FIRST-TIER TRIBUNAL

PROPERTY CHAMBER

(RESIDENTIAL PROPERTY)

Case reference	**: MAN/00BU/LSC/2021/0037**
Property	**: 18 Lloyd Gardens, Altrincham, WA14 2SY**
Applicant	**: Alastair McFarlane**
Representative	**:**
Respondent	**: Trafford Housing Trust Ltd**
Representative	**: Trowers and Hamlins LLP**
Type of application	**: For the determination of the reasonableness of and the liability to pay a service charge**
Tribunal members	**: Judge J White** **John Elliot (valuer)**
	: Paper Determination
Venue	**Northern Residential Property First-tier Tribunal, 1 floor, Piccadilly Exchange, 2 Piccadilly Plaza, Manchester, M1 4AH**
Date of decision	**: 8 September 2023**

DECISION

Decision of the tribunal

(1) The tribunal determines that the full sum of £2444.16 is payable by the Applicant in respect of the service charges in dispute for the years 2014/15-2020/21.

The application

1. The Applicant seeks a determination pursuant to s.27A of the Landlord and Tenant Act 1985 ("the 1985 Act") as to the amount of service charges payable by the Applicant / Respondent in respect of the service charge years 2015, 2016, 2017, 2018, 2019, 2020, 2021 relating to communal electricity, day to day repairs and door entry system. He asked the tribunal to determine the service year 2022, though did not put any service charges at issue. The total value in dispute is £2444.16.

2. The Applicant made the application on 14 May 2021. On 17 January 2022, the Tribunal issued Directions, including that the matter should be determined at an oral hearing. In accordance with those directions both parties submitted a bundle of documents.

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

4. The matter was due to be listed for a video hearing. Both parties agreed that the matter was suitable for a paper determination. We met on 17 February 2023 and found that it would be preferable for the parties to make further representations and that an oral hearing would enable the parties to better explain their submissions. Both parties made written representations that the matter should be determined on the papers. They made submissions in answer to questions of the Tribunal.

5. The Tribunal met again, on 8 September 2023 and as the parties had continued to maintain that they did not want an oral hearing, we decided to proceed on that basis. Having taken into account the parties agreement to proceed in this way, the sums in dispute and their further submissions, we were able to make a fair determination. We also note that the primary consideration is the construction of the Lease.

The background

6. The property which is the subject of this application is 18 Lloyd Gardens, Altrincham, WA14 2SY (the "Property"). It is a mid 2 bedroom maisonette with its own front door. It is on brick construction built circa 1970. The building in which it sits is a block of 20 flats with even numbers 2/40 (the "Building"). Both the upper floor and the lower floor maisonettes. The Building has enclosed stairwells attached to each end leading to an open walkway providing access to the upper floor maisonettes. At the bottom of the stairwell are communal stores and bin stores. There is a roof providing

some shelter at access points to the Building. There is lighting to the upper and lower external partially covered walkways. There is a communal ariel on the top of the Building. The Building sits in a large plot with parking and grassed areas and sits slightly back from the road. It is part of a larger development. The landlords electric meter and access to the arial are located in the upper floor of the Building in a separate room. There are cable boxes externally where each flat may connect their own aerials.

7. Photographs of the Building and a plan of the Property were provided in the hearing bundle. In addition a fire safety report sets out details of the Building. Neither party requested an inspection and the tribunal did not consider that one was necessary, nor would it have been proportionate to the issues in dispute.

8. The Applicant holds a long lease (125 years from 5 January 1998) of the Property which requires the landlord to provide services and the tenant to contribute towards their costs by way of a variable service charge. The specific provisions of the lease and will be referred to below, where appropriate.

9. The Applicant purchased the Property jointly with his wife Fionna McFarlane on 5 February 2014. The then landlord was Trafford Borough Council. The Respondent is the current landlord and freeholder. The Property was originally purchased through the Right to Buy Scheme. It is currently the only maisonette in the building that had been sold.

10. The Applicant contends that following costs are not recoverable at all under the terms of the lease:

11. **Entry Door System:** They dispute the service charges for the door entry system amounting to £368.06 for the years 2014/15-2020/21. It is an installation and not part of the structure and exterior of the Building and the Lease makes no provision for recovery of installations in the common parts. Replacement is an improvement and the Lease limits recovery to repairs of the Building. The Applicant has no right of access through the communal entry door and only those areas with rights of access are recoverable under the lease. The Respondents purported need to access any communal aerial and power supply does not change the position.

12. **Electricity Costs for communal lighting:** £427.69 for electricity for the years 2014-2021. Services under the Lease do not include charges for electricity. It does not come within the meaning of Access of Light. It is not required for access to the Property. He has no greater benefit than other neighbouring properties in the development. There is ample street lighting to allow him access to the Property.

13. **Upgrade of lighting:** £1135 relating to the invoice No RINV/10003953 dated 20 September 2019. This was for a new lighting system. They say they

obtained counsels opinion about their liability in this regard as set out in an email dated 8 November 2019 [53]. An upgrade is an improvement and so not chargeable by way of a service charge.

14. **15% management fees:** In 2020/21 a new charge was introduced amounting to £107.63 for that year. There is no basis under the Lease to make such a charge. It is not reasonable. It is not comparable to Norwich City Council v Marshall (2007) which does not lay down any principle of law. There is lack of transparency. A fluctuating (remarkably high) percentage on top of cost does not provide any certainty or confidence particularly as the Respondent, unlike its predecessors in title, is a profit making body.

15. Though, the Applicant originally disputed the day to day repairs, he has since confirmed they are not in dispute.

Our Determination

16. We have found that, although the lease is not at first sight clear, all service charge costs in dispute are recoverable under the terms of the lease.

The Law

17. The relevant parts of the Landlord and Tenant Act 1985 are set out in the Appendix.

The Housing Act 1985

18. The issues in dispute relate to interpretation of the lease. This is a right to buy property and the provision of Paragraph 14 (2) of Schedule 6 of the Housing Act 1985 (the Act) states that in right to buy leases there are implied covenants by the landlord— *"(a) to keep in repair the structure and exterior of the dwelling-house and of the building in which it is situated (including drains, gutters and external pipes) and to make good any defect affecting that structure; (b) to keep in repair any other property over or in respect of which the tenant has rights by virtue of this Schedule; (c) to ensure, so far as practicable, that services which are to be provided by the landlord and to which the tenant is entitled (whether by himself or in common with others) are maintained at a reasonable level and to keep in repair any installation connected with the provision of those services;…."*

19. The implied rights contained in s 2 of Schedule 6 of the Act, includes… at 2(1)(d) "*rights to the use and maintenance of cables or other installations for the supply of electricity, for the use of any telephone or for the receipt directly or by landline of visual or other wireless transmissions… and (2)The effect is—(a)to grant with the dwelling-house all such easements and rights over other property, so far as the landlord is capable of granting them, as are necessary to secure to the tenant as nearly as may be the same*

rights as at the relevant time were available to him under or by virtue of the secure tenancy".

The Lease

20. The Clauses below contain the relevant sections of the lease, some of which import parts of the Act above. The emphasis is ours.

21. The Building is described in the Lease as *'the block of maisonettes known as 2/40 (even numbers only) Lloyd Gardens, Altrincham'* (the Building) and this clearly includes the Property as the definition of the Property is *'the maisonette numbered 18 on the ground and first floors of the Building and the storeroom shown for identification edged red on the plan.....'*.

22. Clause 4(b) provides that the lessee "*pay annually in arrear on the first day of April in every year of the term ... such sums as the Director of Finance and Property for the time being of the Council shall certify to be the estimated share (any actual under or over payment being taken into account by the Director of Finance and Property when calculating future payments) of the following costs (i) the amounts specified in the first proviso to the First Schedule hereto (ii) a reasonable part of the costs incurred or to be incurred by the Council in carrying out improvements to the Property and in carrying out repairs to the Property and to the remainder of the Building within the repairing obligations of the Council under Clause 5 of this Lease*"

23. Relevant parts of Clause 5 provide:*(a) to keep in repair the structure and exterior of the Property and the Building (including drains gutters and external pipes) and to make good any defects affecting that structure (b) to keep in repair any other property over or in respect of which the Purchaser has rights as specified in the First Schedule hereto (c) to ensure so far as practicable that the services to be provided by the Council as specified in the said First Schedule hereto are maintained at a reasonable level and to keep in repair any installation connected with the provision of such services*.

24. The First Proviso to the First Schedule provides *"PROVIDED THAT the exercise of all the rights specified in this Schedule shall be subject to the contribution by those claiming to exercise the same of a share of reasonable costs of keeping all structures or apparatus affected by such rights in good repair and working order (including replacement where necessary) proportionate to the number of properties.."*

25. The rights provided in that schedule include *"(a) Rights in accordance with Part I of the Sixth Schedule to the Act of:*

(i) Support for buildings or any part of a building
(ii) access of light and air to buildings or any part of a building

(iii) the passage of water and gas or other piped fuel
(iv) the drainage and disposal of water sewage smoke or fumes
(v) the use and maintenance of the pipes and other installations for the said passage drainage and disposal specified in (iii) and (iv) above
(vi) the use and maintenance of cables and other installations for the supply of electricity for the use of any telephone or the receipt directly or by landline of visual or other wireless transmissions

All to the extent that the same are necessary' as specified in paragraph 2(2) of the said Sixth Schedule of the Act
(b) A right of way in common with the Council and all others now entitled or becoming entitled on foot or with bicycles perambulators wheel barrows and like hand propelled vehicles over and along any and all common pathways and passages entrance hall stairs and passenger lifts (if any) as shall be required for the purpose only of ingress to and egress from the Property.

Entrance Door System

26. We must start with the meaning of the lease. In doing so we "*must consider the contract as a whole and, depending on the nature, formality and quality of the drafting, give more or less weight to the wider context in reaching its view as to that objective wording"* [Wood v Capita Insurance Services Ltd [2017] UKSC 24]." We must read the lease in a common sense way, though not imply a business efficiency that cannot be read into the lease.

27. The first point at issue is whether the electric door entry system is part of the structure and exterior as claimed by the Respondent. If so it comes within Clause 4 (b)(ii).

28. As the implied terms are mainly imported into the lease and are not defined, we have to give them their ordinary meaning. Structure and exterior is part of the implied repairing obligations for short term tenancies contained in *s11* of the Landlord and Tenant Act 1985. Fivaz v Marlborough Knightsbridge Management Ltd [2020 UKUT 138 (LC) referred to Climie v Wood [1869] LR 4 Exch 328 *"All structures are constructed out of materials which were originally chattels, such as the bricks used to build a wall. Where an article which was originally a chattel is built into the structure of a building, it will not usually be regarded as a fixture but as part of the building itself. Thus "things may be made so completely a part of the land, as being essential to its convenient use, that even a tenant could not remove them. An example of this class of chattel may be found in doors or windows."*

29. In Edwards v Kumarasamy [2016] UKSC 40 it was said at 17 there may be more than one ordinary meaning and it is for the court to decide which of those meanings are correct. Lord Neurbugher went on to say at 18 that "*There is some force in the argument that a purposive approach to the words of section 11(1A)(a) suggests that they should be given a wide, rather than a narrow, effect, as one might have expected that Parliament intended*

those parts of a building or its curtilage which are not included in an individual residential demise, and which are in any way enjoyed by the tenant in question, would be within the ambit of the landlord's statutory repairing covenant. However, given that the section imposes obligations on a contracting party over and above those which have been contractually agreed, one should not be too ready to give an unnaturally wide meaning to any of its expressions. Quite apart from that, the fact that one might have expected words in a statute to cover a particular situation is not enough to justify giving those words an unnatural meaning in order to ensure that they do so."

30. The lease imports s14 of the Sixth Schedule of the Act, and unlike, for example, s11 of the LTA 1985, does not have a corresponding clause relating to installations. Though there is an argument that it is a chattel built into the structure, so as to become part of the building, the fact that installations are contained in other clauses, and that it is something that can be removed without affecting the structure, we have found that the ordinary meaning of the door entry system, is an installation or apparatus. To say it was part of the structure or exterior would strain its ordinary meaning.

31. However, we have found that there is liability, in accordance with the lease. Clause 4(b)(ii) provides for payment of a service charge, the amounts specified in the first proviso to the first schedule include a reasonable part of the costs incurred or to be incurred by the Respondent in … carrying out repairs..to the remainder of the Building within the repairing obligations of the Respondent set out in Clause 5 .

32. Clause 5(c) provides that the Respondent must ensure (so far as practicable) that the services to be provided by the Council as specified in the First Schedule are maintained at a reasonable level and keep in repair any installation connected to such services.

33. The First Schedule has a proviso "that the exercise of all the rights specified in this schedule shall be subject to the contribution of those claiming to exercise the same of a share of reasonable costs of keeping all structures or apparatus affected by such rights include repair and working order (including replacement where necessary) proportionate to the number of properties using the same …"

34. The First Schedule provide for rights in accordance with Part 1 of the Sixth Schedule to the Act including paragraph (a)(vi) the use and maintenance of cables and other installations for the supply of electricity for the use of any telephone or the receipt directly or by landline or visual or other wireless transmissions or to the extent that the same and necessary as specified in paragraph 2(2) of the said Sixth Schedule of the Act.

35. This imports the implied rights contained in s 2 of Schedule 6 of the Act which includes (a)(vi) and reads… at 2(1)(d) rights to the use and maintenance of cables or other installations for the supply of electricity, for

the use of any telephone or for the receipt directly or by landline of visual or other wireless transmissions… and (2)The effect is—(a)to grant with the dwelling-house all such easements and rights over other property, so far as the landlord is capable of granting them, as are necessary to secure to the tenant as nearly as may be the same rights as at the relevant time were available to him under or by virtue of the secure tenancy

36. So the implied term within the Act has a comma after electricity, meaning all electricity as distinct from "electricity for the use of any telephone" As the Respondent is obliged to maintain and repair to a reasonable level the arial on the roof, they require access using the door entry system which has a trade access bell. They also require access to maintain and repair the lighting and to the communal electricity supply and metre at the top of the Building. The service charge provides for "costs incurred" in the provision of rights and that includes maintenance of the specified installations. It also includes costs of "keeping all apparatus affected by such rights include repair and working order (including replacement where necessary)" This includes communal lighting as set out below.

Electricity for and replacement of Lighting

37. The First Schedule, at paragraph (b) provides for a right of way over and along common passages, entrance hall, stairs and lifts as required for ingress and egress to the Property. Provided that the exercise of all the right specified in this schedule shall be subject to the contribution of those claiming to exercise the same, of a share of reasonable costs of keeping all structures or apparatus affected by such rights include repair and working order (including replacement where necessary) proportionate to the number of properties using the same …In addition Clause 5 (c) obliges the Respondent "to ensure so far as practicable that the services to be provided … in the said First Schedule hereto are maintained at a reasonable level and to keep in repair any installation connected with the provision of such services".

38. The Applicant states that they do not require additional lighting to access their Property. This is amply provided for by street lighting and Communal lighting does not - and physically cannot affect the working order or nature of repair of any structure or any apparatus.

39. We have found that in order to exercise a right of way to and from the Property at all times, then lighting is required. The Applicant's Property includes the store cupboard located immediately next to the entrance door to the upper flats. We can see from the plan in the lease that the Building is set back from the road. The lighting lights the path below both to number 18 and from number 18 to its store cupboard.

40. It is a service provided by the landlord, to which they have a right, that is lighting ensures a right of access to and from the Property, including the bin stores. Southwark LBC v Baharier [2019] UKUT 73 (LC), held that it obliged

the council to provide a service and, in turn, required the leaseholder to contribute to the costs. How the council chose to provide that service was a matter for them. In addition it held that a covenant to provide services was a more onerous obligation than a covenant to repair. If a repair was insufficient to maintain those services to a reasonable level there was an obligation to take additional steps to satisfy the primary obligation.

41. Though there may be other street lighting, this is distinct from additional lighting provided on the Building to ensure access, particularly as it is set back from the road.

Replacement and reasonableness

42. As the replacement of the lighting and the door entry system is allowed within the lease we go back to whether it was reasonable in terms of the decision making process and outcome. There is no issue with the quality of the work. The Respondent states that the entry system required replacement and a Lighting Programme was carried out following a full section 20 consultation following a fire risk assessment. We have no reason to doubt that the Respondent's contention that the door entry system was in need of repair or that the lighting was dangerous. Replacement instead of repair is within a reasonable range of outcomes, taking account the cost of continuing to maintain old installations. This is clearly distinct from an improvement and comes within the nature of a repair. It is also necessary to provide the services and rights.

15% Management Fee

43. The Applicant contends that it is a new charge that is not recoverable under the lease. The Respondent submits that the 15% management charge was previously included within the cost of each of the services and this takes account of the management time in providing that service. In 2020 the Respondent decided to separate out the management fee to show it as an independent charge as a more transparent method. The increase in 2021/22 is due to a benchmarking exercise where it was found that the management company were operating at a loss in terms of caretaking and ground maintenance. The Respondent states they are intending to move to a fixed management fee as a fairer means of charging management fees.

44. The Respondent, as a registered provider of social housing, contends that it is not subject to the RICS Service Charge Code Management Code. Where appropriate, they say they try to follow the guidance provided by the Code; however, the 15% fee is charged across the Respondent's stock in the case of variable service charges and consistency of the charges to their residents is important to the Respondent. The actual costs of management were £65.62 in 2020 / 2021 and £68.16 in 2021 / 2022 not as stated in the Applicant's Statement of Case. The Respondent believes these sums to be much lower than most management fees charged in the market of leasehold management. The Applicant has not provided any alternative comparables,

although it is noted that in his application he does not question the level of the charge.

45. Following Directions the Respondents have stripped out their management fees from previous years. These show a relatively consistent level from 2014/15 to 2021/22. The amount in 2014 being £581.88, 2020 £503.04 and 2021 £522.57. The highest amount was £688.10 in 2019.

46. Norwich City Council v Marshall LRX/114/2007 confirmed where it is clear from the lease the Council must provide services, it must be implied that they are able to levy a reasonable management fee for the provision of those services, even where there is no clause specifically allowing for management costs. The Applicant states that the case does not set down any general principles of law.

47. Norwich City Council v Marshall, is a right to buy case. The Upper Tribunal found that management costs were implied into the lease, though only so far as they related to the carrying out of their obligations under the lease. Brent LBC v Hamilton LRX/51/2005 also concerned a right to buy lease. The tenant was liable to pay a reasonable part of "the expenditure incurred by the Council" during the Council's financial year "in fulfilling the obligations and functions set out in Clause 6 hereto". Although the lease did not refer to "total" expenditure, it was held that a "management fee" levied in respect of work carried out by the council in fulfilling the obligations and functions set out in cl.6 was recoverable. A similar approach was followed in *Wembley National Stadium Ltd v Wembley London Ltd* [2008] 1 P. & C.R. 3 in respect of a commercial lease. It was argued that the landlord was not entitled to levy a charge for services for its own employees and 'in-house' management. In rejecting this argument Morritt C said: "*I can find nothing in the wording of this lease in general ..... to confine the relevant services to actual service to the exclusion of any management cost incurred in its provisions.*

48. In this case the service charge includes "a reasonable part or share of the costs incurred", which would inevitably include an additional management levy, as part of either inhouse costs or additional management fees. These additional costs are not excluded elsewhere in the lease.

49. The costs, though charged as a percentage, which has the potential to fluctuate and thereby provide uncertainty, when looked at over the last 8 years has not done so and are within the low end of management fees for this size and type of development. Though it best practice is to charge a fixed fee, when accounting for the outcome, the fee is within a reasonable range of management fees and so recoverable.

Proportion payable

50. The lease provides that the exercise of all the rights specified in this schedule shall be subject to the contribution of those claiming to exercise the same of a share of reasonable costs of keeping all structures or apparatus affected by such rights include repair and working order (including replacement where necessary) proportionate to the number of properties using the same . In addition Clause 4b (ii) limits liability to "a reasonable part of the costs incurred ...in carrying out repairs ...to the remainder of the Building within the repairing obligations ..under Clause 5".

51. The Supreme Court in Aviva Investors Ground Rent GP Ltd and another v Williams and others [2023] UKSC found that we are not to substitute our own finding of reasonableness but make findings in relation to the landlords view of reasonableness. The Respondent appears to split all costs evenly, though we are not explicitly told. Their view is that the Property does derive some benefit in relation to trade access to shared services and lighting providing a safe right of access.

52. We have also taken into account case Solarbeta Management Co Ltd v Akindele. where a lift was in a separate block entirely. The Upper Tribunal found that the fact that the tenant derived no benefit from the lift was contractually irrelevant. Though in that case there was a specific proportion, we do have to consider expediency and practicality in relation to administrating service charges and that it is a reasonable process and outcome that all maisonettes pay equally all service charges relating to that Building. This method prevents conflict between leaseholders, relating to who derives a benefit.

Conclusion

53. In conclusion the costs are reasonable:

(i) Door Entry System £368.06

(ii) Community Lighting £1135

(iii) Electricity Charges £427.69

(iv) Management Fee £107.63

Application under s.20C

54. In the application form the Applicant applied for an order under section 20C of the 1985 Act. Taking into account the determinations above, and the conduct of the parties, the tribunal determines that it is not just and equitable in the circumstances for an order to be made under section 20C of the 1985 Act.

55. The Applicant did not indicate that he wished to make an application under Paragraph 5A of Schedule 11. Neither party have made any additional submissions, or referred to recovery of costs.

56. Either party is entitled to make a further application regarding litigation costs . They must do so within 52 days. The other party then has a right to reply within 28 days.

57. Finally, I apologise to the parties for the delay in this determination.

Name: J White **Date:** 3 December 2023

Rights of appeal

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

If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber), then a written application for permission must be made to the First-tier Tribunal at the regional office which has been dealing with the case.

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

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

The application for permission to appeal must identify the decision of the tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal and state the result the party making the application is seeking.

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

Appendix of relevant legislation

Landlord and Tenant Act 1985 (as amended)

Section 18

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

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

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

Section 19

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

   and the amount payable shall be limited accordingly.

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

Section 27A

(1) An application may be made to the appropriate tribunal for a determination whether a service charge is payable and, if it is, as to -
   (a) the person by whom it is payable,
   (b) the person to whom it is payable,
   (c) the amount which is payable,

(d) the date at or by which it is payable, and
(e) the manner in which it is payable.

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

(3) An application may also be made to the appropriate tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to -
(a) the person by whom it would be payable,
(b) the person to whom it would be payable,
(c) the amount which would be payable,
(d) the date at or by which it would be payable, and
(e) the manner in which it would be payable.

(4) No application under subsection (1) or (3) may be made in respect of a matter which -
(a) has been agreed or admitted by the tenant,
(b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
(c) has been the subject of determination by a court, or
(d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

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