FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	**CAM/00MC/LIS/2020/0014** **CAM/00MC/LSC/2020/0015** **CAM/00MC/LDC/2020/0032**
HMCTS code (audio, video, paper)	:	**V: CVPREMOTE**
Property	:	**Tetbury Court, Prospect Street, Reading, Berkshire RG1 7TR**
Applicants	:	**1. John Francis Smith (No. 35)** **2. James Dale (No. 18)** **3. Alan Cossey (No. 36)** **4. The other 16 leaseholders named in Schedule 1, represented by Amanda Prior**
Respondent	:	**June Baker (acting by her attorney Jeremy Baker)**
Representative	:	**Womble Bond Dickinson (UK) LLP**
Type of applications	:	**(1) Liability to pay service charges (between the above parties); and** **(2) Dispensation with consultation requirements (between the Respondent and all leaseholders)**
Tribunal members	:	**Judge David Wyatt** **Miss M Krisko BSc (Est Man) FRICS** **Mr J E Francis QPM**
Date of decision	:	**28 April 2021**

DECISION

Covid-19 pandemic: description of hearing

This has been a remote video hearing. 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 we were referred to are described in paragraphs 8 to 11 below. We have noted the contents.

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Key decisions of the tribunal

The tribunal makes the findings set out below. In particular:

(1) The tribunal determines that the following service charges for historic incurred costs were not payable by the Applicants, or they are entitled to set off the following against service charges:

Year	Item	Total service charge (£)	Per Applicant (1/35th) (£)
2015	External redecoration costs	7,200	205.71
2016-17	Scaffolding	17,168.26	490.52
2019	Compensation	324	9.26
2019	Waste management	530.36/914.86*	15.15/26.14
Total			**720.64/731.63**

* If the total waste management cost of £11,205.36 does not include the separate invoice for £384.50 considered in paragraphs 86 and 89 below, the total reduction is £914.86. Otherwise, it is £530.36.

(2) The tribunal determines under section 20ZA of the Landlord and Tenant Act 1985 to dispense with all the consultation requirements in relation to the major works to the residential blocks and the garage block.

(3) In relation to those major works, the tribunal determines that the estimated costs of £382,119.87 (inclusive of professional fees and VAT) are reasonable, which would equate to a service charge of £10,917.71 per Applicant (1/35th). However, each Applicant is entitled to set off against service charges the minimum damages set out in Schedule 1 to this decision. Accordingly, the service charge payable by each of the Applicants in relation to the estimated major works costs is as set out in the fifth column of Schedule 1, subject to the appropriate further deduction as set out at (1) above in relation to the historic service charges.

(4) The Respondent shall by **12 May 2021** send a copy of this decision to all leaseholders at Tetbury Court. On or after **25 May 2021**, the tribunal will determine the applications under section 20C of the Landlord and Tenant Act 1954 and paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002, taking into account any written submissions provided by the parties in accordance with paragraph 122 below.

REASONS

Applications

1. The Applicants sought determinations under section 27A of the Landlord and Tenant Act 1985 (the "**1985 Act**") as to whether certain service charges were payable by them. The first application was made by John Francis Smith in March 2020 about proposed major works. These were described as remedial works to the buildings and garage block with estimated costs of more than £10,000 per leaseholder. Mr Smith alleged the relevant areas had not been properly maintained, damage was caused by water ingress over a long period of time and as a result (amongst other things) the remedial costs were higher. Mr Smith also (for himself and the other leaseholders at Tetbury Court) sought orders: (a) to limit any recovery of the Respondent's costs of the proceedings through the service charge, under section 20C of the 1985 Act; and (b) to reduce/extinguish liability of the leaseholders to pay any administration charge in respect of litigation costs, under paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 (the "**2002 Act**").

2. The judge gave initial case management directions in May 2020, requiring the Respondent landlord to give notice of the application to all leaseholders. In response, James Dale applied to join the proceedings. Jonathan Baker (one of the Respondent's sons) wrote to the tribunal to apply on behalf of Siger Limited (No.5) and Hawthorn Crow Limited (Nos. 7 and 16) to join the proceedings as leaseholders. These companies were not joined to these proceedings because they did not provide any statement of case when directed to do so. Antonio Mariano (No. 34) gave his name and consented to the applications made by Mr Smith under section 20C and paragraph 5A (as described above) on his behalf.

3. The leaseholders represented by Ms Prior made a separate application under section 27A of the 1985 Act, seeking service charge determinations in respect of certain costs for the years from 2015. Their application raised the same issues as the original application in respect of the proposed major works but additionally (in broad summary): (a) queried whether certain repair costs were reasonably incurred in the years from 2015; (b) contended (in effect) that damages should be set off against the service charges for every year from 2017 because leaseholders had been unable to use their garages since 23 December 2016; and (c) queried insurance costs in the later years, and company secretarial expenses. These leaseholders also made applications for orders under section 20C and paragraph 5A.

Procedural history

4. The first case management conference, on 20 August 2020, was attended by Mr Smith, Ms Prior, Mr Dale, Mr Joyce (the Respondent's solicitor) and Jeremy Baker (another of the Respondent's sons). Mr Joyce had

already explained that the Respondent had become seriously unwell in March 2020. Mr Baker said an application had been made through a separate firm of solicitors to register a lasting power of attorney for property and financial affairs. Directions were given to enable the parties to prepare as far as possible for a substantive hearing, before a further case management conference on 29 October 2020. To that end, the directions given on 20 August 2020 required disclosure and inspection of roof inspection records and other documents by specified dates in September 2020, so that Ms Prior could finalise her statement of case on behalf of those she represented. Mr Joyce confirmed in early September 2020 that the power of attorney had been registered.

5. Ms Prior had difficulties obtaining the requisite documents from the managing agents, and asked to see additional documents, including all property inspection reports sent by the managing agent to the landlord. The judge gave an extended deadline of 25 September 2020 for disclosure of the original documents and directed that best endeavours be used to disclose by 1 October 2020 the additional documents requested by Ms Prior. On 7 October 2020, Mr Joyce wrote to assert that private site reports made by the managing agent (and other documents requested by Ms Prior, including instructions from the landlord) were: "*outside the scope of the disclosure directions and/or privileged. Any such documents will not be disclosed and any requests for the same are inappropriate*".

6. The same parties attended the next case management hearing on 29 October 2020. As requested, the judge gave further directions for provision of information about the (then) proposed auction sale of the freehold and disclosure of documents. The tribunal office was later informed that the freehold had been withdrawn from the auction. The judge gave directions for the landlord's case and preparation for the hearing, which was listed for 20 January 2021. On 25 November 2020, Ms Prior sent an addendum to her statement of case, producing further documents and making further submissions. The judge directed these be included; the only substantive change was a simple extension of the existing claim in relation to the garages because in November 2020 the Respondent had locked the gates to the garages.

7. On 18 December 2020, the Respondent applied for a determination to dispense with the statutory consultation requirements for major works to the residential blocks following a condition survey and works to the garage block following a structural survey. They contended that the leaseholders had suffered no prejudice from any non-compliance with the consultation requirements and there was a real risk of deterioration, increased costs and inconvenience to residents if the work was delayed by a further consultation exercise. On 18 December 2020, the judge gave directions requiring the Respondent to serve the dispensation application, key documents and directions on each leaseholder. Mr Joyce certified that these were served on 23 December 2020. The directions required any leaseholder who opposed the dispensation

application to respond by 7 January 2021, providing a reply form for them to use. The dispensation application was opposed by Mr Smith (who produced written objections with his reply form), the Applicants represented by Ms Prior (who produced a written response to the application with their reply form) and Mr Dale (who lodged his reply form late, on 16 February 2021, but did not seek to rely on any additional documents).

Documents and hearing

8. The Respondent produced main document bundles of 2,459 sequential pages for the main applications, and a supplemental bundle of 185 pages for the dispensation application. In view of the volume of material produced in the main bundles and after consultation with the parties, the hearing was moved to 10 and 11 March 2021. On 10 February 2021, the Applicants represented by Ms Prior produced an amended response to the dispensation application (with enclosure) and a signed copy of the report from Andrew Colangelo FRICS FCABE MFPWS IMaPS which had already been included in the main bundles in draft format. The judge gave permission for those amendments and for the expert evidence in that report to be adduced.

9. At the hearing on 10 and 11 March 2021, the first and second Applicants, Mr Smith and Mr Dale, attended and represented themselves. Mr Smith sought when making his submissions to provide information about various matters. We allowed him to do so, but (as was pointed out at the hearing) what he said carried less weight because he had not produced a witness statement so had not been exposed to cross-examination. Shortly before the hearing, Alan Cossey (No. 36) had contacted the tribunal office and confirmed he wished to apply to be joined as a party. We raised this at the start of the hearing. Since none of the parties had any objections, we joined Mr Cossey as an additional Applicant, as requested. He confirmed he did not wish to speak at the hearing, only to rely on the documents and submissions from the other Applicants, but attended to observe and answer questions. The other Applicants were represented by Robert Bowker of Counsel. Ms Prior attended and was called to give evidence for them. The Respondent was represented by Ellodie Gibbons of Counsel. Simon Gwynn of John Mortimer Property Management Limited (now part of the Encore group), which has acted as managing agent for the landlord since about 1985, and John Staves BSc (Hons) CEng MIStructE of Michael Aubrey Partnership Ltd, were called to give evidence for the Respondent. We are grateful to Counsel for their assistance, generally and in particular with identifying the key documents and avoiding the many duplicates in the volume of material produced in the main bundles.

10. In the lead up to the hearing, Mr Smith, Mr Bowker and Miss Gibbons produced skeleton arguments and a bundle of authorities. Ms Prior produced an additional bundle of 55 pages, with copies of invoices

obtained from the managing agents which had been omitted from the main bundles. As directed, she also produced copies of her witness statement and the Land Registry entries for the freehold title. During the hearing, Mr Bowker explained that Bridget Albano (No. 15), who had been represented by Ms Prior, had recently sold her flat and was applying to withdraw from the proceedings. Miss Gibbons had no objections and we consented to the withdrawal.

11. After hearing from the parties, we gave permission to adduce the expert evidence in the reports from Mr Staves (already in the main bundles) and in his answers to questions at the hearing. This was not opposed, on the basis that he had read rule 19 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 (the "**Rules**"), confirmed he understood his duty in Rule 19(1) and would comply with it, and confirmed he believed the facts stated were true and the opinions he expressed were correct. He confirmed these matters and told us he had over 30 years' experience as a structural engineer. We assess his evidence bearing in mind that his instructions were not disclosed and (unlike the evidence of Mr Colangelo) it was not given in an expert report in the form required by Rule 19. During the hearing, the Respondent sent to all parties and the tribunal an asbestos report dated 4 June 2007, which had not previously been disclosed. We gave the Applicants permission to make written submissions on this report by 5pm on 12 March 2021. After the hearing, Ms Prior confirmed that the leaseholders she represented, and Mr Smith and Mr Dale, had decided not to make such submissions, apart from inviting us to consider the document and the timing of its disclosure when reaching our decision. We have done so.

12. There was no inspection. The directions given by the judge had noted that they considered an inspection was not required, but relevant photographic evidence would be considered if produced in good time. No party requested an inspection and photographs were produced in the bundles. We are satisfied that an inspection is not necessary to determine the issues in this case.

Basic law, the property and the leases

13. The main relevant statutory provisions are set out in Schedule 2 to this decision.

14. The Respondent landlord owns the freehold title to Tetbury Court, and has owned it since 1983, granting most of the relevant leases. The Applicants acquired their leases at the times set out in Schedule 1.

15. Tetbury Court comprises 35 purpose-built flats (Nos. 1 to 36, without a 13) in three blocks, two of which are linked, with a separate garage block containing 35 garages and a bin store. The relevant flats are studios or have one or two bedrooms. Some of the flats extend over two storeys. Mr Bowker said in his skeleton argument, and it was not disputed, that:

(i) nine of the flats are held on a 99-year lease dated 1 January 1975 (so have about 53 years unexpired); and

(ii) the other flats are held on 125-year leases with various dates from 2004 to 2017, other than one lease which was recently "extended" under the 1993 Act (so all have at least 90 years unexpired).

16. We were provided with sample forms of lease, old and new. As summarised below, the differences between them do not affect the issues we need to decide in this application. They require the landlord to provide services and the leaseholder to contribute towards their costs by way of a variable service charge. Each lease demises a flat and a garage in the block.

17. The lease of No. 35 was surrendered and re-granted to Mr Smith in 2007, so is in the new form. The Demised Premises are defined as the flat and the garage, including any plastered coverings but generally excluding any parts above the surfaces of the ceilings or below the surfaces of the floors and any main timbers and joists. The landlord covenants in clause 5.5 to: "*…maintain and keep in good repair and condition … the main structure of the Building including the principal internal timbers and the exterior walls and the foundations and the roof thereof with its main water tanks main drains gutters and rain water pipes … the Common Parts…*" and other areas. The "*Building*" is defined as the buildings of which the Demised Premises form part, and specifically includes the garages.

18. The leaseholder covenants in clause 4.4 to pay the Interim Charge and the Service Charge as provided in Schedule 5. Each leaseholder's share of Total Expenditure (incurred by the landlord in carrying out their obligations under clause 5.5 and any other costs and expenses reasonably and properly incurred in connection with the Building, including the cost of managing agents) is fixed at 3%. Because there are 35 flats, the Respondent charges less than this. It simply divides total expenditure by 35, so each leaseholder pays about 2.85%. The Accounting Period under the leases is 1 October to 30 September in the following year. Under Schedule 5, the Interim Charge is to be paid by equal payments in advance on 1 April and 1 October in each year, in the sum the landlord or their managing agents specify as a fair and reasonable interim payment. The leaseholder is to pay their proportion of any shortfall within 28 days of service of a certificate signed by the agents under paragraph 6 of Schedule 5.

19. The sample old-form lease of No.35 was in substantially the same terms except that clause 5(5)(a)(iv) of the old form was not included in the new form. This was the landlord's covenant to maintain and keep in good repair all other parts of the Building not included in the specific repairing obligations or in any demise. This difference is not said to affect any of the issues in these proceedings.

Problems with the blocks and the garages

20. The development was probably built in the 1960s. Each residential block is three storeys high and has a flat roof, surrounded by a low parapet. There are six stairwells. The garage block is on a sloping site, built over two levels, with hollow concrete sections (described as "planks") forming the floor of the upper level and the ceiling of the lower level. The lower level has 19 garages (Nos. 18-36). The upper level has 16 garages (Nos. 1-17) with a bin store at the end, above three of the lower garages. The roof of the garage block was generally asbestos-containing cement sheeting, but the area above the bin store had been covered or replaced with transparent plastic sheeting.

21. A letter from the managing agents in 2004 refers to possible work to the garages, but gave no details and proposed only a modest increase in the monthly payment on account to fund this. An asbestos survey report dated 16 February 2005 found in summary that: "*The garage block has a corrugated asbestos cement roof that contains chrysotile (white) asbestos. This roof is in a fair condition with some weathering. This material should be monitored on an annual basis for signs of deterioration.*" The appended register put the roof in risk category D (minor risk material requiring at least an annual inspection) and noted the need to maintain the roof in a good state of repair. The asbestos surveyors did not see inside the garages. When asked how such roofs could be repaired, Mr Staves said the only treatments he had seen were to apply a coating or remove the sheets and replace them. He said that as a matter of design practice a sheet roof would not be expected to last 50 years. The next asbestos survey was dated 4 June 2007. We see no significant difference in its findings and none was pointed out to us. Mr Smith had produced correspondence showing that in 2007 he had reported to the managing agents that the bin store roof was leaking. The subsequent correspondence indicated that the agents had obtained a quotation but not given the necessary instruction to carry out the work.

22. External redecoration works for the residential blocks were carried out in 2010. A notice dated 24 August 2010 indicated total anticipated costs of £23,359. Mr Gwynn confirmed that, while this was before his time, it "*sounded like*" this involved painting external timber window frames and similar work. The consultation documents from the managing agents in 2017 referred to external painting completed in 2010. Mr Smith had produced correspondence indicating that in 2011 he had reported to the managing agents that mortar was missing from coping stones and bricks on the roof parapet of the residential block(s), saying he had used the roof hatch in his flat to go up and fill in some of the gaps himself. He said this suggested there had been no adequate inspections when the scaffolding was up for the decoration work in 2010. He claimed the leaseholders had paid for scaffolding on a regular basis since 2005 and asked why repointing had not been done as part of the external redecorations. He said that he ran a residents' association for Tetbury Court from 1998 to 2014. In his objections to the dispensation

application, he said he had: "*…in 2007, 2011 and 2012 flagged up the problems with leaks in the binstore and mortar missing on the roofs though I did not realise their seriousness at the time*." At the hearing, he repeated this.

The blocks - external decoration planned for 2015

23. In early 2015, the managing agents issued a notice of intention to carry out external redecorations. Ms Prior responded, on 10 and 11 February 2015, to object. She questioned the need for decorations and suggested that: "*…the roof, including the brickwork and the guttering, be repaired before any redecoration takes place*". She had recently reported a leak into her bedroom from the roof and said she had been "*…told by the contractor that not only was the roof in a poor state of repair, but also that it had been reported to you some time ago*."

24. On 6 March 2015, the agents replied and said they had sent a surveyor to visit. They said: "*We already knew there is an issue with the high-level render as some pieces had become detached with obvious health and safety implications, there are also problems with the parapet walls and coping stones. The render would be treated in any case with the decorating and so it makes sense to do all the work while access is available*." On 30 April 2015, the managing agents issued a notice of estimates for redecoration works, reporting a tender from LSM Building Contractors at £25,632 and a tender from Fields (Reading) Ltd (who had carried out the 2010 redecoration) at £25,674.

25. On 4 June 2015, Ms Prior wrote again to dispute the need for decoration and (again) press for roof repair work to be given priority, referring again to problems with the brickwork. On 9 June 2015, the agents replied to claim the render needed to be sealed with new paint to avoid water penetration, but the roof repairs including the brickwork would be done at the same time and the notified prices included those repairs. They said the only way this could change was if they found more serious problems with the roof once the scaffolding was in place to allow access. On 26 August 2015, the agents notified leaseholders that the external redecoration would commence in September 2015.

26. It appears that by September 2015 the scaffolding had been erected, but the selected contractors (LSM) reported concerns about the repair of the blocks and the redecoration work was stopped. On 24 September 2015, Mr Staves inspected the blocks and on 26 October 2015 he issued his report. This identifies a range of defects, detailed with photographs. He concluded that the: "*…majority of the defects observed relate to masonry at the upper level. These defects seem almost entirely due to water entering the masonry and subsequent frost action or corrosion of cast in metal parts. The water appears to be soaking the masonry due to coping being in poor condition and allowing rainfall to enter the head of the wall*." He recommended that the coping be lifted, the top

courses of masonry re-bedded and the coping replaced with metal capping "*…which will not be subject to the same deterioration…*". The report also identified some cracked concrete lintels in need of replacement and some which could be repaired. It said the rendered band on the southern block was in very poor condition, needing to be hacked off and replaced. Blown bricks needed to be cut out and replaced. There were slipped hanging tiles which needed to be removed so that fixing battens could be checked and the tiles could be rehung. Repairs were also needed for soil pipes and other secondary items. The report warned that most of these matters had health and safety implications, given the risk of falling material. The masonry and handrails around the tops of stairwells were also in poor condition.

Garages

27. On 3 June 2015, recorded as a dry day, Mr Staves inspected garages 17 and 18. He confirmed this was his first visit to the site. He could not remember whether this was his first job for the managing agents, but it was an early one. He had been instructed to survey and report on defects in the floor between garages 17 (the upper level) and 18 (below it). These are at the end of the block. His report dated 23 June 2015 describes the block construction as: "*…loadbearing masonry walls with concrete slab over the lower garages and a corrugated sheet roof laid to falls over the upper garages. The concrete slab is formed from precast hollow units spanning the width of the garages. The roof sheeting is typically supported on timber purlins spanning the width of the garages*." He went into the lower garage and his report notes historic patch repairs in the concrete, shown in his photographs 6 and 7. He did not know whether this concrete repair product had been applied by a leaseholder or someone working for the landlord. He could not access the interior of the upper garage (17). His report advised that the concrete planks between the upper and lower garages were of immediate concern, saying the corrosion and exposure of "*reinforcing bars*" where the concrete had spalled meant the planks would be significantly weakened. It suggested a survey of the entire block, and assumed the planks would be 150mm to 200mm thick. It recommended that the floor slab of garage 18 be propped and noted: "*Our secondary concern is that the garages may be beyond economic repair, depending on the extent of some of the defects*." It suggested comparison of repair and replacement costs.

28. On 6 October 2015, Mr Staves carried out a fuller survey. His report (dated 9 November 2015) notes that the weather was wet, with extremely heavy rain most of the morning. The following extracts are from different parts of his report (taken out of order and with our emphasis added):

"*Typically, the upper level units exhibited roof leaks at the laps between the corrugated sheets… This typically led to saturation of the timber purlins which were at various stages of decay and also significant water within the garages sat on the floor slabs. <u>The position of the</u>*

standing water on the upper garage floors was one of the typically defective areas of floor slab when observed from the lower garages."

"*In some locations, the roof sheets were split longitudinally in the trough and this was just allowing water to pour into the garages during rainfall … We would suggest that the roof is beyond economic repair and consideration should be given to re-roofing the whole block…*"

"*It seems clear that the leaking roof construction has allowed water ingress over a long period of time and that this in turn has led to saturation of the precast concrete floor planks and the result is deterioration of the planks*."

"*The lower garages often had problems at the back … the front of the upper garages did not completely align with the back of the garage below, such that the first precast concrete floor plank was partially exposed outside the upper garage*."

"*The defects observed in the concrete slabs varied in severity but were typically spalling concrete and exposed reinforcing strands, which were then heavily corroded … The failed unit at the back of garage 34 shows how thin the concrete sections actually are. The cover to the reinforcing strands is very small, especially considering the exposure conditions (by design and then by roof failure over). The extent of corrosion of the reinforcement was such that the planks cannot easily be repaired. The reinforcement in the lower section of the hollow unit is carrying all the tensile stresses. Where the cross-sectional area has been reduced by corrosion, the strength of the plank will therefore be similarly reduced. Because of the thin sections, any sign of defect is likely to mean significant reduction in capacity. While it is not possible to be absolutely definitive based on this visual inspection, we would suggest that in the region of 25% of the planks are likely to be compromised…The floor defect was particularly pronounced in garage 34 which was below the bin store entrance… the floor slab had failed completely in this area and immediate remedial measures were recommended on site…*"

"*The construction detail seems to be that the plank ends are built into the party walls between the garages. As such, we cannot see a practicable method to replace the defective planks, without demolishing the upper level garages, rebuilding the floors (in more suitable construction to resist the external environment also allowing for de-icing salts which could be carried in on vehicles) and then rebuilding the upper level. The detailing would need to address the fact that the back of the lower garages are not completely protected by the upper garages*."

29. The report noted that the concrete planks were "*approximately 120mm*" thick and replacement with reinforced concrete might require a deeper

section. The photographs at the end of the report demonstrate the problems identified in each garage except No. 21 ("*no access*"). These include leaks in all the upper garages and, in most of the lower garages, cracking and/or exposed corroded reinforcement in the slab roof. Mr Staves acknowledged that his reports referred to "*precast*" floor planks, but he had meant "*prestressed*" planks. He told us these were pre-stressed metal wires/strands, not solid reinforcing bars of the type used in "*precast*" planks. He said in his opinion the overall depth and form would not have worked, structurally, without some form of pre-stressing. He said that, at 120mm, the planks were thin even for a single-width garage span. The apparent defects indicated that the pre-stressed effect had been lost. That could not, in his opinion, be recovered by repair.

30. Mr Staves said these planks did not meet modern design standards and had a "*nominal design life*" of 50 years, although engineers were still designing only for 50 or 60 years. When asked, he said the design life for the roof sheeting specified for the garage remedial works was "*probably 20 or 25 years*". He said the current garages, including the planks and the roof, were at the end of their design life. He told us that in his opinion time would have led to the deterioration and need to replace the concrete planks in any event. Water ingress had clearly "*contributed*" to the failure of the concrete slab. However, there were other sources of water ingress apart from the leaking roof. The exposed edge referred to in his report was the back wall of garage 18, which sits forward of the garage door. He said this was one of the routes of water ingress, but in addition the surface of the concrete was not protected from damp coming in from vehicles. These pre-stressed planks had only a thin layer of concrete covering the reinforcing wires, as noted in his report. He told us there were other problems with concrete from the 1960/70s, such as carbonation (which he explained, in essence, as a chemical change over time towards acidity which tends to accelerate corrosion of metal reinforcement, reducing durability). He told us the reason that some of these other issues were not described in his report was that the physical defects were obvious and at that time there was no point in investigating/advising further. When he had inspected in June, he had seen damp coming through the wall and pushing render off, not water on the floor - but that was on a dry day when he could not access the upper unit. He acknowledged that as a professional he erred on the side of caution, and in October 2015 the rain was so heavy that he had seen the garages at their worst, but his advice remained the same. The water had run or been blown in between the overlaps in the roof sheets, but the lap would have been adequate if the roof itself had been in adequate condition. This was not a one-off; some garages had sealant in the lap where people had tried to stop leaks.

31. It was put to Ms Prior that water was penetrating from inherent defects in design, that wet/road-salted cars drive into garages and there was no damp proofing/sealant on top of the concrete floor in the upper garages, leaving them exposed to damp. She observed that water had been leaking into the backs of garages as well. There was no suggestion that

the residential and garage blocks were built at different times, but only the latter was said to need to be rebuilt. The garages were some 50 or 60 years old. In the 30 years Ms Prior had owned her lease (since 1990), the residential blocks had been re-roofed but to the best of her knowledge there had been "*little or any*" maintenance to the garage block, and no repairs to the garage roof other than the "*patch repair*" over the bin store (apparently replacing the sheeting with transparent plastic) and "*in the last 12-18 months*" when a polythene sheet had been put over some of the garages.

32. The Respondent did not refer us to any records of monitoring the garage roof before the inspections by Mr Staves in 2015, other than the asbestos reports in 2005 and 2007, or of any repairs to the garage block. Mr Gwynn could not tell us anything from his own knowledge from before 2018 and the Respondent did not produce anyone who could. Mr Gwynn told us that the agent's records from 2015/16 included inspection records (which, as noted above, had not been disclosed), but told us these would include routine checks on gardening services and the like, not checks on the condition of the buildings. He said such matters were put out to external experts for any major works, as they did in 2015 when Mr Staves was instructed to inspect.

First consultation notices for remedial work - 2015 to 2016

33. On 26 November 2015, the managing agents issued a notice of intention to carry out "*...remedial external works to the building identified following a condition survey...*" and "*...remedial works to the garage block following a structural survey.*" In January 2016, Mr Staves produced a remedials scope. In April 2016, the programme in this document was revised. The Respondent said the tender documents were (eventually) issued in July 2016. The initial documents were addressed to the freeholder of Tetbury Court. Leaseholders had been concerned that later documents relating to the remedial works had been addressed to Hawthorn Crow, a "*property development company*" of which the Baker family were directors. We accept the evidence of Mr Staves that he had been informed by the managing agents that the company was the freeholder and it was not until Mr Baker began acting as attorney, in 2020, that this had been corrected.

34. On 9 November 2016, the agents issued a statement of estimates, saying they had selected two estimates from which to make the final choice of contractor. They summarised these, indicating totals (inclusive of professional costs and VAT) from Lollypop Ltd of £348,172.28 and from Francis Construction of £455,604.13. Lollypop were recommended, but then withdrew. The Applicants represented by Ms Prior contended that Lollypop should never have been selected because they did not have sufficient financial standing. The managing agents said that, to allow the scaffolding to be removed, emergency work was then carried out by Lollypop to the outside of the building to make it safe.

35. On about 23 December 2016, the managing agents fixed notices to each garage saying: "*Danger … due to the condition of the garages they are no longer safe and must not be used … by Order of the Freeholder*."

Second consultation notices and garage repair investigation – 2017 to 2018

36. On 27 June 2017, the managing agents issued a new notice of intention for the same remedial works. On 28 July 2017, solicitors for leaseholders made representations, assisted by their expert, Mr Colangelo. They challenged the scope and certain prices. In particular, they challenged the need to cover the block copings with new metal capping rather than re-bedding the existing copings and re-pointing, but also said that it would be prudent to lift the existing copings and re-lay them, renewing the damp proof course if necessary. They agreed the garage roof needed to be replaced, but asserted most of the damaged concrete planks should be capable of repair. They recommended that advice be obtained from a specialist concrete repair contractor to determine the feasibility of repair and provide costs. They nominated contractors and said a (named) concrete repair specialist had opined that all the affected planks could be repaired using a proprietary cementitious concrete repair system at an estimated cost of between £15,000 to £22,000 plus VAT. We have considered the separate expert report from Mr Colangelo dated July 2017 about these matters and we refer to it below.

37. The managing agents responded to these observations. They said the scope of work for the blocks would be changed to include a price for lifting the existing coping and installing a damp proof course, as requested. They confirmed there was no existing damp proof course. As for the garages, they said: "*We do not believe the concrete planks are repairable as their construction and depth would indicate the planks are pre-stressed and not only reinforced. The Structural Engineer would not underwrite the repair concept given the safety implications of failure*." They added: "*We appreciate the damage to the garages has been caused by roof leaks, however we do not have access to the garages as this is the leaseholders demise and we rely on the leaseholders reporting problems*." On 26 September 2017, the agents issued a statement of estimates, saying they had selected two estimates from which to make the final choice of contractor. They summarised these, giving totals (inclusive of professional fees and VAT) from LSM Building Contractors Ltd at £461,123.57 and from "*C J Swainland Building Services*" (an incorrect name, later corrected) at £286,073.39.

38. A report dated October 2017 for leaseholders from Engineering Design Associates ("**EDA**") is described as a structural survey of the suspended concrete floor planks in the garage block. This said that due to the extent of the corrosion they were unable to clearly establish whether the reinforcement was steel rods (precast concrete) or steel strands (pre-stressed concrete). They thought most of the reinforcement appeared to be rods. They suggested repair of some of the planks and said: "*…where*

the planks are more severely damaged or already collapsed as in garage 34 these can be removed and replaced with an in situ concrete section." As a result, in December 2017, the concrete repair companies suggested by leaseholders (Structural Renovations and Concrete Repairs Limited ("**CRL**")) were asked to price for sufficient works to provide a 10-year warranty. Mr Haynes of Structural Renovations attended to inspect and Ms Prior said (in effect) that Mr Staves gave him a hard time. On 10 January 2018, Mr Haynes wrote: "*Due to the construction of the garage floors/soffits being thin hollow slabs, we do not believe it to be cost effective to repair the defective slabs. In addition to this we would not be in a position to provide a guarantee on longevity of the repaired and unrepaired areas*."

39. On 16 March 2018, CRL provided their estimate for concrete repair works for the floor slab. This included replacing a single unit, repairing the rest and applying a "waterproofing sealer" to the floor, for a price of £128,224.80 plus VAT. On 21 March 2018, the managing agents reported this to the leaseholders, pointing out that this slab repair cost would (together with the roof replacement and other work to the garage block) be substantially higher than the tendered prices for demolition and reconstruction. They reported that CRL had explained: "*…there is simply too much labour involved in repairing the existing planks or carrying out localised replacement … couple this with the issue, that the remainder of the structure would continue to deteriorate over time leading to further repair works in 10-15 years' time, I have to agree that full removal and rebuild of the upper section of the garages would be the best way forward*."

40. The Respondent said that, on 21 March 2018, Swainlands were asked to revalidate their price from September 2017. They would not do so. Eventually, on 29 October 2018, Swainlands produced a price of about £290,000 plus fees and VAT, subject to qualifications and exclusions. As a result, the Respondent decided they should run a new consultation and tender exercise.

Third consultation notices – 2018 onwards

41. On 12 November 2018, the managing agents issued a new notice of intention for substantially the same works. The Respondent said a tender exercise was carried out between March and May 2019 to test the market for professional fees of surveyors. The agents then instructed Michael Aubrey Partnership (Mr Staves' firm) to re-survey and re-tender the works. An update survey was carried out in September 2019 and the schedule of works was amended to "*reflect current condition*". The tender documents were then issued in November 2019 for return by 12 December 2019.

42. On 28 February 2020, the managing agents issued their statement of estimates, giving the following figures:

Contractor	Estimate (£)	Professional fees (£)	Total inc. VAT (£)
LSM (blocks)	109,258.06	14,608.27	148,639.60
LSM (garages)	250,735.45	21,611.40	326,816.23
DB Building Services (blocks)	137,263.75	15,994.56	183,909.97
DB Building Services (garages)	176,624	17,942.89	233,480.27
Contract Trading Services (blocks)	147,620	16,507.19	196,952.63
Contract Trading Services (garages)	273,855	22,755.82	355,932.99
Courtyard Construction (blocks)	136,879.75	15,975.55	183,426.36
Courtyard Construction (garages)	228,082.13	20,490.07	298,286.63

43. The statement of estimates indicated that the Respondent had not received written observations in relation to the notice of intention issued on 12 November 2018. The Respondent accepted this was wrong; it had received observations. The statement indicated that two contractors had been nominated prior to the notice being given, one of those contractors had tendered and one did not respond to the surveyor. Mr Gwynn was not certain, but he thought the nominated contractor who had tendered was Contract Trading Services.

44. Mr Staves told us that the professional fee structure had been set following the competition organised by the managing agents. He said it comprised fixed fees for standard elements plus 2.95% of the works cost for contract administration and site supervision.

45. In late 2020, the Respondent instructed LSM to commence work on the residential blocks. At the hearing, Mr Staves told us that work started on 18 January 2021 and it had taken time to erect the scaffolding. He said the contract documents for the garage block were out with DB Building Services for signature, with a view to works starting in late April or early May, as soon as LSM had completed their work on the blocks and could hand over the site.

The issues

46. In preparation for the hearing Mr Dale, the leaseholders represented by Ms Prior and the Respondent agreed a list of the 10 issues they wanted

us to consider. Each of these is reproduced in bold below. Mr Smith did not agree this list, and produced his own, which largely overlapped. The exceptions were references to a demand which he said had arrived on 3 March 2021 (which we cannot consider, not least because neither he nor anyone else provided a copy) and a question about who was acting "as landlord" before Mrs Baker became unwell in March 2020 and until the power of attorney was registered (which we will not discuss further because it is not necessary for the determinations we need to make). In relation to the agreed issues, the Applicants had raised so many points and arguments in their documents that it would not be proportionate for us to describe all of them specifically in this decision. We have considered them carefully and we are not satisfied that any of those not summarised in this decision merit further examination.

Issue 1 – historic neglect. Do the Tenants have a claim for damages for breach of covenant that may be set off against any service charges to which the Landlord is entitled. If so, what is the value of that claim?

47. Mr Bowker submitted that in view of the alleged neglect of the garages the cost of remedial work would not be reasonably incurred, but he accepted that we were bound by Continental Property Ventures Inc v White [2006] 1 EGLR 85, while reserving his right to contend on appeal that White (and Griffin and Cain, referred to below) were wrongly decided. In White, HHJ Rich said at [11] that: "*...the "relevant costs" which by s.19(1)(a) are limited to what is "reasonably incurred" are defined by s.18(2) as the "costs ... incurred ... by the landlord ... in connection with the matters for which the service charge is payable". Those matters include "reasonably maintenance etc" [*sic*]. The question of what the costs of repairs is does not depend on whether the repairs ought to have been allowed to accrue. The reasonableness of incurring costs for their remedy cannot, as a matter of natural meaning depend on how the need for remedy arose...*". This approach was confirmed in Daejan Properties Ltd v Griffin and Another [2014] UKUT 0206 (LC) at [88].

48. At [13] in White, HHJ Rich cited submissions adopted in Loria v Hammer [1989] 2 EGLR 249: "*...It is of the nature of building defects that they get worse with the passage of time, often at an accelerating rate. A stitch in time ... can save nine; the landlord can, as it were, recover the cost of the timely one stitch but, if he fails to make that one stitch, he cannot later pass on the cost of the nine which would have become necessary because the one was not made or was not made in good time.*" He concluded at [14] that: "*...there can be no doubt that breach of the landlord's covenant to repair would give rise to a claim in damages. If the breach results in further disrepair imposing a liability on the lessee to pay a service charge, that is part of what may be claimed by way of damages. At least to that extent it would ... give rise to an equitable set-off... This would not mean that the costs incurred*

for the "nine stitches" were not reasonably incurred. It would however mean that there would be a defence to their recovery."

49. At [89] in Griffin, the Upper Tribunal said that: "*The only route by which an allegation of historic neglect may provide a defence to a claim for service charges is if it can be shown that, but for a failure by the landlord to make good a defect at the time required by its covenant, part of the cost eventually incurred in remedying that defect, or the whole of the cost of remedying consequential defects, would have been avoided. In those circumstances the tenant to whom the repairing obligation was owed has a claim in damages for breach of covenant, and that claim may be set off against the same tenant's liability to contribute through the service charge to the cost of the remedial work. The damages which the tenant could claim, and the corresponding set off available in such a case, is comprised of two elements: first, the amount by which the cost of remedial work has increased as a result of the landlord's failure to carry out the work at the earliest time it was obliged to do so; and, secondly, any sum which the tenant is entitled to receive in general damages for inconvenience or discomfort if the demised premises themselves were affected by the landlord's breach of covenant.*"

50. In Griffin, the Upper Tribunal also confirmed the well-established principles that, at [90]: "*Where part of a building is not demised, but remains within the possession of a landlord which has covenanted to keep it in repair, the risk of undetected deterioration falls on the landlord whether or not it has, or could have, knowledge of the condition of that part (see British Telecommunications plc v Sun Life Assurance Society plc [1996] Ch 69)…*", and at [87]: "*The assignee of a lease granted before 1 January 1996 cannot maintain an action for a breach of covenant which occurred before the assignment (see Woodfall's Law of Landlord and Tenant, para. 16.133). The same is true of a lease granted after that date by virtue of s. 23(1), Landlord and Tenant (Covenants) Act 1995.*"

51. Miss Gibbons accepted that we had jurisdiction to consider the alleged breach of covenant in this context, but urged caution and the need to apply the same standard as would be required in the county court as to breach, causation and loss. At [15] in White, HHJ Rich said: "*It was submitted that the determination of such claims for damages was outside the jurisdiction of the LVT. I accept that the LVT has jurisdiction to determine claims for damages for breach of covenant only in so far as they constitute a defence to a service charge in respect of which the LVT's jurisdiction under s.27A has been invoked. I see no reason of principle why such jurisdiction should not extend to determining even a claim for loss of amenity or loss of health arising from breach of a repairing covenant, but would draw attention to what I said in Canary Riverside Pte v Schilling (LRX/65/2005 decision dated December 16, 2005) as to the desirability of the LVT's exercising restraint in the exercise of the extended jurisdiction given to it by the Commonhold and*

Leasehold Reform Act 2002." Then, citing himself in Schilling: "*45. I can see no basis, however, for saying that the LVT lacks jurisdiction to determine any issue not expressly the subject of some other tribunal's exclusive jurisdiction, if determination of that issue is essential to determining whether 'a service charge is payable'. That is the issue which s.27A gives the LVT jurisdiction to determine. That must include any issue necessary for or incidental to such determination…*"

Conclusion - breach

52. We are satisfied that the Respondent was in breach of its repairing covenant, at least in respect of the garages and probably in respect of most of the disrepair identified by Mr Staves in his reports. Mr Bowker referred us to the five-stage test in Dowding & Reynolds (*Dilapidations: The Modern Law and Practice*, 6th Ed, Ch 6). As to this, we broadly accept his submissions in respect of the garage block, i.e.: (1) the garage roof is part of the physical subject matter of the covenant; (2) that subject matter is in a damaged or deteriorated condition because it is not keeping water out; (3) the nature of that damage/deterioration is such as to bring the condition of the subject-matter below the standard contemplated by the covenant; (4) the work required to put the subject matter into the contemplated condition is repair or replacement; and (5) that work is not nonetheless of such a nature that the parties did not contemplate that it would be the liability of the covenanting party. For the reasons explained below, we do not propose to examine any further the allegations of breach in relation to the residential blocks.

Conclusion – loss in relation to the blocks

53. The Applicants have not shown any loss in relation to the residential blocks. The planned works are relatively substantial, but involve natural matters of repair and it was rightly accepted by Ms Prior that repair can include replacement. It seems likely from Mr Smith's documents (particularly his photographs from 2011) and Mr Staves' report that re-pointing was not done as part of the external redecoration work in 2010. However, the Applicants have produced no real evidence that this caused greater remedial costs than would have been incurred if the blocks had been repaired whenever disrepair arose. On the contrary, Mr Colangelo concluded in his report (at para. 4.3.2): "*With regard to the main building, while disrepair has occurred over time, in my opinion the condition of the exterior fabric is unlikely to have deteriorated significantly due to any action on the part of the Landlord and the issues noted are due to the natural ageing of the building and its elements*".

54. Ms Prior had argued that if disrepair had been remedied promptly it might not have been necessary to replace any of the precast concrete lintels, but Mr Colangelo did not say that and she produced no other evidence for this. We noted that Mr Colangelo had said damage to the lintels was typically worse in those immediately beneath the parapet

walls "*...which is to be expected given the evidence of damp penetration in the walls above...*", but he did not attribute this to neglect. When we asked, Mr Staves told us that the damp in the masonry was contained in the top four or five courses of bricks, with the lintels about eight courses down (measured from the underside of the coping stones). In our assessment, those top floor lintels were probably more exposed to the elements than those lower down. If damp was reaching the lintels from the walls above them, it is likely that the lack of a damp proof course under the parapet coping stones topping the walls above these lintels was at least part of the cause of any such problem. The addition/replacement of such a damp proof course had immediately been advised by Mr Colangelo and incorporated in the planned remedial works. We are not satisfied on the balance of probabilities that any additional costs were caused in relation to the lintels.

Loss in relation to the garages

55. Mr Bowker submitted that we should draw adverse inferences from the Respondent's failure to disclose key documents. He contended that proper disclosure had not been given for what he said was the relevant period of 2005 to 2015 and the Respondent should not benefit from its failure to disclose. The Respondent had failed to take basic steps from 2005 to 2015 to monitor and respond to disrepair, whether by patch repairs or replacement of the roof. He submitted that the "*fair condition*" of the roof as described in the 2005 and 2007 asbestos reports simply meant that the roof was doing its job, keeping water out. The remedial works now being planned had come too late. He argued that we should reject Mr Staves' theory about design life and said no proper evidence of inherent defects had been provided, referring us back to the specific findings in the written report from Mr Staves about the leaks, damage to the purlins and obvious leak positions. He said the damages claim was the difference between the cost of the "*one stitch*" of replacing the roof and rainwater goods for approximately £27,000 (a figure based on the tender from Swainlands) and the cost of over £200,000 for the remedial works. Mr Smith argued that adequate periodic repair work would have significantly prolonged the life of the garage block.

56. The Respondent's case was that the problems with the garages which had led to the requirement to rebuild would not have been avoided by proactive maintenance, and that substantial repair costs would have been incurred by leaseholders if interim work had been carried out. Miss Gibbons asked when repair should have taken place and pointed out that even if work should have been done but was not, it did not follow that this had caused loss. There was no damp proofing or other covering on the concrete planks and part of the back wall extended beyond the roof covering, so water ingress was inevitable. She said the concrete plank failure was not entirely due to water ingress; she referred to the narrow pre-stressed planks, the thin cover over the reinforcement, and notes in the Bicknell (EDA) report about no, or ineffective, reinforcement. In any event, she submitted, it could not be said that the breach was the main

cause of any losses. She contended that the Applicants had suffered no loss, since these problems would have arisen at some point and it was always going to be necessary to rebuild the garage block. If repair work had been done, the Applicants would possibly have been in the same position, needing to rebuild in addition. Further, the remedial works would result in betterment, since the rebuilt garages would be constructed to modern design standards.

Conclusion

57. We are satisfied that we should draw adverse inferences against the Respondent for their failure to keep/disclose adequate records. Based on our assessment of the evidence of the condition of the garages and the evidence from Ms Prior, we consider that the Respondent probably failed to carry out any relevant repair work to the garage block for many years (save for the possible historic replacement of the bin store roof sheets, which themselves were not repaired in 2007 when leaks were reported). For the same and the following reasons, we are also satisfied that the leaking roof was probably the main cause of the damage to the concrete slabs. Despite Mr Staves' explanations, this was clear from the matters recorded in his report (as set out above) and appears to have been admitted by the Respondent's agents (as summarised in paragraph 37 above). We bear in mind that Mr Staves' report referred to exposure "*by design*" before the roof leaks, and his explanation of why his evidence about design life, carbonation and so on was not included in his report. We accept that the garages might have been approaching the end of their "*design*" life even if the roof had not been leaking, but if the Respondent had complied with their repairing covenant the block would probably have remained adequate for many years to come.

58. Accordingly, we are satisfied that the Applicants have good claims at least to the minimum damages specified under issue 8 below in respect of the garages, and that these claims may be set off against any service charges to which the Respondent is entitled. However, on the case and evidence produced, we are not satisfied that any increase in the true costs of the remedial work (above those which would have been incurred if the landlord had carried out re-roofing and other repair work at the earliest time they were obliged to do so, and allowing for the benefit of the improvements made) would exceed these minimum damages. We explain our reasons for these findings below.

59. None of the Applicants could say convincingly or consistently when the additional/consequential damage was done, bearing in mind the undisputed evidence from Mr Staves that it was likely that "only" about 25% of the garage slabs had probably been compromised. We note what Mr Bowker says about the asbestos reports from 2005 and 2007, but these were reports by asbestos surveyors tasked with inspecting the exterior condition of the asbestos. They had no access to the interior of the garages. We cannot infer much from these reports about this issue,

except that up to June 2007 at the earliest the sheets probably did not have splits which could be seen from outside. Most of the leaks identified by Mr Staves when he inspected inside the garages in 2015 were coming through the holes in the sheets for the fixing nails/screws and the overlap in the asbestos sheeting. Ms Prior could not say when the roof had started leaking or when the damage was done to the concrete planks in the garage. In 1990, her garage had been dry inside and she had used it for storage, but the photographs attached to the report from Mr Staves indicate that water might have started leaking through the roof into other garages in the early 2000s. She referred to the 2004 letter mentioned above and the different material over the bin store roof which (based on Mr Smith's documents) was leaking from 2007. She recalled she had used her garage a lot in 2008 and had noticed some flaking areas but "*nothing major*". In hindsight, she thought perhaps she should have reported this but she had still been happy to store her goods there. She had not looked again until everything stored in her garage had been destroyed by the leaks. Mr Smith said that in 2003 his garage was perfectly dry but the papers he stored there were later destroyed by the leaks. He contended that the roof needed to be replaced from 2007, when he had contacted the agents to say that water was getting in, probably through the plastic sheeting above the bin store. Allowing for the differences shown in the report from Mr Staves, it is likely that the additional damage was caused from 2007, but some such damage may have started to be caused to some of the garages before that.

60. If the landlord had complied with their repairing obligations proactively enough to seek to avoid any need for rebuilding, or at least significantly prolong the life of the block, the relevant leaseholders (those who have held their leases for long enough to make this claim) would have paid substantial service charges for such repair. At current values, this would probably have totalled £100,000 or rather more. We expect Mr Dale was right when he submitted that (looking at the 20-25-year lifespan for a modern sheet roof, as advised by Mr Staves), the garage block should be on its third roof by now. Even based on the Swainlands figures referred to by Mr Bowker, each roof and ancillary work would have cost the equivalent of about £30,000 once professional fees and VAT are included, plus any additional access costs. Further, looking at the comments from the concrete repair specialists in 2018, we consider it is likely that even without the roof leaks some repair work would have been needed to maintain the concrete planks, and such costs would have been relatively high.

61. These likely repair costs are to be compared with the anticipated rebuild costs of £233,480.27 including fees and VAT, and the interim repair and protective work charged from 2015, as explained under issue 4 below. Parts of the rebuild costs are improvements to rectify inherent shortcomings in the original construction. Ms Prior did not dispute that the rebuilt garages, built to modern design and building standards and more resistant to the weather, would be better and more durable than the ~1960s block. The new concrete planks will be stronger and more

durable precast units made to modern standards. The work to cover the exposed area at the back wall of the block, and the protective sealant for the garage floors, is the type of work which could have been recovered through the service charge even if there had been no need to replace the concrete planks. The rebuilding costs are coming all at once, when spreading payments has considerable value for leaseholders, but the leaseholders have known since 2016, from the previous consultations, that substantial costs were being proposed and no evidence was produced of any additional funding costs caused to any of the Applicants. A comparison of likely costs would probably also need to allow for the fact that this work should give the block a longer lifespan, over which it should require less maintenance (and so lower service charge costs for leaseholders) than the repaired old block would have needed even if rebuilding could have been avoided. It would also be necessary to consider the service charge proportion of the relevant figures against the period each relevant leaseholder had held their leases.

62. Taking all these matters into account, on the evidence produced, we are not satisfied that there is a true net cost to leaseholders from the costs of the remedial and interim works, or that any damages for any additional costs would exceed the minimum damages determined under issue 8 below. The Applicants have not provided sufficient particulars or evidence of any other pecuniary damages. Our determinations under this issue 1 are not intended to preclude any damages claim any leaseholder might be able to demonstrate in any other proceedings. Apart from anything else, the actual cost of the remedial works is not yet known - we are working only with estimated costs - but we should not be taken to be encouraging any such claim. The leaseholders may be able to prove additional losses, such as damage to the interiors of flats or loss of rental income, as mentioned under issue 8 below, but they made only passing references to such matters, without making a proper case or providing adequate evidence. Following White and its reference to Schilling, we have determined only those claims which have been sufficiently stated and evidenced in these proceedings for it to be essential/appropriate for us to determine them in order to determine whether a service charge is payable.

Issue 2 – misrepresentation. Do the Tenants have a claim for damages for misrepresentation that may be set off against any service charges to which the Landlord is entitled. If so, what is the value of that claim?

63. This issue was raised only by: (1) Vanreen Miles of Flat 1; (2) Rafal Szulc of Flat 2; (3) Beverley Jones of Flat 20; (4) Mark Hester of Flat 28; (5) Nicholas Clark of Flat 29; and (6) Dave Thomson of Flat 33.

64. We are not satisfied that deciding this issue is essential to determine whether a service charge is payable, or that it is appropriate for us to attempt to do so based on what we have been provided with. If we are

wrong about that, we would not have been satisfied, on the evidence produced to us, that any of these Applicants have a claim against the Respondent for damages for misrepresentation. The claim was based on a single leasehold information form dated January 2015 from the managing agents on behalf of the landlord. There was no evidence of the forms provided to the other five relevant Applicants, and it would have been incumbent on prospective purchasers to inspect the development. Critically, there was no challenge to Miss Gibbons' submission that the relevant transactions involved private sellers assigning their leases and the Respondent was not a party to the relevant contracts, or acting as agent for the sellers. Even if it had been acting as agent for the sellers in making misrepresentations, any misrepresentation claim would have been against the sellers, not the Respondent. As noted in the extract from *Chitty on Contracts* produced by Miss Gibbons in the authorities bundle, this does not necessarily mean that a third-party representor cannot be liable to the representee in cases of negligent misstatement, but no such claim was made or evidenced.

Issue 3 – price increases. Has the Landlord unreasonably delayed starting the major work so that its cost has increased and it is therefore unreasonable for the Landlord to pass that cost on to the Tenants? If so, what is the amount of the increase?

65. The Respondent was very slow in planning and starting the major work. The detailed chronology set out in the Respondent's statement of case gives some explanations for the delay, but many of the stages have taken substantially longer than they should have done. Set against that, a considerable part of the delay was caused at least in part by the insistence of some leaseholders that the possibility of repair of the garages be explored. Given this, and the reports from Mr Colangelo and then from EDA, and the indications from the 2016 and 2017 estimates that combining the works to the residential and garage blocks would achieve a lower price, it was not unreasonable to wait for the (delayed) quotation for repair of the garages. The agents contacted Swainlands immediately on receipt of the repair quotation (which made it clear that repairing would be more expensive than rebuilding), but Swainlands would not stand by their original estimate. Given the reliance placed by some of the Applicants on the original estimate from Swainlands, it was reasonable to wait for at least some of the time they took to produce their revised estimate in 2018.

66. In any event, we are not satisfied that the delays have caused the remedial costs to increase in real terms. The claims referring to increases by reference to inflation are plainly unsustainable. We have carefully considered what was said about the first estimate from Swainlands, but the main reason this was not accepted was the leaseholders' insistence on investigation of repair rather than rebuilding the garages. Further, we consider it unlikely that the necessary work would have been done for the price estimated by Swainlands in 2017. That estimate seems unrealistically low, as did the estimate from Lollypop in 2016 - which the

agents sought to accept only for that company to become insolvent or say it was unable to proceed because its scaffolder was insolvent, or the like (accounts differ on this but the result is the same). We note that the estimates from the other contractors in 2016 and 2017 were higher than the current estimated costs for the blocks and the garages. These previous estimates, exclusive and inclusive of VAT and professional fees, were respectively: (a) £346,900.10/£455,604.13 (Francis in 2016); and (b) £352,971.09/£461,123.57 (LSM in 2017). The second estimate from Swainlands, in 2018, was £290,434 exclusive of professional fees and VAT. That was a realistic price, at a level they may have been ready to deliver, but was subject to qualifications and exclusions. As explained below, the estimated costs on which we have been asked to base our determination are at the same level, or slightly less than this (£285,882 exclusive, or £382,119.87 inclusive, of professional fees and VAT).

Issue 4 – historic service charges excluding scaffolding. Have the Tenants been over-charged for the various items on their list? If so, by how much?

67. The Respondent agreed that the company secretarial fees challenged by the Applicants had been charged in error. They told us that the relevant sums have now been credited back to the service charge accounts. Otherwise, the Respondent contended that the historic costs challenged by the Applicants under this heading (and the historic scaffolding costs examined under issue 5 below) had been incurred over time, in respect of which service charges had been paid without protest. As a result, Miss Gibbons submitted, it should be inferred that the leaseholders had agreed the amounts claimed were the amounts properly payable. The effect of this would be that, under section 27A(4)(a) of the 1985 Act (set out in Schedule 2), the tribunal would not have jurisdiction to determine the relevant agreed/admitted service charges.

68. In Cain v London Borough of Islington [2015] UKUT 0542 (LC), HHJ Gerald referred to section 27A(4) and (5) and said at [18]: "*Looking at the reasoning behind this provision, no doubt the reason why the making of a single payment on its own, or without more, would never suffice is that such will often be insufficiently clear but also, in the peculiar area of landlord and tenant, it is common enough for tenants to pay (even expressly disputed) service charges so as to avoid the risk of forfeiture and preserve their home and the value of their lease. But the reason why a series of unqualified payments may, depending on the circumstances, suffice is because the natural implication or inference from a series of unqualified payments of demanded service charges is that the tenant agrees or admits that which is being demanded … Self-evidently, the longer the period over which payments have been made the more readily the court or tribunal will be to hold that the tenant has agreed or admitted that which has been demanded and paid. It is the absence of protest or qualification which provides the additional evidence from which agreement or admission can be implied or inferred.*"

69. In our assessment, as Mr Bowker submitted, agreement or admission of the historic service charges identified below is not properly to be implied from the circumstances of this case. All the remaining disputed charges date back only to 2015 and the applications were made within the following five years. Further, Ms Prior was specifically protesting about these service charges (from the proposals for external redecoration work onwards). We refer, for example, to the correspondence from early 2015, as summarised above.

70. Accordingly, we examine below the disputed historic service charges as set out in the schedule prepared by Ms Prior and answered by the Respondent. Before doing so, we consider the related submission from Miss Gibbons that the Respondent was prejudiced in relation to these historic charges because the managers who had been involved had "*moved on*". Mr Gwynn acknowledged there had been several different individual property managers since Encore acquired the managing agent in 2015. Mr Gwynn had never been to the site. His current property manager (Alex Long) has been responsible for the property for the last six months. The previous manager, Anna Stahl, had moved on. Mr Smith put it to him that a previous manager, Paul Lorenzo, had been in place for four years. Mr Gwynn referred to the software and management systems used by the agent for registration of jobs and details to allow people to take over and manage buildings, and arrangements for assistants and team leaders to give interim support. He said this enabled the agents to manage effectively even when there had been high turnover of property managers. Services relating to any major works were put out to external advisers. Mr Gwynn said that the agent's inspection reports are internal documents, a management tool which is not offered up (or, in other words, which the Respondent/agents had refused to disclose). When asked by Mr Bowker, Mr Gwynn said he was not aware of any roof inspection reports in relation to the garages which had not been disclosed. He confirmed he had looked at the records back to 2015 and did not have records prior to that because they had been kept by the previous owner of the agent. He had not asked the Respondent for any relevant documents, because he anticipated that the Respondent's solicitors would do so.

71. In view of the timeline, the contemporaneous protests from Ms Prior and the evidence of Mr Gwynn, we consider that the Respondent has not been prejudiced in relation to these historic charges. In our assessment, they or their agents have either failed to procure and keep adequate records or failed to disclose them. We will bear in mind that the takeover of the agent in 2015 and the staff turnover may have made matters more difficult for the managing agents, but the Respondent had more than enough time to produce any evidence they wished to rely upon. Further, in accordance with the overriding objective, we allowed Mr Staves to give new oral evidence at the hearing to answer questions about what had happened with the decoration and scaffolding from 2015 onwards, despite the failure of the Respondent to provide a witness statement about such matters or explain them in its statement of case.

2015

72. The Applicants challenged a charge of £7,200 for external redecorations in 2015. The Respondent said this was the first stage payment in respect of the external redecorations which started around 21 September 2015. The relevant invoice is from LSM Building Contractors Ltd dated 21 September 2015 for £6,000 plus VAT, the sum of £7,200, and is marked as paid. It refers to a contract sum of £21,360, "application one". Mr Gwynn agreed that this "looks like" an interim payment under a larger contract for external decorations. Ms Prior contended that the redecoration work was not done. Mr Smith said he had been at the property in 2015 when the decorators said they were "stopping" work. Mr Staves had seen painters on site when he inspected the main building on 24 September 2015. His impression was work was stopped because it included items which would be wasted, such as decorating render which would need to be hacked off and replaced. Mr Gwynn had no personal knowledge of these matters, since he had only started dealing with the Property from 2018. He repeated that the property inspections carried out by the agents themselves are not property condition reports, but checks that basic services are being provided. The agent uses external professionals, such as surveyors when considering major works, to inspect property condition and advise on what work is needed.

73. In our assessment, this cost was not reasonably incurred. The scaffolding up in 2010 for the last set of redecoration works should have been used to inspect the state of repair of the blocks. If it was, that information was not used to plan future work. In early 2015, before the work was ordered, Ms Prior warned that repair works were needed and it is clear from the correspondence that the agents were aware of other problems. The agents sent someone to inspect, but it is likely either that whoever inspected was not in a position properly to assess the condition of the building, or adequate access arrangements had not been made for them. It ought to have been possible to ask to inspect using a roof hatch from those flats who have them (as Mr Smith did) or using suitable equipment such as a boom lift ("cherry picker"), rather than erecting full scaffolding all around the three blocks only to find that (as Ms Prior seemed to have been warning) the necessary repair work was far more extensive than the decoration/repair work which had been ordered and at least part of the decoration work should not be carried out beforehand because it would be wasted, as Mr Staves explained. It might even then have been possible to mitigate the costs by seeking urgently to procure further works, but on the evidence the Respondent did not, and had already made themselves liable for the first instalment of the redecorations price. They or those acting for them then acted too slowly to assess what work was needed and seek to procure this. On the evidence produced, it is likely that only a small part of the work expected for the first instalment of the redecoration work was done, and this cost was wasted.

2016

74. The Applicants challenged a total of £3,040.12 under a "general repairs" heading. They argued these costs would not have been incurred if the major works had been carried out sooner, and challenged specific entries on other grounds. This figure includes scaffolding costs of £658.28 (which the Respondent addressed in paragraphs 32(6) and 46 of its statement of case), dealt with under issue 5 below. We accept the explanations in paragraph 32 of the Respondent's statement of case for the other items. In our assessment, based on the information provided by the parties, these other costs were reasonably incurred.

75. The Applicants also challenged £1,555.20 for hire of Acrow props for the garages. They said they had not seen any invoices from late 2015 but the props were still in place, so they must be paying for the hire of them for each of the following service charge years. The Respondent said the Acrow props were purchased for £418.80 in November 2015 and no further hire costs were charged to the service charge account. We accept that explanation and we consider these costs of propping the worst-affected areas of the garage block were reasonably incurred. The Applicants had challenged similar sums for Acrow props in each of the following service charge years on the same basis. To avoid repetition, we confirm we accept the Respondent's explanation for each of those years; no such costs for hire of Acrow props were charged to the service charge account.

2017

76. The Applicants challenged a total of £1,996 under a "general repairs" heading. The Respondent explained that £1,257 of this was an accounting adjustment for a prepayment carried over, not an actual cost incurred in 2017. As to the balance, it said £280 was for temporary roof repairs required pending the carrying out of the major works and the costs of £297 and £162 were fees charged by the managing agents for the additional bank reconciliation work caused by the voluntary arrangement allowing leaseholders to pay their service charges by monthly instalments rather than the biannual instalments specified by the leases. The Applicants produced no alternative quotations or other evidence to challenge these explanations. We consider that the costs which were charged to the service charge account were reasonably incurred.

77. The Applicants also challenged costs of £3,677.24 for rubbish disposal in 2017. Mr Bowker took Mr Gwynn to the service charge accounts for 2015, which show that cleaning and waste disposal charges were then £580, up from £370 in 2014. This is a substantial increase, but the leaseholders seem to have benefited from the tidying work done voluntarily by Mr Smith in the past. For the reasons given in the more detailed examination below of such charges in 2018, we are satisfied that these charges were reasonably incurred.

2018

78. The Applicants challenged major works costs of £5,335.20 because they said these costs would not have been incurred if the major works had been carried out sooner. The Respondent said £1,368 of this ("*supply and fit decking boards and felt system*") would have been incurred in any event, because it related to work to the roof itself, not the areas to be repaired by the major works. The Respondent admitted that the other costs would not have been incurred had the major works been undertaken, but argued the reason they were not undertaken in 2018 was the leaseholders' challenge to the scope of works to be carried out.

79. We accept the Respondent's explanation for these costs. The major works were further delayed in late 2017 and 2018 at least partially by the objections from the leaseholders based on the evidence they had obtained from Mr Colangelo/EDA and the time taken by third parties to respond to the investigations they had requested. Although their objections focussed on repair of the garages, at that time it appeared from the estimates that a better price could be secured by awarding the work for the residential blocks and the garages under the same contract. In view of the representations on behalf of the leaseholders, it was not unreasonable for the Respondent to delay both sets of works during the relevant period. As Miss Gibbons explained, this is not a criticism of the leaseholders, who were entitled to participate fully in consultation and press for full investigation of repair options rather than rebuilding as advised by Mr Staves. However, in relation to these costs it undermines their criticisms of the Respondent's delay in carrying out the major works. In our assessment, these costs were reasonably incurred.

80. Next, the Applicants challenged a total of £2,353 under a "general repairs" heading. The Respondent said £870 of this was for redecoration following a roof leak into Flat 10, £250 was for scaffolding to investigate a leak through the roof of Flat 19, £650 was to repair a broken skylight and £186 was to unblock a soil pipe. It said none of these items were included in the proposed major works and put the Applicants to proof that they would have been avoided if the major works had been carried out sooner. The balance of £397 is the managing agent's fee for bank reconciliation of monthly payments by some leaseholders, as explained above. The roof leaks may have been caused by the delay in carrying out the works, but the leaseholders have not provided real evidence of this and again are partially responsible for the delays during this period. Even if we draw adverse inferences from the Respondent's failure to disclose documents in relation to these leaks, we are satisfied that on the balance of probabilities these costs were reasonably incurred.

81. The Applicants also challenged rubbish disposal costs of £10,598.90. The Respondent said the basic costs were £250 per fortnight and include removing the bins, sorting the recycling to decontaminate it, cleaning the bin store and removing any large items. The basic costs therefore amount

to £6,500 per year. The additional costs are for removing large items and the like. One of the sample invoices from the invoices bundle prepared by Ms Prior is from J Burling Property Services dated 30 October 2018 for five out of hours visits to put the bins out for collection and five return visits to put the bins away and all discarded black bags into empty bins for £180 each, the total sum of £900.

82. Mr Dale said neighbours had cleaned out the bin store themselves on occasion. Mr Smith said there were rats and rat droppings on the floor. He said when he ran the residents' association (until 2014) he had regularly picked up litter and tidied up. On occasion, he had spent four hours going through the recycling to sort it out. He thought another leaseholder had been paid to do this after 2014. He understood some residents were not doing the right thing now but argued this was because of the rats. He said the local authority previously collected from the bin stores and it was the "*condemned*" garages and the rats living in them which meant they would not collect any more. Mr Gwynn said the local authority was no longer willing to collect bins from the bin store in the garage block, so they had to be taken out to the pavement at about 5am. He said they are communal bins, not assigned to individual flats. He told us they were badly used, with ripped bags and the need to decontaminate and remove quite a few dumped items. If the bins were not decontaminated, the local authority would not collect them. He admitted residents had not been asked to use the bins better and put them out themselves. He said he was certain this would not work given these communal bins, the early hour and the rented flats in the building. He could not comment on the allegations about rats, but confirmed again that he had never inspected the Property.

83. In our assessment, these costs were reasonably incurred, but at just over £300 per leaseholder they are the most which could reasonably be incurred. The leaseholders benefited from the substantial amount of work done voluntarily by Mr Smith in the past. Mr Smith had not given a witness statement and was not cross examined, so the evidence he attempted to give in his submissions carries less weight. It seems likely there were some problems with rats which might have been addressed with pest control services. However, none of the Applicants pointed us to correspondence raising this with the managing agents at the relevant time, and we can see from the charges originally queried in the documents from Ms Prior that rodent control services were procured in 2019. Ms Prior had produced correspondence indicating that the reason the local authority would no longer collect from the bin store was that it had been deemed unsafe, but the leaseholders were partially responsible for the delay to the major works during this period, as explained in paragraph 79 above. Further, none of the leaseholders produced alternative quotations or could show they had done anything to propose self-help by leaseholders in relation to bin collections. As with the other items above, on the evidence produced, we are not satisfied that they have any substantial claim for special damages by way of additional refuse collection costs in relation to the failure to repair the garages, or

that any damages for any such additional costs would exceed the minimum damages determined under issue 8 below.

2019

84. The Applicants disputed major works costs of £3,040, saying these would not have been incurred if the repair works had been carried out sooner. They had previously contested additional items under this heading, but in their final schedule reduced their dispute to this sum. In context, this must comprise the costs they originally challenged of £1,300 for repair of a leaking skylight and £1,740 for structural consultancy services including re-run of the tender process. The Respondent said the £1,300 to repair the leaking skylight would have been incurred in any event. They admit the other costs would not have been incurred had the major works been undertaken sooner, but again argued these costs were necessary because of the leaseholders' challenge to the scope of the works to be carried out.

85. In our assessment, these costs were reasonably incurred. The Applicants have not shown that the skylight repair costs would not have been incurred if the major works had been carried out. The major works do not extend to repair of skylights. It was reasonable to incur the additional professional costs of updating the tender invitation documents and re-running a tender exercise for the same reasons as explained in paragraph 79 above and when assessed against the chronology outlined above. Swainlands would not stand by their (apparently unrealistic) estimate from 2017, and produced their substantially higher estimate with qualifications only in the latter part of 2018, making it reasonable (or indeed appropriate) to prepare and run a new tender exercise in 2019.

86. Next, the Applicants challenged £1,328.50 under the heading of "general repairs". The Respondent said £380 was the excess payable in respect of an insurance claim for an escape of water into Flat 2, which is not a top-floor flat. It produced the relevant documents. It said £240 was for an asbestos inspection and £384.50 was to clear the bin store, dispose of fly-tipped items and sweep and disinfect it throughout. We accept the Respondent's explanation in relation to these first three items; in our assessment, these costs were reasonably incurred.

87. The balance of £324 was paid to the first Applicant (Mr Smith) following a leak into his flat. The Respondent put the Applicants to proof that this leak would have been avoided if the major works had been carried out earlier. At the hearing, Mr Smith put it to Mr Gwynn that the Respondent had failed for a long period of time to resolve this leak, which had been reported immediately to the managing agents but had not been addressed, leading to the interior damage he described. Mr Gwynn accepted this, explaining there had been exceptional circumstances which had led to an individual taking the report and then having to leave

immediately for serious personal reasons, so the need to resolve the problem was not logged on the manager's system. He said Mr Smith had been compensated for this, but did not mention that the compensation payment had been put through the service charge. In our assessment, this cost of £324 was not reasonably incurred, or the Applicants are entitled to damages for the corresponding proportion of this sum to set off against service charges. Unlike the other such claims, the Applicants have done enough to show that on the balance of probabilities this payment to compensate Mr Smith was caused by the breach by the Respondent of their obligation to keep the block in repair and the continuing reported but un-remedied leak into his top-floor flat.

88. Next, the Applicants challenged a balancing adjustment of £2,685.27, because they thought it must relate to anticipated or additional repair costs. The Respondent explained this was a year-end adjustment for the difference between the estimated and actual costs, not a major works provision. On the case and evidence produced by the parties, we accept this is not a service charge cost to be determined.

89. Finally, the Applicants challenged rubbish disposal costs of £11,205.36. For the same reasons as explained above, we consider that up to £10,675 of this cost (£305 per leaseholder) was reasonably incurred, but the balance of £530.36 was not. If the total figure of £11,205.36 does not include the separate invoice for £384.50 considered in paragraph 86 above, the total reduction to be made is £914.86 (£530.36 plus £384.50). As with the similar charges in 2018, on the evidence produced, we are not satisfied that the Applicants have any substantial claim for special damages by way of additional refuse collection costs in relation to the failure to repair the garages, or that any damages for any such additional costs would exceed the minimum damages determined under issue 8 below.

2020

90. The Applicants challenged an estimated major works charge of £286,074.14 under this heading, but to avoid repetition/confusion we consider this under issue 6 below.

91. Finally, the Applicants challenged insurance costs of £1,551.69, as part of the difference between the 2019 premium (£7,758.47) and the premium for 2020 (£10,040.90 with AXA Insurance UK PLC). The estimate had been £9,400, and the 2019 premium had already increased to allow for current building costs in the estimated reinstatement cost (not the market value of the building, as the Applicants had previously thought). The Respondent said the increase between 2019 and 2020 was attributable to a further increase of 7.8% in the building cost index and two claims: (1) towards the end of 2019, a leak between flats 16 and 22, not because of any disrepair which the major works are to address, for which a reserve of £20,070 was made; and (2) in 2020, a claim for £1,355

for storm damage. This explanation is borne out by the relevant insurance documents in the invoices bundle produced by Ms Prior. We accept the Respondent's explanation and note that the total cost even with these claims is less than £290 per leaseholder. In our assessment, this insurance premium was reasonably incurred and the Applicants have demonstrated no damages claim in respect of it.

Issue 5 – historic service charges (scaffolding). Have the Tenants been overcharged? If so, by how much?

92. The Applicants challenged scaffolding costs which they calculated at £22,236.26 in 2016 and £7,392 in 2017. They had already challenged the planned redecoration works this scaffolding was erected for, as noted above. Further, they contended that any appropriate work needed for safety should have been carried out immediately and the scaffolding should have come down to avoid further hire costs. Ms Prior pointed out that she had asked at the time for copies of invoices for the scaffolding and the work carried out, but nothing was provided until she could obtain the (incomplete) invoices in these proceedings. She produced in her invoices bundle copies of scaffolding invoices which she had been able to obtain but had not been included by the Respondent in the main bundles.

93. The Respondent confirmed the scaffold was erected and hired to carry out the external decorations from 2015. They said it was retained to protect the block access route, primarily from loose hanging tiles overhead. They asserted that the main cost of scaffolding is erecting and striking rather than renting, but provided no real details of or evidence for this, only an invoice for hire costs of £320 per week from 19 to 31 May 2016 in the sum of £548.55 plus VAT (£658.26) and an irrelevant invoice for scaffolding in 2018. They said that the Respondent tried to avoid striking to save overall costs, but when it became apparent the major works would not proceed quickly they instructed Lollypop FM to make safe the immediate danger and then struck the scaffold. They said the costs of erecting and striking would have been incurred in any event and the scaffold was in place longer to protect residents and carry out emergency work. Mr Staves pointed out that he had also used the scaffolding to carry out his detailed inspection in September 2015. He said the scaffolding had been left in place from September 2015 in the expectation that the remedial works would be carried out sooner. He said the immediate problem area (the loose hanging tiles) had been over the entrance, or one of them. He said they had made sure the scaffolding was fitted in such a way as to catch any tiles that fell. He said the battens (used to fix the tiles) were rotten, so the whole panel had to be re-felted and replaced before the tiles could be securely fixed back in place. He also referred to the health and safety risk of falling masonry from the third floor and said this had been made secure by being laid on the roof. He thought the emergency work was done in November/December 2016. Mr Gwynn confirmed all scaffolding costs had been put through the service charge and could not say how much the emergency remedial

works had cost. He pointed out that the scaffolding may have avoided a serious injury/claim and said this was a question of the welfare of residents, not just how much the emergency work had cost.

94. The parties could not give us precise dates, but on the evidence produced the scaffolding was up between September 2015 (at the latest) and December 2016. Despite the inspection by Mr Staves in September 2015, the statement of estimates for the major works was not produced until November 2016. In our assessment, even allowing for the benefit of hindsight, most of this cost was not reasonably incurred. First, as explained above in relation to the external redecoration, the Respondent should have made proper arrangements for inspection of the building to assess the scale of work which might be needed before erecting scaffolding around all the blocks. Second, having found itself in this situation, it should at least have procured the emergency remedial works promptly and then struck the scaffold. It seems likely that the total cost of the emergency works would not have taken them above the consultation threshold. Even if the cost had been above the threshold, an urgent application for dispensation could have been made.

95. In our assessment, the total cost it was reasonable to incur in these circumstances was the equivalent of three months' rent of the scaffolding (£320 per week for three months, £4,160, plus VAT, the sum of £4,992, which we round up to £5,000). Three months is substantially longer than the appropriate period to deal with the problem as we have outlined above. We have reached this figure to give an appropriate allowance for the costs of erecting and striking the scaffold, as best we can with the evidence provided to us. Some such cost may have been included in the first invoice for the redecoration work in 2015, which we disallowed, so we have allowed for it here.

96. When Mr Gwynn was taken to the relevant part of Ms Prior's statement of case he confirmed the figures analysed in her spreadsheet (other than the first item for £7,460, which he confirmed was not for scaffolding; Ms Prior had projected this from another unreferenced document). Those figures are slightly higher than the figures of £22,236.26 plus £7,392 adopted in the final schedule exchanged between the parties, so we adopt those lower final figures. On that basis, again doing the best we can with what has been provided to us, the total scaffolding costs put through the service charge for 2016 and 2017 were £22,168.26 (those figures from Ms Prior's schedule, less the £7,460). It appears this is the main part of the £25,180 for "major works" in the service charge accounts for the year ended 30 September 2016, and the smaller amount in the following accounts. We determine that £17,168.26 (£22,168.26 less £5,000) of these scaffolding costs were not reasonably incurred.

Issue 6 – future service charges (external work and garage replacement). Will the Tenants be over-charged for the proposed major work? If so, by how much?

97. It is well established that if the landlord has chosen a course of action which leads to a reasonable outcome, the costs of pursuing that course of action will have been reasonably incurred even if there was a cheaper outcome which would also have been available. However, this is not a licence to charge a figure which is out of the market norm; the charge needs to be reasonable in the light of market evidence. Miss Gibbons referred us to Forcelux v Sweetman [2001] 2 E.G.L.R. 173. We also refer to what was said in White, as set out above, as to the basis on which we are to assess reasonableness where it is said disrepair has increased costs.

98. In his report in 2017, Mr Colangelo advised that the reasonable costs of the works to the main building would be "…*about £123,100 excluding VAT and any professional fees*." Ms Prior agreed that following the last tender exercise the accepted price from LSM (£109,258.06 plus fees and VAT) was less than this, and the price was a reasonable cost. She was worried that it was only an estimate, but acknowledged that the tribunal was being asked to decide the reasonable cost payable in advance for the works. Miss Gibbons pointed out that the Respondent had also arranged for the coping stones to be lifted and a damp proof course fitted before they were re-laid, as suggested in the consultation exercise.

99. For the reasons set out in more detail above, we are satisfied that rebuilding the garage block was reasonable. Mr Smith appeared to accept this and Ms Prior did not. On the balance of probabilities, repair would not have been cost-effective and the "repair option" cost of £67,700 plus fees and VAT estimated by Mr Colangelo (who had assumed the building was of more recent construction than appears to be the case) was not achievable. Even allowing for what Ms Prior said about any influence from Mr Staves, the responses from the two concrete repair specialists confirm this. Mr Colangelo had allowed only about £18,000 in his £67,700 for the actual concrete repairs. As Miss Gibbons pointed out, if the £128,000 repair estimate from the concrete repair specialists was added to the other items in Mr Colangelo's estimate, his £67,700 would increase to more than £214,000 plus fees and VAT. Mr Colangelo advised in his report in 2017 that if repair was not feasible the reasonable rebuilding costs would be £180,961 plus fees and VAT. The estimate from DB Building Services, which we have been asked to base this determination on, is £176,624 plus fees and VAT. Based on the advice from Mr Colangelo, this cost would have been reasonable in 2017 and it is reasonable now.

100. As explained above, we do not consider that the first Swainlands estimate was achievable and we are not satisfied that the second Swainlands estimate would have resulted in a lower price. Ms Prior sought to separate out the garage element to show that Swainlands' price for the garage works could have been cheaper, but this was a combined quotation. We can only speculate about what preliminary costs relate to which items and whether Swainlands would have been prepared to deliver the garage works for this lower price if they were not receiving a

higher price for the works to the residential blocks. In our assessment, it is unlikely that the price from Swainlands for the garages alone would have been lower, since the total cost in the second estimate from Swainlands was £290,434 exclusive of VAT and fees - and subject to qualifications. As noted above, the estimated costs we have been asked to assess (LSM for the blocks and DB for the garages) are less than this, at £285,882 exclusive of VAT and fees. Swainlands had sent an e-mail to Ms Prior in January 2021 saying they were still very interested in the works and would be pleased to re-price as competitively as possible, attaching a copy of their second combined tender at £290,434 plus fees and VAT. However, we accept the evidence of Mr Staves that he asked Swainlands whether they wished to participate in the final tender exercise in 2019 and, at that time, they declined.

101. Further, as noted above, the Respondent was not obliged to select the cheapest prices estimated (although it seems likely it has). We are satisfied that the works price of £285,882 plus professional fees and VAT is reasonable. The estimated professional fees were not seriously challenged. We were not given full details of the fixed charging elements as described by Mr Staves, but we are satisfied that as a proportion of the total cost these professional fees are reasonable. With VAT on the works price and the professional fees, they take the total reasonable estimated cost to £382,119.87.

Issue 7 – future service charges (loose bricks and render, and rubbish disposal). Will the Tenants be overcharged for the items on their list? If so, by how much?

102. We do not have enough information to make a determination about this. We understand why the Applicants sought to cover everything they possibly could in these proceedings, but we do not have enough information about any costs the Respondent may seek to recover in relation to these works. We hope the parties will be able to reach agreement on them in future. If they cannot, they may be the subject of a new application in due course; this decision does not preclude that.

Issue 8 – garages. Do the Tenants have a claim for breach of covenant that may be set off against any service charges to which the Landlord is entitled. If so, what is the value of that claim?

103. As explained under issue 1 above, we are satisfied that the Applicants have a good claim for damages for breach of the repairing covenant in respect of the garages, that may be set off against any service charges to which the Respondent is entitled.

104. In Earle v Charalambous [2006] EWCA Civ 1090, Carnwath LJ said at [32]: "*A long lease of a residential property is not only a home, but is also a valuable property asset. Distress and inconvenience caused by disrepair are not free-standing heads of claim, but are symptomatic of*

interference with the lessee's enjoyment of that asset. If the lessor's breach of covenant has the effect of depriving the lessee of that enjoyment, wholly or partially, for a significant period, a notional judgment of the resulting reduction in rental value is likely to be the most appropriate starting point for assessment of damages. Generally, this reduction will not be capable of precise estimation; as Morritt LJ said in Wallace, it will be a matter for the judgment for the court, rather than for expert valuation evidence."

105. In Moorjani v Durban Estates [2016] 1 W.L.R. 2365, Briggs LJ said at [36]: "*...it is therefore not a fatal obstacle to a claim for damages for that impairment in the lessee's rights that the lessee may have chosen not to make full use, or even any use, of them during part of even all of the relevant period, for reasons unconnected with the disrepair itself. The use which the lessee chooses to make, or not to make, of those rights is, at least in principle, res inter alios acta...*" and at [37]: "*...it by no means follows that the use, or non-use, of the lessee's property rights during the period of disrepair is irrelevant for all purposes. It may for example be relevant as mitigation of loss. Thus in the Earle case, the lessee mitigated the consequence of having his premises rendered uninhabitable by lessor's default by living for part of the relevant period with his parents. Prima facie, the loss of his rights of use and amenity at his flat was total, and should have entitled to him to a 100% notional rent by way of damages. But the Court of Appeal was content to limit his damages to 50% of a notional rent*."

106. Briggs LJ concluded at [42]: "*The outcome of the above analysis of the principles and the authorities is that, in my view, the Judge was wrong to treat Mr. Moorjani's non-occupation of his flat during most of the period of disrepair as fatal to his claim for his compensation for loss of amenity. In my judgment he suffered precisely the same loss as would have been suffered by a lessee who, in comparable circumstances, had remained in the flat throughout, namely a serious although temporary impairment of the rights in relation to that flat conferred upon him by the Lease, for which he had paid a full premium. The starting point for the valuation of that impairment ought to be by reference to the rental value of the flat during the relevant period, with a very substantial percentage discount to reflect the Judge's conclusion that the disrepair in the flat was cosmetic and did not render it uninhabitable, and that the disrepair in the common parts was not, by reference to other cases with which she was familiar, of a particularly severe kind*." Briggs LJ went on at [46] and [47] to say that in those circumstances his starting point would have been 5% of the estimated notional rental value. He reduced that by half in view of the tenant's non-occupation.

107. The Respondent put the Applicants to strict proof of loss. Miss Gibbons pointed out that we were dealing with multiple Applicants who had owned for different time periods, and claims for special damages will differ, but there was no breakdown of claims or evidence of loss of rental income or other losses. When we referred to the above authorities, Miss

Gibbons reminded us that there are many factors in such an assessment. Some of the Applicants do not use their flats as their home, but rent them out. Some may use the communal parking area at Tetbury Court, so have use of parking in any event. Miss Gibbons submitted that it was too simplistic to attempt to assess even general damages based on the material provided by the Applicants.

108. We have considered this carefully but in our view, it is not an answer. We certainly cannot make a comprehensive assessment of damages. We do not have enough evidence about any additional costs in respect of the remedial works (there may be none, as explained under issue 1), or from each Applicant of their individual circumstances and all the losses they might have suffered, such as loss of rent or damage to their personal possessions. However, we are making this assessment only to the extent that it is essential for us to determine what service charges are payable. Any assessment we make for this limited purpose could be taken into account in the event of any claims for additional/specific damages in future, although we should not be taken to be encouraging or discouraging any such claims; they might never be made.

109. Ms Prior had produced basic evidence indicating that privately renting a single garage in the general area would cost approximately £20 per week. She had calculated an average value as £15 plus £5 for the inconvenience of using garages which would probably be a long way from the building. She pointed out that it would be difficult to rent enough garages in central Reading for everyone at Tetbury Court, and trying to do so would probably push up the price. She had claimed various sums calculated in different ways, but they were all based on her figure of £20 per week per leaseholder. We put this figure to Mr Gwynn, who said he paid about £70 per month for the garage he rented in a different part of the country. The Applicants had already pointed out that Tetbury Court has an RG1 postcode, near to the centre of the town, and parking is very tight. That is clear from the photographs produced by Ms Prior in the bundles, showing severe parking difficulties even before the garage gates were locked.

110. In our assessment, Ms Prior's figure of £20 per week (which equates to £1,040 per year) is low, even as a basic rental figure, for these garages in this location if they had been kept in repair. It was put to her that an alternative might be storage space, rather than garages, but no evidence was produced to indicate that equivalent storage space could be rented for less. In our view, it is likely to be more expensive. Mr Smith emphasised the limited communal parking spaces on site and the high demand for them even when the garages were open for use. Again, it is obvious from the photographs in the bundle that this only became worse when the garages were closed, and that the communal parking area is also used by contractors attending to provide services. Ms Prior accepted that the garages were relatively narrow, but said a lot of people had kept their cars in the garages and some had kept cars and bikes in theirs. Some had used theirs for storage and one (Mr Cole) had kept using his

garage throughout, despite the warning notice/order from the Respondent.

111. Each garage is a valuable part of the property demised to each Applicant under their leases. The disrepair and order at the end of 2016 not to use the garages was a serious impairment of their property rights. The starting point for the true rental value of the garages is likely to be substantially higher than has been suggested. However, we are satisfied that for the purposes of this assessment it is appropriate to reduce the level of the damages to £20 per week to take into account the possibilities that some leaseholders might never have used their garages, or made some use of them from 2017, and some leaseholders may be partially responsible for some of the delays in the carrying out of the works to the garage block, as explained above. This results in a conservative minimum assessment, given that any non-use during the relevant period (from 2017) was after the Respondent had ordered that the garages must not be used because they were dangerous. However, in all the circumstances we are satisfied that we should not increase (or further reduce) the basic figure of £20 per week. We do not make a discount in relation to the communal parking at Tetbury Court, because this was limited non-exclusive communal parking which should have been available for household members, visitors, service providers and the like, in addition to the exclusive dedicated space in the garages.

112. Having weighed the evidence produced to us, our assessment of the minimum damages each Applicant is entitled to set off against service charges is set out in Schedule 1 to this decision. For simplicity, it is calculated (at £2.8571428 per day) from 1 January 2017 to 31 March 2021 (1,550 days) for all the Applicants except Josh Wilson (666 days) and Stuart and Veronica Chin (1,121 days), who acquired their leases later. For the avoidance of doubt, we are satisfied this is the lowest value of the damages claim that any of the Applicants can set off against the service charges. This determination does not limit their claim(s), but because they have not provided further particulars or evidence it is not essential or appropriate for us to attempt to determine any greater claims (if there are any such claims) in order to determine whether the relevant service charges are payable.

Issue 9 – consultation (previous rounds). Did the Landlord comply with the consultation process? If not, what consequences flow from that, if any?

113. We do not propose to make a separate determination about this. None of the parties made a focussed case about the previous consultation exercises and the Respondent does not rely on them. We take them into consideration as relevant background when we consider the final issue below.

Issue 10 – dispensation (current round of consultation). In which respects did the Landlord not comply with the dispensation requirements? What financial prejudice did the Tenants suffer, if any? Is dispensation appropriate? If so, what conditions should be imposed, if any?

114. Mr Smith queried plans and said in effect that he did not receive 30 days' consultation, because plans were not provided when he visited to ask for them and the further details he asked for were not provided at that stage. The Respondent addresses this in paragraph 23 of their statement of case. Mr Smith did not dispute that the plans were provided voluntarily more than 14 days before the end of the consultation period and did not point to any observations he would otherwise have made. Further, it appears that he was not entitled at that stage to see the further information he had requested. The Respondent accepted there had been a "technical" breach of the requirements by failing to summarise in the third statement of estimates the observations received in response to the third notice of intention. We are satisfied that, in that respect, the Respondent did not comply with paragraph 11(5)(b)(ii) of Part 2 of Schedule 4 to the Service Charges (Consultation etc) (England) Regulations 2003 (the "**Regulations**").

115. The Applicants submitted that it followed that the Respondent did not have regard to the observations. They also argued that the consultation and work had been delayed too long after the notice of intention. Ms Prior referred in her statement of case to Jastrzembski v Westminster City Council [2013] UKUT 0284 (LC), where the Upper Tribunal said by reference to the period of 30 days for providing observations or suggesting contractors: "*…This indicates that the relevant time periods for the work to be undertaken is months rather than years*." In that case, delay from 2007 to 2009 combined with a change in the proposed works meant that a notice served in 2007 was invalid for works carried out in 2009.

116. We are satisfied that the Respondent did not comply with paragraph 10 of Part 2 of Schedule 4 to the Regulations. We assume for the purposes of this decision that the delays constituted additional non-compliance, or rendered the notices which were served non-compliant, but we did not hear sufficient argument to make a separate determination on this.

117. By section 20ZA of the 1985 Act, following the application by the Respondent, the tribunal may make a determination to dispense with all or any of the consultation requirements in relation to any qualifying works if satisfied that it is reasonable to dispense with the requirements. In this connection, the Respondent relied on Daejan Investments Limited v Benson [2013] UKSC 14, where Lord Neuberger said:

"*44. Given that the purpose of the requirements is to ensure that the tenants are protected from (i) paying for inappropriate works or (ii)*

paying more than would be appropriate, it seems to me that the issue on which the LVT should focus when entertaining an application by a landlord under section 20ZA(1) must be the extent, if any, to which the tenants were prejudiced in either respect by the failure of the landlord to comply with the requirements.

45. Thus, in a case where it was common ground that the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the requirements, I find it hard to see why the dispensation should not be granted (at least in the absence of some very good reason): in such a case the tenants would be in precisely the position that the legislation intended them to be — ie as if the requirements had been complied with.

46. I do not accept the view that a dispensation should be refused in such a case solely because the landlord seriously breached, or departed from, the requirements. That view could only be justified on the grounds that adherence to the requirements was an end in itself, or that the dispensing jurisdiction was a punitive or exemplary exercise. The requirements are a means to an end, not an end in themselves, and the end to which they are directed is the protection of tenants in relation to service charges, to the extent identified above. After all, the requirements leave untouched the fact that it is the landlord who decides what works need to be done, when they are to be done, who they are to be done by, and what amount is to be paid for them."

118. The Applicants contended that the cost of the major works should have been no more than £290,000 including fees and VAT, but failed to explain why that should be the case. They may have been referring to the original estimate from Swainlands in 2017 - which we consider was unrealistic, as explained above. The more realistic price from Swainlands was their second estimate (in 2018, at just over £290,000 plus fees and VAT, as attached to the Applicants' response to the dispensation application). The current estimated costs are in line with that. In our assessment, the Applicants have not demonstrated any increase in prices, or any other prejudice, arising from the failures to comply with the consultation requirements. Despite the failings in the third consultation, the Respondent had already had regard to the key useful observation from the previous consultation exercises, that the coping stones on the residential blocks should be lifted and reinstated on a damp proof course. This was incorporated into the work. The Respondent was very slow in carrying out the works, but part of the reason for some of the time taken was the (understandable) objections and representations from leaseholders that the possibility of repair of the garages must be fully investigated. The leaseholders had taken advice from their own surveyor and then their own engineer, and the Respondent had then liaised with the concrete repair specialists as requested by the leaseholders to obtain their proposals.

119. The parties agreed (in effect) that the costs of the reports obtained by leaseholders in 2017 were not directly referable to the failures to comply with the consultation requirements. These were costs of participating in the previous consultation exercise. The only costs referable to the failures to comply with the consultation requirements were Counsel's fees of advising on the dispensation application. We do not consider that it would be appropriate to make it a condition of dispensation that such fees be reimbursed. The Applicants represented by Ms Prior went on to oppose the application for dispensation. In view of that, and the other circumstances summarised above, we consider that the Applicants have not suffered any prejudice for which they should be compensated by imposing such a condition, or any conditions.

120. In the circumstances, we are satisfied that it is reasonable to dispense with the consultation requirements in relation to the relevant works. The tribunal determines under section 20ZA of the 1985 Act to dispense with all the consultation requirements in relation to the works to the residential blocks and the garage block.

Section 20C/paragraph 5A applications

121. As noted above, these applications were made by or on behalf of all the Applicants and Antonio Mariano (No. 34). Miss Gibbons rightly acknowledged that the leases do not "*explicitly*" provide for the costs of proceedings to be included in the service charge. However, she had no instructions as to whether the Respondent might attempt to recover any such costs through the general service charge provisions or as an administration charge.

122. As arranged at the hearing:

(i) by **12 May 2021**, the Applicants may send to the tribunal and the other parties written submissions as to whether we should make an order under section 20C of the 1985 Act or paragraph 5A of Schedule 11 to the 2002 Act, and whether we should order reimbursement under Rule 13 of the tribunal application/hearing fees paid by the Applicants; and

(ii) by **21 May 2021**, the Respondent may make written submissions in answer.

Name: Judge David Wyatt **Date:** 28 April 2021

<u>**Rights of appeal**</u>

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.

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).

Schedule 1

Applicants

Applicant	Flat	Acquired lease	Set-off (£)	Balance of £10,917.71 (£)
Vanreen Miles	1	2015	4,428.57	6,489.14
Rafal Szulc	2	2012	4,428.57	6,489.14
Alex Batiashvili	6	1994	4,428.57	6,489.14
Peter Emanuel	10	1996	4,428.57	6,489.14
Josh Wilson	11	4 June 2019	1,902.86	9,014.85
James Dale	18	2012	4,428.57	6,489.14
Andrew and Amanda Young	19	2 August 2016	4,428.57	6,489.14
Jeremy and Beverley Jones	20	2015	4,428.57	6,489.14
Alicia Alexander	21	2006	4,428.57	6,489.14
Ana Martins	22	1999	4,428.57	6,489.14
Robert Hughes and Eva Simurdova	23	2007	4,428.57	6,489.14
Timothy Richard Cole	26	1986	4,428.57	6,489.14
Amanda Prior	27	1990	4,428.57	6,489.14
Mark Hester	28	2015	4,428.57	6,489.14
Nicholas Clark	29	2007	4,428.57	6,489.14
Stuart and Veronica Chin	30	6 March 2018	3,202.86	7,714.85
Dave Thompson	33	2014	4,428.57	6,489.14
John Francis Smith	35	1986	4,428.57	6,489.14
Alan Cossey	36	April 2016	4,428.57	6,489.14

Schedule 2

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 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.

Section 20ZA

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

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.