is apparent there is no reference to the works to the back of the property in that document. It follows that the Applicant must have appreciated that the estimates referred to the back of the property. Although the Applicant is not experienced in statutory consultation, it is apparent from his letter of 1st February 2019 at [74] that he did consult a solicitor at about that time and 2 days later in his e-mail of 24th September 2018 at [57] was asking for "the process [to be] repeated".

66. The Applicant is an intelligent person capable of expressing his views in writing. If he had not received the Notice of Intention and other documents referred to in the Notice of Estimates the Tribunal would have expected him to have expressed himself differently in his e-mails to the Respondent of 22nd and 24th September 2018.

The Notice of Estimates

67. This Notice of 12th September 2018 at [52-53] incorrectly stated:

a. that the 30 day consultation period ended on 15th September 2018.
b. that there had been a Notice of Proposals given on 4th July 2018 (No such notice was given or referred to).

These errors were not complained of by the Applicant and the Tribunal addresses them no further for the purpose of this determination.

Relevant legal issues concerning the Notice

68. The date of the Notice for the purpose of the 2003 Regulations is the date that the notice is received by the recipient not the date of posting: *Trafford Housing Trust Limited v Rubinstein* [2013] UKUT 0581.

69. The presumption that the Notice was a document, which unless the contrary is proved, is deemed to have been given at the time at which the letter would be delivered in the ordinary course of post (section 7 of the Interpretation Act 1978) is of no relevance here. For this presumption to apply there would need to be evidence that the Notice was properly addressed, of pre-paying and posting. There is no satisfactory evidence of posting from Mr Powell or the Respondent. The Tribunal has been compelled to reach findings about the date of posting in the absence of such evidence.

70. Neither the Notice nor the Statement of Estimates referred to the possible need for supervision or management costs in relation to the works by the Respondent or CCL, estimates or possible costs for those services. Mr Powell described the need for Mr Goubel (or someone doing this kind of work) to supervise contractors, liaise with contractors and lessees and if necessary call in a surveyor to do other works or give advice whilst the work was ongoing. Examples given were the possible need to call in asbestos contractors if asbestos was found or if something unexpected was found during the course of the works.

71. It is clear from Mr Powell's oral evidence and paragraph 17 of the Statement of Case that this role was considered to be an essential component in the satisfactory completion of the proposed works and in the Tribunal's view an inherent part of the cost of the proposed works to the rear elevation.

Compliance with the 2003 Regulations

72. The Tribunal concludes:

a. The Notice did not give 30 days' notice (the relevant period) for receipt of observations as it arrived after 4th June 2018
b. The Notice of Estimates did not give 30 days for receipt of observations as it stated the period ended on 15th September 2018
(contrary to paragraph 11(1) of the part II of the Fourth Schedule)
c. The Notice failed to describe in general terms the supervisory or management works envisaged as paragraph 2 of the part II of the Fourth Schedule) required.

d. The Notice of Estimates did not give any estimates or details for the supervisory or management works said to be 10% of the value of the works plus VAT. The cost and nature of these services which were part of the qualifying works only became apparent from "the section 20 invoice" and accompanying calculation dated 19 10 2018 at [5960]. The precise nature of the works envisaged by the "management fee" only became clear at the hearing of this application. This was a breach of paragraph 11(5) of the Fourth Schedule to the 2003 Regulations. This issue is relevant to the validity of the section 20 Invoice addressed.

The section 20 invoice

73. As is apparent from the Tribunal's earlier findings, this invoice at [5960] was dated 19th October 2018 and was expressed to be due for immediate payment. The section 20 invoice included a charge of £2550.00 plus VAT for a "management fee" in respect of the works. The need for such a fee or its amount had not been mentioned previously in any of the Notices or correspondence.

74. Mr Powell was asked why the monies were demanded at that stage and gave evidence to the effect that it was necessary for the Respondent to take" a hard line" when payment was disputed. This was a reference to the Applicant's denial that he had received the Notice of Intention in his e-mail of 8th November 2018 at [62].

75. Mr Powell expressed this as the Respondent's rationale for threatening to issue proceedings in the County Court without further reference if payment was not received by 15th November 2018 in Mr Powell's e-mail of 08 November 2018 at [62].

The provisions in the lease relevant to the section 20 Invoice

76. Under clauses 5(5) of the Lease the Respondent covenanted subject to the repairing covenant in clause 5(4) "as often as reasonably required

decorate the exterior of the building and common parts in such manner as shall be agreed between the lessees of the units comprised in the Building and the managing Agents for the time being in the manner in which the same was last decorated or as near as thereof as circumstances permit and in particular will paint the exterior part of the Building usually painted with two coats of good quality paint at least once every four years"

77. By the relevant parts of clause 5(4)(i) of the Lease the Respondent as landlord covenanted to maintain repair redecorate and renew the main structure and in particular the external and load bearing walls,,,,roof and all parts of the Building not comprised in any lease".

78. By clause 5(10) the Respondent was obliged to "use its best endeavours to maintain the annual maintenance charge at the lowest reasonable figure consistent with the due performance and observance of the obligations hereunder".

79. The Respondent's costs of carrying out those obligations were chargeable as the yearly maintenance charge payable in advance under clause 1 (reservation of rents) and part II of the Fourth Schedule.

80. By the relevant part of part I of the Fourth Schedule the Applicant as lessee was required to pay one quarter of the Respondent's "expenses outgoings and matters incurred by the landlord in carrying out the obligations listed in part Ii of the Fourth Schedule (including the repairing and decorating covenants in clauses 5(4)) and 5(5). That sum was payable in advance initially in the sum of £400 or "such as amount as the landlord or its agent shall in their reasonable discretion specify on account of the said share of the said costs expenses outgoing and matters aforesaid".

81. The Tribunal considered carefully whether it was a reasonable and rational exercise of the contractual discretion to demand a quarter of the cost of the works (£25,550.00 being the lowest tender) in advance of the works commencing. The Tribunal was very nearly persuaded that the existence of a dispute as to the receipt of a Notice was not a relevant factor or that it was not a rational exercise of the Respondent's contractual power to demand the entire cost of the works on 19 10 2018, when there was no evidence the works were imminent and there had been no prior budget estimate or programme of works. The rationality of this demand was borderline in the sense that although the Specification described the works as "Planned" and "Cyclical", Mr Powell's evidence was that the works were a response to demand from the lessee. There was no evidence of planning or budgeting for cyclical works by the Respondent or CCL. The works carried out in 2016 to the front elevation were a response to external pressure. However, the Respondent has just tipped the balance and persuaded the Tribunal that it was a rational approach for the purpose of Part I of the Fourth Schedule to the Lease necessary to obtain funding for

the works before they commenced and to respond to concerns expressed by the lessees about the state of repair and decoration of the rear elevation which were within the repairing and decorating covenants in clauses 5(4) and 5(5) of the Lease.

82. Different considerations apply to the 10% management fee for the works. As mentioned as above, the 10% fee was not the subject of the Notice of Intention or the Notice of Estimates. It was first mentioned in the section 20 Invoice on 19 October 2018 at [59-60]. The Specification referred to the contract administrator being Vivid the surveyor and made no mention of an additional management fee.

83. When asked about what was included in the management fee of 10% plus VAT, Mr Powell said this would include all liaising with lessees by e-mail, and contractors and photographs and the cost of any surveyor if needed. He also mentioned that Mr Goubel would inspect the works. When asked if this arrangement had been reduced to writing or there was a contract for management by CCL (or other managing agents), Mr Powell said there was not. He was not able to point to any written confirmation of this fee or the basis for the fee either before or after the demand for the fee in the section 20 invoice was made. As mentioned, paragraph 7 of the Statement of Case and the section 20 invoice suggested the management fee was payable to the Respondent not CCL.

84. In the Statement of Case (paragraph 17) Mr Powell said that prior to starting the work one of his colleagues "will engage with all leaseholders and arrange a meeting at the building with the contractors so that the leaseholders can give their input and raise questions." And "the contractors will not receive their final payment until the leaseholders are satisfied with the quality of the work". This tends to suggest that the management fee is for contract administration duties as it would only be the contract administrator who could certify final payment under the JCT contract envisaged by the Specification.

85. Mr Powell said 10% was a reasonable fee for providing a personal service to a good level. He did not assert that Mr Goubel had any particular qualifications or expertise in management and conceded that if a surveyor was required, a surveyor would be obtained as part of the management cost.

86. When asked to whom the 10% management fee would be paid, Mr Powell after some hesitation, said CCL was entitled to the fee.

87. The Tribunal was not persuaded that it was a reasonable exercise of the contractual discretion in the Fourth Schedule to the Lease to request the 10% management fee in advance some 4 months before work commenced. There was in practice no imminent liability to a third party for the fee. CCL was effectively an arm of the Respondent landlord. On the evidence put

before the Tribunal, there had been no prior notification that such a charge would be made under the terms of the Lease.

88. Clause 5(5) of the Lease envisaged an attempt at agreement as to the manner of redecoration and clause 5(10) envisaged an attempt to keep the annual maintenance charge at the lowest reasonable figure consistent with due performance and observance of the covenants. The on account demands earlier the same year were running at £693.88 for each 6 months: see the invoice of 13 04 2018 at [64]. The earliest the lessees would have known of the cost of the works would have be 12th September 2018 (the date of the Notice of Estimates) partly because of the absence of a programme of works, budget or Estimate.

89. Mr Powell's evidence that it was the Respondent's practice to listen to feedback from lessees which they usually received after the Notice of Estimates. His oral evidence understood the importance of the consultation process and the significance and of that consultation. That process could not be implemented if the lessees were not notified of the 10% management fee until the invoice arrived.

90. The Tribunal finds that the absence of earlier warning or notice of the amount and services provided by the management fee, or the identity of the party performing the services means that it was not a reasonable exercise of the contractual discretion to demand the entire cost of the 10% management fee in advance in addition to the cost of major works.

91. Mr Powell's evidence confirmed in his letter to the Applicant of 9th January 2019 at [121] was that it was the Respondent's "policy to involve leaseholders throughout the process". The omission to provide written confirmation of the management fee at an early stage until the notice of Estimates and then to demand payment in full just over a month after the figure was ascertained was not consistent with such a policy. The Respondent was given the opportunity to explain what charges might be payable when the Applicant enquired about "major rendering work to the back of the house" in his e-mail of 07 07 2018 at [50]. The Respondent did not deny receipt of that e-mail or that it went unanswered, the Applicant having drawn attention to this in his written comments of 1st February 2019 at [74]. The Tribunal finds that cost of the management fee charged to the Applicant £765.00 was not reasonably incurred at that stage on 19th October 2018.

92. For similar reasons the omission to provide advance notice of the management fee or the scope of the services included means that the fee was not reasonable to incur in advance of the works commencing within section 19 of the 1985 Act. In this respect the Tribunal does not find that the Respondent reasonably incurred the liability or costs for management fees in the absence of a written contract specifying which services were included or not included and whether (as remains unclear) the

management fee was in addition to or in substitution for the cost of a contract administrator provided in the Specification.

93. In reaching this conclusion the Tribunal has derived some assistance from the decision in *Waaler v Hounslow London Borough Council* [2017] 1 W.L.R. 2817 which observed:

> "whether costs were "reasonably incurred" within the meaning of section 19(1)(a) of the Landlord and Tenant Act 1985 , as inserted, was to be determined by reference to an objective standard of reasonableness, not by the lower standard of rationality, and the cost of the relevant works to be borne by the lessees was part of the context for deciding whether they had been so reasonably incurred; that the focus of the inquiry was not simply a question of the landlord's decision-making process but was also one of outcome; that, where a landlord had chosen a course of action which led to a reasonable outcome, the costs of pursuing that course of action would have been reasonably incurred even if there were a cheaper outcome which was also reasonable; that, further, before carrying out works of any size the landlord was obliged to comply with consultation requirements and, inter alia, conscientiously to consider the lessees' observations and to give them due weight, following which it was for the landlord to make the final decision; that the court, in deciding whether that final decision was reasonable, would accord a landlord a margin of appreciation; that, further, while the same legal test applied to all categories of work falling within the scope of the definition of "service charge" in section 18 of the 1985 Act, as inserted, there was a real difference between work which the landlord was obliged to carry out and work which was an optional improvement, .."

94. In the absence of written contract with CCL, specifying the services to be provided or agreement from the lessees, the Tribunal is far from persuaded that the services of Mr Goubel (as opposed to the services of a contract administrator) were reasonably incurred for the purpose of demanding payment in advance.

95. In the *Waaler* decision at paragraph 45 the Court of Appeal noted as follows in relation to discretionary decisions to demand service charge under the Lease

> "In many cases financial impact could no doubt be considered in broad terms by reference to the amount of service charge being demanded having regard to the nature and location of the property and as compared with the amount demanded in previous years. Reasonable people can be expected to make provision for some

fluctuations in service charges but at the same time would not ordinarily be expected to plan for substantial increases at short notice."

96. The Tribunal accepts *Waaler* was *primarily* addressing the landlord's decision to make improvements and not as here the decision to demand sums in advance or incur cost for works within the landlord's repairing and decorating obligations. Making allowance for this, the decision to require an on account payment which had not been the subject of previous consultation or notification is of a similar order.

97. Whether the same considerations would apply to the decision to make a service charge demand for a management fee after, the services had been performed and the fee had been incurred is not for the Tribunal's determination. The Tribunal is not reaching any finding about whether the management fee will be payable or will have been reasonably incurred if charged after the works have been completed and duly certified.

Should the leak to the rear elevation have been the subject of an insurance claim?

98. There was very little evidence about the cause of a leak. There was reference to a damp patch on the basement flat rear side wall in the Applicant's letter of 31 12 2018 at [71] where he referred to the photograph on page [32]. Assuming, without deciding that the buildings insurance policy would have responded to a claim for damage caused by such a leak, the Tribunal is not persuaded that the cost of repair of the leak or of the external rendering (which were within the landlord's maintenance and repairing covenants) would have been paid by insurers. Most such policies contain conditions requiring the property to be kept in a reasonable state of repair. Even if some of the costs of repair would have been met from such a claim on the policy, the Tribunal is not persuaded that the cost of external works would have been reduced by any measureable or significant amount.

CHI/21UC/LSC/2019/0005

REASONS

99. The Applicant seeks a determination pursuant to Section 27A of the Act as to the amount of service charges payable by him in respect of management costs incurred in relation to the provision of the asbestos report undertaken by 4Site Services for the Respondent dated 31st April 2017.

100. The Applicant's Bundle for this application consisted of 129 numbered pages. The Respondent's unnumbered bundle consisted of Statement of Truth (3 pages) and 5 pages of documents and letters.

101. The issues clarified at the outset of the hearing with the parties were:

a. Is the cost of asbestos report charged to the year ended March 2018 service charge reasonably incurred? Is the failure to secure access to parts of the Building relevant to this?
b. Is the cost of asbestos report charged to the year ended March 2018 service charge of a reasonable standard?
c. Is the management fee charged for year ended 2018 reasonably incurred or of a reasonable standard because of the failure to secure access to parts of the Building for an asbestos survey? –
d. Is the management fee charged for year ended 2018 reasonably incurred on account of failure to respond to questions about this?

Some of these issues appeared in the application notice and some appeared from the Applicant's letter of 25 February 2019 at [73-74].

Relevant background

102. On 13th April 2017 the Building was inspected by Thomas Finn of 4site Consulting Limited for the purpose of compiling an Asbestos management Survey report and register. On the same day that inspector issued a written report, a copy of which is found at pages [19 – 52] ("the report"). It is common ground such a report is a statutory requirement. The cost of that report was charged to service charge in year ended 24 March 2018 resulting in a charge to the Applicant of £74.10 as part of his contribution to service charge costs under the Lease.

103. The need for such a report and register is not in issue. The report was produced to the Applicant's solicitor as part of the pre-contract enquiries process.

104. The report noted at least two areas where the Inspector was unable to gain access: the rear of the Building (see pages 12 -13 of the report) at [30-31], the roof (see page 14 of the report) at [32], the soffits at the front external elevation (see page 15 of the report) at [33]. These are also summarised at page 10 of the report. Where access could not be obtained the report has notated those areas as Presumed Asbestos and recommended a further inspection for Asbestos on 13 April 2018. It was not in issue that no inspection took place on 13th April 2018 or thereafter.

105. Mr Powell's evidence was that the Respondent did not intend to arrange a further inspection as this was not thought necessary. If any suspected asbestos is seen in the course of the external decoration works this would be investigated further whilst the scaffold is in place. The accuracy of this evidence was not challenged by the Applicant who did however disagree with the thinking that left the report in its current state.

106. The Applicant contended the report was unhelpful because of the references to areas of the Building where access could not be obtained at the time of the inspection in April 2017. He believed the report would lead prospective purchasers to believe that asbestos was or might be present. He also believed that a further report was necessary. He argued that the manager should have arranged access for the Inspector and the omission to arrange access was a failure of the agent which meant that the value of the services received by him was below an acceptable level. This should mean, he argued, that the element of service charge which reflected the fee paid for managing agent, should be reduced to reflect his view of the value of the service provided.

107. There was some support for the Applicant's argument in connection with the Inspector's omission to view the rear of the Building. The rear of the Building is bounded by a high wall at ground level depicted in the photograph at page [49] of the Applicant's bundle in the application numbered 0108. Access can only easily be obtained through the basement flat. The Appellant's contention that the Inspection should have taken place at a time when the basement was available to be used as a mean of access and that should have been arranged through the Respondent's powers of entry under the Lease, has some attraction.

108. However, the 3 other areas where the Inspector reported he was unable to dismiss the possibility of asbestos by taking a sample were a cowl to the rear of the Building (see [31]), the roof area at the top of the Building and the soffits at high level (see [32-33]). These areas would have required scaffolding for an inspection, at least for external inspection.

109. The Respondent through Mr Powell indicated that it did not propose to arrange for a further inspection as the risk of the existence of asbestos where asbestos was presumed to be present was low.

110. On this issue the Tribunal accepted that access could most easily and practicably be obtained to the areas where asbestos was presumed to exist by scaffold. The Tribunal also accepted that the decision to alert the contractors who were currently on site to the possible presence of asbestos and if necessary arrange further inspection or remediation was within the range of reasonable response of a competent managing agent or manager.

111. The Tribunal's view is that it is common for such reports to contain exclusions or qualifications and that it is not always practical or economic to arrange access to areas which are difficult to inspect from ground level, although this would be preferred in some situations.

112. The Tribunal is unable to accept the contention that the report *taken as a whole* was of reduced value or that the managing agent's services in procuring or arranging the inspection which led to that report were below an acceptable standard. Even if access had been arranged to the ground

level rear area through the basement flat, the report would have been qualified in a similar manner.

113. For similar reasons the Tribunal does not accept the contention advanced by the Applicant in a slightly different way that the cost of the report was not reasonably incurred or of a reasonable standard.

Reimbursement of application and hearing fees

114. The Applicant did not seek an order for reimbursement of these fees in either application. No order will be made under this head.

Section 20C of the 1985 Act

115. The Applicant applied for an order to this effect in each application. Section 20C of the 1985 Act provides in its material parts (immaterial amendments omitted):

> "(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 or leasehold valuation tribunal, or the Lands 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."
>
> .....
>
> "(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".

116. Mr Powell said that the Respondent would not seek to charge any of the cost of either set of proceedings to service charge. In the circumstances the Tribunal finds it is just to make an order preventing any of the costs of these proceedings from being charged to service charge.

117. The Tribunal makes no determination on the issue whether such costs are recoverable as service charge under the terms of the Lease.

Litigation costs

118. Mr Powell said that the Respondent would not seek to charge any of the cost of either set of proceedings to the Applicant by way of administration charge. The Tribunal has the power to make an order restricting or extinguishing the Applicant's liability to pay any litigation costs of these Tribunal proceedings. The Tribunal's power to make such an order was introduced by paragraph 5A of the Schedule 11 to the 2002 Act with effect from 5th April 2017.

119. The relevant parts of paragraph 5A of the Schedule 11 to the 2002 Act provide:

> "(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"
> .....
> First-tier Tribunal proceedings
> The First-tier Tribunal"

120. In the circumstances the Tribunal finds it is just to make an order preventing any of the costs of these proceedings from being charged to the Applicant by way of an administration charge.

H Lederman
Tribunal Judge
10 April 2019

RIGHTS OF APPEAL

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case.

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

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

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

Appendix of relevant legislation

Landlord and Tenant Act 1985 (as amended)

Section 18

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

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

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

Section 19

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

and the amount payable shall be limited accordingly.

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

Section 27A

(1) An application may be made to the appropriate tribunal for a determination whether a service charge is payable and, if it is, as to -

(a) the person by whom it is payable,
(b) the person to whom it is payable,
(c) the amount which is payable,
(d) the date at or by which it is payable, and (e) the manner in which it is payable.

(2) Subsection (1) applies whether or not any payment has been made.

(3) An application may also be made to the appropriate tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to -

(a) the person by whom it would be payable,
(b) the person to whom it would be payable,
(c) the amount which would be payable,
(d) the date at or by which it would be payable, and (e) the manner in which it would be payable.

(4) No application under subsection (1) or (3) may be made in respect of a matter which -

(a) has been agreed or admitted by the tenant,
(b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
(c) has been the subject of determination by a court, or
(d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

(5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

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.