11441

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00AW/LSC/2015/0128**
Property	:	**Flats 1 and 4, 69 Cadogan Square, London SW1X 0DY**
Applicant	:	**Ms Sarvin Bagherzadeh (1)** **Trumann Holdings Limited (2)** **Ms Ekaterina Berezovskaya (3)**
Representative	:	**Mr Bechara Madi**
Respondent	:	**Nearfine Limited (1)** **Cavendish Offices and Houses Investments Limited (2)**
Representative	:	**Mr Adam Rosenthal (Counsel)**
Type of Application	:	**For the determination of the reasonableness of and the liability to pay a service charge**
Tribunal Members	:	**Mr Jeremy Donegan (Tribunal Judge)** **Mr Michael Mathews FRICS (Professional Member)**
Date and venue of Hearing	:	**24 and 25 September 2015** **10 Alfred Place, London WC1E 7LR**
Date of Decision	:	**15 November 2015**

DECISION

Decisions of the tribunal

(1) Cavendish Offices and Houses Investments Limited is added as the Second Respondent to the application, pursuant to Rule 10(1) of The Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013 ('the 2013 Rules').

(2) Those parts of the application relating to the section 20 consultations for major works undertaken at 69 Cadogan Square, London SW1X 0DY ('the Property') in 2001, 2002, 2004 and 2008 are struck out, pursuant to Rule 9(3)(d) of the 2013 Rules.

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

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

(5) The tribunal determines that the Respondent shall pay the Applicants £340 within 28 days of this decision, in respect of the reimbursement of the tribunal fees paid by the Applicants.

The application

1. The Applicants 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 for Flats 1 and 4 at the Property in respect of the service charge years ended 31 December 2001 to 2014, inclusive.

2. The application was originally submitted by the First Applicant on 10 March 2015 and related to the years 2001 to 2010, inclusive. Directions were issued at an oral case management hearing on 07 April 2015. The Second and Third Applicants were added as parties, at their request, on 16 June 2015. The scope of the application was subsequently extended to include service charges for the years 2011 to 2014 and challenges to notices served under section 20 of the 1985 Act, at the request of the parties, on 24 June 2015.

3. Paragraph 12 of the directions provided that the parties should exchange copy witness statements of fact by 14 August 2015. It also stated that witnesses were expected to attend the hearing to be cross-examined as to their evidence, unless their statements had been agreed.

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

The hearing

5. The full hearing of the application took place on 24 and 25 September 2015. The Applicants were represented by Mr Madi, who is as leaseholder of a neighbouring property at Flat 1, 65 Cadogan Square, London SW1X 9DY. He has pursued two separate tribunal applications against the First Respondent, relating to his flat. Those applications involved a number of similar issues to this case. One of those applications was compromised. The other was the subject of a detailed decision dated 23 June 2014, under case reference LON/00AW/LSC/2013/0638.

6. None of the Applicants attended the hearing or provided any witness statements. Mr Denis Stubbenhagen gave oral evidence, on behalf of the Applicants.

7. The Respondent companies were represented by Mr Rosenthal, who was accompanied by Mrs Helen Ryman who is an in-house solicitor. Dr Reza Etminan gave oral evidence, on behalf of both Respondents.

8. The tribunal were supplied with two hearing bundles, containing copies of the application, directions, statements of case, witness statements, a Scott Schedule, leases, service charge accounts and demands and other relevant correspondence and documents. On the morning of the hearing, the tribunal were also supplied with a supplemental bundle of correspondence and documents.

The background

9. The Property is a Victorian red brick, terraced, Grade 2 Listed Building comprising five flats let on long leases and a caretaker's flat in the basement. The First Applicant was the under-lessee of the ground floor flat (Flat 1) between 1982 and June 2010. The Second Applicant has been the under-lessee of Flat 1 since June 2010. The Third Applicant was the under-lessee of the third floor flat (Flat 4) between December 2006 and January 2014.

10. The First Respondent is the current head-lessee of the Property. It acquired the head-lease from the Second Respondent, which is an associated company, in 2009.

11. None of the parties requested an inspection of the Property and the tribunal did not consider that one was necessary, nor would it have been proportionate to the issues in dispute.

12. The under-leases each require the landlord to provide services and the tenant to contribute towards their costs by way of a variable service charge. The relevant provisions of the under-leases are set out below.

The leases

13. The head-lease of the Property was granted by Viscount Chelsea and Cadogan Estates Limited ('CEL') to Tonpats Investments Limited ('TIL') on 25 March 1986 for a term of 64 ½ years from 25 December 1984 to 24 June 2049. The head-lessee's obligations are to be found at clause 2 and include:

(3)(a) At the Lessee's own expense to carry out as soon as reasonably practicable and in any event before the Twenty fifth day of December 1986 with the best materials and workmanship available and to the reasonable satisfaction of the Company's Surveyor all such repairs and other works as may be necessary to put the whole of the demised premises into a good state of repair and condition including decorative condition throughout (the colours of the external decorations to be first approved by the Company) and thereafter throughout the said term well and substantially to repair maintain and keep the demised premises and all landlords fixtures which at any time during the said term shall be erected fixed or fastened upon or to the demised premises in good and substantial repair and condition and to clean the windows of the demised premises at least once a month during the said term

....

(7) AT all times during the said term to insure or cause to be insured in the joint names of the Company and the Lessee (with the addition of such other names as may first be agreed by the Company) with the Eagle Start Insurance Company Limited or in such other Insurance Office or with such Underwriters as may from time to time be named in writing by the Company through the agency of the Company or such other person or company as may from time to time be so named the buildings and all other erections for the time being standing upon the site of the demised premises including landlords fixtures and fittings therein or thereon against loss destruction or damage by fire lightning earthquake explosion aircraft and other aerial devices and articles dropped therefrom riot civil commotion malicious damage impact storm tempest floor and bursting or overflowing of water pipes water apparatus or water tanks and such other risks as the Company may from time to time require in the full reinstatement value thereof for the time being with the Architect's and Surveyor's fees on such full value as the current scales for the time being of the Royal Institute of British Architects and the Royal Institution of Chartered Surveyors and also against the loss of two years' rent and whenever thereunto required by the Company or its Agents to produce

the policy or policies of such insurance and the receipts for the premiums payable for the then current year And in case the demised premises or any part thereof shall at any time be destroyed or damaged by fire or other insured risks to lay out all the moneys received under or by virtue of any such insurance and all such other sums of money as shall be necessary in substantially rebuilding repairing and reinstating the buildings or such part thereof as shall be so destroyed or damaged And in case of default shall be made in effecting or keeping on foot such insurance or in producing the said policies or receipts for the current premiums it shall be lawful but not obligatory for the Company to insure the said buildings in manner aforesaid and the Lessee will forthwith repay all such sums expended in effecting or keeping on foot such insurance

14. The original under-lease of Flat 1 was granted by TIL ('the Lessors') to Elizabeth Bagot Minchin and Group Captain John Bagot Curtiss ('the Lessees') on 25 April 1969 for a term expiring on 25 March 2023 (less the last 7 days). A new under-lease of this flat was granted by CEL ('the Landlord') to the Second Respondent ('the Tenant') on 12 December 2013, expiring on 18 March 2113.

15. The under-lease of Flat 4 was granted by TIL ('the Lessor') to Felicity Jane Gault ('the Lessee') for a term of 64 ½ years (less the last 7 days) from 25 December 1984.

16. The under-leases are largely in the same form, save that the service charge provisions for Flat 1 are different to those for Flat 4.

17. In the original under-lease of Flat 1 the service charge provisions are contained in the recitals, which include an obligation to pay *"...by way of further or additional rent from time to time a sum or sums of money (calculated from the date hereof) not exceeding three elevenths of Two hundred pounds annually to be paid by them into a reserve fund to offset wholly or in part the cost of providing the services and carrying out the repairs covenanted to be provided and carried out by them and in insuring the building against fire and such other usual perils as the Lessors shall think fit and by way of further or additional rent from time to time a sum or sums of money equal to three elevenths of the Costs actually expended by them in providing the services and carrying out such repairs as aforesaid exceeding the amount for the time being standing to the credit of any such reserve fund The cost of providing such services and carrying out such repairs as aforesaid shall be certified half yearly by the Accountants for the time being of the Lessors whose certificate shall be binding and conclusive and the proportion hereinbefore referred to shall be paid by the Lessees to the Lessors on the quarter day next following upon the receipt by the Lessees of a demand for such contribution together with a copy of the certificate of the Accountants as before referred to in respect of the half year then immediately passed..."*.

18. In the new under-lease the relevant service charge provisions are to be found in the fourth schedule and are set out below:

Until 18 March 2023 or the expiry or sooner determination of the Head Lease (whichever is the later) the service charge is

1.1 such sum or sums of money not exceeding £1,000 annually as the Landlord may in its absolute discretion from time to time determine to be paid by the Tenant into a reserve fund to offset wholly or in part the cost of providing the services and carrying out the repairs covenanted to be provided and carried out by the Landlord and in insuring the Building against fire and such other usual perils as the Landlord shall think fit and

1.2 a sum or sums of money equal to three elevenths of the costs actually expended by the Landlord in providing the services and carrying out repairs as aforesaid exceeding the amount for the time being standing to the credit of any such reserve fund

19. In the case of Flat 4, the service charge provisions are to be found at clause 2(3) and are set out below:

(3) IN respect of the period commencing Twenty-fifth day of December One thousand nine hundred and eighty-five to pay to the Lessor on demand a sum equal to 2/11ths of the cost and expense incurred by the Lessor in the performance of its covenants contained in the Head Lease under which the Lessor holds the Building and/or under Clause 3 hereof including (and without prejudice to the generality of the foregoing) the preparation of specifications and schedules in connection therewith and the fees charged and expenses of any expert consulted by it in connection therewith together with an annual management charge equal to fifteen per centum of the amount payable by the Lessee as aforesaid. Such proportion (2/11ths) shall be ascertained by the auditors for the time being of the Lessor in respect of the six monthly periods ending on Thirtieth day of June and the Thirty-first day of December in each year and the certificate of such auditors as to the amount payable by the Lessee shall (except in the case of manifest error) be final and binding on the parties hereto PROVIDED ALWAYS that the Lessor shall be entitled to include in such costs an annual sum not exceeding TWO HUNDRED POUNDS (£200.00) to be paid by them into a sinking fund to offset wholly or in part the costs of repairs covenanted to be carried out by them but so that such payment shall not in any way prejudice their right to recover from the Lessee the aforesaid proportion of the costs actually expended by them in carrying out repairs etc as aforesaid if such costs shall exceed the amount for the time being standing to the credit of any such sinking fund The proportion hereinbefore referred to shall be paid by the Lessee to the Lessor within fourteen days following upon the receipt by the Lessee of a demand for such contribution

together with a copy of the certificate of the accountants as before referred to in respect of the half year immediately past

20. An important difference between these service charge provisions is that the under-lease for Flat 4 requires the Lessee to pay an annual management charge of 15% of total service charge expenditure. There is no corresponding obligation in the under-leases for Flat 1.

21. All three under-leases contain an obligation on the part of the Lessor/Landlord to insure the Property. In the original under-lease of Flat 1 and the under-lease of Flat 4 the obligation is at clause 3(2), namely:

THAT the Lessor will at all times during the said term (unless such insurance shall be vitiated by any act or default of the Lessee or the owner lessee or occupier of another other flat comprised in the Building) insure and keep insured the Building in the joint names of the Lessor and the Lessee against loss or damage by fire and such other risks if any as the Lessor shall from time to time think fit (and of which the Lessor shall give to the Lessee full particulars in writing when the said risks shall be insured against) in some insurance offices of repute in such sum (being not less than the full reinstatement value for the time being) as the Lessor shall from time to time think fit and to provide the Lessee with copies of the policy or policies and all endorsements thereon and the receipt or receipts for the current premiums and in the event of the Building being damaged or destroyed by fire or other insured risk as soon as reasonably practical to lay out the insurance monies in the repair and rebuilding or reinstatement of the Building

22. In the new under-lease of Flat 1 the insurance obligation is at clause 4.1.2. This is largely the same as that in the other under-leases although it refers to the parties as "*Landlord*" *and* "*Tenant*", rather than "*Lessor and Lessee*".

23. All three under-leases require the Landlord/Lessor to comply with the Lessee's covenants in the head-lease. In the original under-lease of Flat this obligation is at clause 3(6), which reads:

To observe and perform or to procure the observance and performance of the Lessee's covenants contained in the Head Lease (including the covenant for the payment of rent therein reserved) except insofar as such covenants relate to the flat hereby demised and are reimposed or expressly varied herein

24. All three under-leases require the Lessor/Landlord to provide various services. In the original underlease of Flat 1 and the underlease of Flat 4, the services are listed in the third schedule. In the new underlease of

Flat 1, they are listed in the fourth schedule. In all three cases they include obligations to provide:

1. *Supply of constant hot water to the flat*

2. *The provision of adequate central heating during the months of October to April inclusive in each year*

25. In the case of Flat 4, the third schedule also includes an obligation to provide:

6. *The services of a resident caretaker (the cost of the provisions of which shall be deemed to include wages and all other expenses incurred of and incidental to such employment the cost of the maintenance upkeep and repair and outgoings payable in respect of the flat occupied by such caretaker together with the rack rent letting value of such flat) who shall carry out such duties as the Lessor may from time to time direct...*

26. Paragraph 6 of the third schedule to the original under-lease of Flat 1 also includes an obligation to provide a resident caretaker but omits the words in brackets.

Preliminary issues

Addition of Second Respondent

27. At the start of the hearing the tribunal queried if the Second Respondent should be added as a party to the application, given that some of the disputed service charges pre-dated the First Respondent's acquisition of the head-lease. Mr Rosenthal advised that the First Respondent had been registered as the head-lessee since 29 June 2009. Before that time the head-lease has been held by the Second Respondent. Prior to the assignment the service charges were payable to the Second, rather than the First, Respondent. Both of these companies are controlled by Dr Etminan. Mr Rosenthal and Mr Madi were content for the Second Respondent to be added as a party and the tribunal made an order under Rule 10(1) of the 2013 Rules.

Strike out application

28. In its statement of case the First Respondent argued that part of the application, being the challenge to the section 20 consultations for major works undertaken in 2001, 2002, 2004 and 2008, should be struck out under Rule 9(3)(d) of the 2013 Rules. On 22 September 2015, the tribunal wrote to the parties indicating that it would deal with this as a preliminary issue at the start of the hearing

29. Mr Rosenthal submitted that the section 20 challenges should be struck out as an abuse of process, as the contributions to the major works had been paid at the time without complaint. It is only now, several years later, that an opportunistic challenge has been made. This has been initiated by Mr Madi, who raised similar arguments in one of his applications. He is acting for the Applicants on a contingency fee basis, whereby his fee is linked to the sum disallowed. This means that he has a vested interest in challenging as many items as possible.

30. Mr Rosenthal stressed that the strike out application was not being made on limitation grounds. He accepted that for the purposes of the tribunal hearing, there is no limitation period under the Limitation Act 1980. However there might be limitation arguments in any subsequent County Court proceedings to enforce the tribunal's decision. Over 6 years have elapsed since the most recent set of challenged works, in 2008. If the tribunal applies the section 20 statutory cap to any of the historic works then the Applicants might be unable to recover the sums disallowed, given the time lapse. Further it would only be the First and Third Applicants who could try and recover any sums disallowed, as the Second Applicant did not acquire Flat 1 until 2010.

31. The First Respondent has searched its archived documents and it has not retained copies or originals of all of the documents relevant to the section 20 challenges. In particular a number of quotations for the challenged works are missing. The documents that have been located have all been disclosed. At the relevant time, all management issues were dealt with by Mr Richard Brayham who was the Respondents' Property Manager. He died in December 2014. The Respondents will be prejudiced if they have to deal with the section 20 challenges now, due to the passage of time, the lack of documents and Mr Braham's demise.

32. Mr Rosenthal submitted that the tribunal should exercise its discretion and strike out the section 20 challenges, as an abuse of process. He referred the tribunal to comments made by Leasehold Valuation Tribunal ('LVT') for properties at ***St Andrews Square, St Marks Road and Bartle Road (LON/00AW/NSI/2003/0054 and others)***, in a decision dated 26 February 2004. At paragraph 35, which concerned the procedural regulations then in force, the LVT commented "*...the tribunal has the power to dismiss applications which are frivolous or vexatious or otherwise an abuse of the process of the tribunal; and it is considered that it will be likely to exercise if the investigation is disproportionate or the applicant has been unreasonably slow to exercise his rights to apply to the tribunal*".

33. Mr Rosenthal also pointed out that there was no evidence from any of the Applicants, dealing with the section 20 challenges or explaining why the challenges had been made so late.

34. Mr Madi opposed the strike out application. He suggested that the limitation period for trying to recover any overpaid service charges was not "*black and white*" and could be extended in certain circumstances. The section 20 challenges are to be found at items 17 (2001), 46 (2002), 152 (2007) and 168 (2008) of the Scott Schedule.

35. Mr Madi also provided the tribunal with some of the background to the application. The First Applicant used to live two doors down from him and they shared a garden. They spoke on a regular basis and she told him she was "*extremely dissatisfied*" with her service charges. Her decision to challenge the service charges arose from the outcome of Mr Madi's applications to the tribunal and a previous LVT decision, also involving the Respondents (***Flat 5, 34 Pont Street, London SW1X 0AD - LON/00AW/LSC/2009/0689***). The First Applicant asked Mr Madi to assist in disputing the charges and he agreed to deal with the tribunal application on a contingency fee basis.

36. Mr Madi advised that there were no statement from the First Applicant, as she has "*learning disabilities*", which make it difficult for her to express herself verbally or in writing. However these do not affect her mental capacity and she is aware that the section 20 consultations are being challenged.

37. Mr Madi also advised that there was no statement from the Third Applicant, as she has sold her flat at the Property. He receives instructions from her representative and does not deal with her directly. The Third Applicant is the daughter of a "*Russian personality*", who had committed suicide. Her representative had contacted Mr Madi with a view to challenging the service charges for Flat 4, as "*she is desperate for funds*".

38. As to the alleged prejudice, Mr Madi stated that a similar argument had been pursued in his applications and that this point had previously been raised at the case management hearing. The Respondents have since produced copies of most of the section 20 notices and a number of invoices. However most of the quotations for the major works are missing. The Applicants accept that valid notices were served but contend that the Respondents failed to obtain independent quotes, in breach of section 20. Mr Madi suggested that the missing quotes do not exist.

39. After hearing the submissions on the strike-out application, the tribunal adjourned the hearing to decide this preliminary issue.

The tribunal's decision

40. Those parts of the application relating to the section 20 consultations for major works undertaken at the Property in 2001, 2002, 2004 and 2008 are struck out, pursuant to Rule 9(3)(d) of the 2013 Rules.

Reasons for the tribunal's decision

41. The First and Third Respondents first challenged the consultations in 2015. This was approximately 14 years after the first set of disputed works and more than six years after the most recent set of disputed works. The First and Third Applicants had paid their contributions to the major works, seemingly without demur. There was no witness evidence to suggest that they disputed the consultations at the time or explain why the challenges had been made so late in the day.

42. The tribunal is not bound by the comments made by the LVT in ***St Andrews Square***, as relied upon by Mr Rosenthal. However it largely agrees with these comments. Depending upon the circumstances, a substantial delay in making an application can amount to an abuse of process.

43. Paragraph 12 of the directions provided for exchange of witness statements. The tribunal was concerned by the lack of statements from the Applicants, given the wide ranging nature of their complaints. The First and Third Applicants' personal circumstances should not have prevented them from giving statements and no reason was given for the lack of a statement from anyone in the Second Applicant company. The statements could have been prepared by Mr Madi, before being checked and signed by the Applicants

44. The late challenge to the consultations combined with the absence of any witness evidence explanation or explanation for the Applicants' delay amounts to an abuse of the tribunal's process. The tribunal concluded that it should exercise its discretion and strike out the offending parts of the application, given the substantial prejudice to the Respondents outlined by Mr Rosenthal. The Respondents would be hugely disadvantaged if they have respond to the challenges at this late stage, given the missing documents and unfortunate demise of Mr Braham.

45. The tribunal informed the parties of its decision to strike out part of the application at the hearing. This reduced the number of issues to be determined. Furthermore a number of issues that had originally been disputed were agreed or withdrawn.

Agreed issues

46. By the start of the hearing the parties had agreed the following issues, with reference to the numbering in the Scott Schedule:

Item 1

Telephone	agreed at £154.85

Items 8, 19, 26, 48, 55, 63, 73, 84, 92, 100, 110, 121, 133, 158, 170, 184, 204, 220, 234, 252 and 272

Telephone	agreed at £150 per half year

Items 7, 18, 25, 47, 54, 62, 72, 83, 91, 99, 109, 120, 132, 157, 169, 183, 203, 219, 233, 251, 271, 287, 299, 313, 318, 321, 327 and 329

Accountancy fees	agreed at £350 per half year

Items 242 and 269

Boiler contract	agreed at £29,796.36

Withdrawn issues

47. During the course of the hearing, Mr Madi withdrew two issues, namely:

- the challenge to the service charge proportion payable for Flat 1; and
- the liability of Flat 4 to contribute to the ground rent payable under the head-lease.

Although these issues were withdrawn, Mr Madi stated that the Applicants would pursue them elsewhere. This could involve an application to the tribunal under section 35 of the Landlord and Tenant Act 1987, regarding the service charge proportion and a claim in the County Court, regarding the ground rent.

The issues to be determined by the tribunal

48. The outstanding issues to be determined by the tribunal are:

    (i) Buildings insurance costs for all years;

    (ii) Heating gas charges for 2001 to 2010, inclusive; and

    (iii) Property repairs and maintenance for 2001 to 2012, inclusive.

49. At the hearing, Mr Rosenthal accepted that if the tribunal reduced any of the service charges payable for Flat 4 then there should be a corresponding reduction in the management fee for this flat.

50. Having heard evidence and submissions from the parties and considered all of the documents provided, the tribunal has made determinations on the various issues as follows.

Buildings insurance costs (items 3, 21, 50, 65, 86, 102, 123, 160, 186, 222, 247, 274, 302, 320 and 328 in Scott Schedule)

51. The Property is insured with Zurich Insurance Group Limited ('Zurich'), as part of the First Respondent's block policy and the policy is renewed annually on 24 June of each year. Zurich offer a payment arrangement, which has enabled the Respondents to pay the premiums by monthly direct debits. This attracts a finance charge of 8% per annum.

52. The Applicants do not dispute the amount of the insurance premiums. Rather they only dispute the finance charges. Their argument is that finance is unnecessary, as the service charge statements are normally issued by the First Respondent in early July. This means that there is only short period between the annual insurance renewal and the collection of insurance contributions from the leaseholders.

53. At the hearing, Mr Madi accepted that the finance charges are part and parcel of the cost insuring the Property. However the Applicants case is that the arrangement to pay the premium by monthly instalments is purely for the Respondents' benefit and they should not have to pay for this. They do not benefit from the arrangement and should not have to pay for it. The Applicants also rely on the decision for ***Flat 5, 34 Pont Street***, where the LVT disallowed the 8% finance charge in very similar circumstances.

54. The Applicants dispute the principle, rather than the level of the finance charge.

55. The Respondents' case is that the finance arrangement is necessary, as the under-leases provide for payment of the service charges in arrears. The premiums are payable in June whereas the service charge contributions for the six-month period ended 30 June cannot be demanded until early July. In his witness statement, Dr Etminan suggested that on average, only 50% of the leaseholders pay their contributions within 30 days. He also stated that the Applicants *"...have never been prompt payers, and Trumann Holdings are currently over £40,000 in arrears"*.

56. Mr Rosenthal submitted that the finance charges should be allowed in full, as they satisfy the test of reasonableness in section 19 of the 1985 Act. Given the service charge mechanism in the leases and the poor payment history, it is not unreasonable for the Respondents to spread the cost of insuring the Property over 12 months.

57. Mr Rosenthal also made the point that the tribunal was not bound by the LVT's decision in ***Flat 5, 34 Pont Street*** or the applications pursued by Mr Madi, as these involved different properties and different leaseholders. He also suggested that the determinations in these cases are inadmissible as evidence of facts relied upon by the Applicants in this case.

58. In response, Mr Madi suggested that the Respondents could negotiate an extended payment period with the insurers to overcome any delay in collecting insurance contributions. He also made the point that leaseholders that paid their contributions promptly were being penalised for the late payers. He suggested that the finance charges are unreasonable, as the arrangement benefits the Respondents rather than the Applicants.

The tribunal's decision

59. The tribunal determines that the finance charges of 8% per annum are not payable by the Applicants.

60. In relation to the Third Applicant, the tribunal determines that no management fees are payable for the disallowed finance charges.

Reasons for the tribunal's decision

61. The tribunal is not bound by previous decisions of this tribunal or the LVT unless there is an issue estoppel involving the same parties and property. This means that it is not bound to follow the decision in ***Flat 5, 34 Pont Street*** or that for Mr Madi's flat.

62. The First Respondent (and previously the Second Respondent) is obliged to insure the Property in the joint names of CEL, under clause 2(8) of the headlease.

63. The underleases provide for payment of service charges six-monthly in arrears, following production of a demand and an accountant's certificate. The six-monthly periods end on 30 June and 31 December. There is provision for payment of advance charges into a reserve fund but the amount of these advance charges is capped in each underlease and is relatively modest. This means that the Respondents face cash flow problems in that the insurance is renewed on 24 June in each year but the insurance contributions cannot be demanded until the start of July, at the earliest.

64. The tribunal was not provided with details of the Applicants' payment history but accepts that service charges are not always paid promptly. However the under-leases provide remedies for late payment, which could ultimately include forfeiture.

65. The Respondents have chosen to pay the insurance by monthly instalments, as this benefits their cash flow. It does not assist the leaseholders, who derive no benefit from the finance arrangement. The tribunal agrees with Mr Madi that this is not a service for the leaseholders and is purely for the benefit of the Respondents. Accordingly it disallows the finance charges in full.

66. Given that the finance charges have been disallowed, there needs to be a reduction in the corresponding management fee payable by Flat 4. This is equivalent to 15% of its share of the disallowed finance charges.

Heating gas costs (items2, 9, 20, 27, 49, 56, 64, 74, 85, 93, 101, 111, 122, 134, 159, 171, 185, 205, 221 and 235 in Scott Schedule)

67. There is a gas fired, communal heating and hot water system at the Property and the gas is supplied by British Gas Plc ('BG'). The Applicants are/were obliged to contribute to the heating and hot water cost via their service charges.

68. The Applicants' case is that they were overcharged for gas costs between 2001 and 2010, as the Property was billed on a commercial rather than residential tariff. It is accepted that the Property was moved to a commercial tariff in 2000. This resulted in higher unit charges, VAT being charged at the standard rate (rather than the discounted rate of 5% for residential properties) and a climate change levy ('CCL').

69. The incorrect gas tariff was applied to a number of freeholds owned by the Respondents, including 65 Cadogan Square. Mr Madi relied on the

tribunal decision for his flat, where the gas charges were substantially reduced. At paragraph 35 of that decision the tribunal accepted Mr Madi's submission that the First Respondent *"..as experienced investors in property...should have been aware of the VAT and CCL status of the building"*.

70. Mr Madi has analysed the gas costs at the Property and produced a detailed spreadsheet, quantifying the overcharges for Flats 1 and 4. This follows the methodology used by the tribunal in his case and results in the following overcharges:

Flat 1 (First Applicant's period of ownership)	£3,156.85
Flat 1 (Second Applicant's period of ownership)	£306.80
Flat 4	£1,493.12

In brief, Mr Madi has reduced the VAT rates to the discounted rate for residential properties, stripped out the CCL charges and corrected errors in the gas bills. He has also applied a *"tariff rebate"* of 35% to reflect uncompetitive unit rates, following the tribunal decision in his case.

71. Mr Madi has compared the gas unit rates charged for the Property with those for his flat at and produced a graph, showing the differing rates over time. The figures in the graph and the Applicants' statements of case appear to differ slightly and the following figures are taken from the graph. Between 2001 and 2005 the unit rate at the Property was on average 39.1% lower than those for Mr Madi's flat, which he attributes to the heavy consumption and preferential rates for the Respondents' various freeholds. Between 2006 and 2010 the rate was on average 10.5% more expensive. Following the discovery of the overcharging the unit rate dropped and the average rate for 2011 to 2013 was 38.7% below that for Madi's flat. His argument is that the unit rates for the Property for 2006-10 were skewed and should have been lower, rather than much higher, than those for his flat. Taking a broad-brush approach he suggests a global reduction of 35% for the years 2006-10, although he considers that a reduction of 50% could be justified.

72. The figures in the spreadsheet take account of the 15% management fee charged on the gas costs for Flat 4 and a settlement agreed between BG and the First Respondent in 2011. The arithmetic in the spreadsheets is agreed by the Respondents but not the underlying principles. They deny that the gas charges were unreasonably incurred.

73. Dr Etminan first queried the level of gas charges with BG in 2009 and was advised by the account manager (Ms Helen Gribble) that the tariff was correct due to the level of gas supplied to the Respondents'

freeholds. She stated that the commercial tariff applied when a building consumes more than 145kWh of gas per day (pro rata), as in the case of the Property. This advice was repeated on a number of occasions and was relayed to Mr Madi.

74. Mr Madi took the matter up with Ms Gribble direct, with the First Respondent's authority, on 29 November 2010. Later that day, Ms Gribble acknowledged the incorrect gas charges in an email to Mr Brayham timed at 15:52, which read:

"Good Afternoon

As per our telephone conversation this afternoon I can confirm that residential properties can qualify for a reduce rate of VAT at 5%.

I sincerely apologise for the error for incorrectly advising that residential properties would be charged at 17.5% dependent on usage, this would only apply to commercial premises.

I will send you the appropriate forms to complete to have these VAT amount reduced and the CCL charges removed from these accounts. Once these are completed I will ensure that the billing is processed.

Once again I am very sorry for any inconvenience caused by my error"

75. Mr Brayham responded to Ms Gribble in an email timed at 18:23, in which he threatened legal proceedings against BG. The contents are instructive and include the following paragraphs:

"My rough calculation shows that during the past ten years we have been overcharged tens of thousands of pounds which we have unfairly passed on to our tenants by way of Service Charges. In our opinion this case is extremely serious and we recommend that you refer this matter to your legal team.

We are herewith giving you 14 days from the date of this email, expiring on Monday 13th December 2010, to provide us with the details set out below. Meanwhile we are copying this email to our solicitors to make them aware of this disaster and for their immediate action if necessary.

By this deadline we need to receive the following: -

1. *Detailed calculations of the overcharged VAT & CCL for each property separately. Otherwise we will need to employ a forensic accountant, the cost of which will have to be borne by British Gas.*

2. *Calculation of interest on the basis of 4% above base rate, which is the rate our bankers (Coutts & Co) charge on our overdraft facility.*

3. *Your serious proposal for compensation for the damage caused to our company vis-à-vis our tenants.*

If we do not receive your full and satisfactory response by the aforementioned deadline we will instruct our solicitors to start legal action against British Gas, reserving our right to also refer this matter to OFGEM and the media."

76. Mr Madi suggested that the overcharging on the gas costs was more than simple negligence on the part of the Respondents. Rather he considers this was deliberate, as the Respondents benefitted financially from the overcharging. Their management fee of 15% (for Flat 4) was applied to all gas charges, so the higher the charges the greater were their fees.

77. The Respondents' case is that they were unaware of the incorrect gas charges until 2009, as this was not apparent from the face of BG's invoices. In cross-examination, Dr Etminan stated that he was unaware of the discounted VAT rate on gas supplies for residential properties and unaware of the different tariffs being charged across the freeholds owned by the First and Second Respondents. He purchased the shares in the Second Respondent in 1997. This company had a portfolio of 7 freeholds. Following the purchase, Dr Etminan continued with the gas contract with BG. He does not know how BG charge and relied on them to invoice correctly.

78. Dr Etminan was also cross-examined about the move to a commercial tariff in 2000 and accepted that he and Mr Brayham should have spotted the overcharges earlier. In re-examination he clarified that he should have noticed the incorrect VAT rate earlier. He was unaware of the CCL or different unit rates charged by BG for commercial properties so would not have spotted these overcharges.

79. The settlement with BG was negotiated by Mr Brayham and resulted in BG crediting overpaid VAT and CCL for all of the affected buildings, for a four-year period dating back to 06 March 2007. BG were unwilling to credit any earlier charges. In cross-examination, Dr Etminan stated that he was not a party to these negotiations. However paragraph 7 of his statement suggests that he took the decision to settle, as the costs of litigation would be disproportionate to the sum at stake.

80. The Respondents do not admit the unit rates for Mr Madi's flat or his analysis of the different rates for his flat and the Property. The communal heating system at the Property was replaced in 2011, which probably accounts for the lower rate from this time on. The

Respondents rely on a letter from their heating engineers, H H Abbs & Co Ltd, dated 19 July 2010, recommending the replacement of the system. The penultimate paragraph of that letter reads:

"New gas fired condensing boilers would show a minimum 15% saving on gas consumption and with a triple boiler module a very reliable service."

81. The Respondents also contend that the First Applicant is precluded from challenging the gas charges by virtue of a settlement in early 2013. This was negotiated by Mr Brayham and the First Respondent's solicitors, Brice, Droogleever & Co ('BDC'). Mr Brayham calculated the gas overcharge for the First Respondent's period of ownership of Flat 1 and sent BDC a refund cheque for £1,360.61 on 07 March 2013. At paragraph 8 of his statement, Dr Etminan said that his *"..own clear recollection is that this very precise sum was agreed and paid in full and final settlement of any claim in relation to overpayment of gas charges, although all calculations were carried out by Mr Brayham".* However in cross-examination he stated that he was not a party to the negotiations and was not in the country when terms were agreed.

82. There is no dispute that the First Applicant received the settlement cheque for £1,360.61. What is in dispute is whether the payment was made in full and final settlement of any claim she had for gas overcharges. This was denied in the Applicants' additional statement of case, which also pointed out that there was no agreement setting out the terms of the settlement. The hearing bundles contained some of the correspondence passing between Mr Brayham and BDC but not the crucial letter dated 07 March 2013.

83. In their statement of case, the Respondents suggested that the settlement precluded the First Applicant from seeking a determination of the gas charges, upon the basis that these charges had been agreed (section 27A(4)(a) of the 1985 Act).

84. In his submissions, Mr Rosenthal distinguished between the incorrect VAT and CCL charges and the disputed unit rates. In relation to the former, he submitted that the Respondents had acted reasonably by settling with BG. It was reasonable to accept a rebate going back four years, given the six-year limitation period for pursuing contractual claims.

85. Mr Rosenthal also submitted that the Respondents did not act unreasonably in failing to spot the overcharges earlier. They relied on the invoices from BG and simply passed on the sums billed. This was entirely reasonable given they had a long standing account with BG, which is a national entity. Once the problem came to light, Dr Etminan queried the charges and was then given incorrect information by BG.

This was subsequently retracted and the Respondents then obtained the best rebate they could.

86. In relation to the unit rates, Mr Rosenthal suggested that there was an evidential issue. The Applicants rely on Mr Madi's spreadsheet and graph, which reflect the unit rates billed for his flat. However there is no evidence of what rates should have been charged for the Property. Although the Respondents accept the arithmetic in the spreadsheet, they do not accept that Mr Madi's flat is a valid comparison. Mr Rosenthal submitted that it was not unreasonable for the Respondents to pay the gas charges at the tariff billed by BG.

87. Mr Rosenthal also made the point that the tribunal should not have regard to the tribunal's decision for Mr Madi's flat, as evidence of the reasonableness of the unit rates.

88. In relation to the settlement payment, Mr Rosenthal pointed out that the payment was made to the First Applicant 3 years after she sold her flat and the amount was very precise. It was negotiated by her solicitor and it is very unlikely that payment would have been accepted other than on a full and final settlement basis.

The tribunal's decision

89. The tribunal has no jurisdiction to determine the gas charges payable by the First Applicant, as these have been agreed for the purposes of section 27A(4)(a) of the 1985 Act.

90. In relation to the Second and Third Applicants, the tribunal determines that:

(a) the VAT and CCL overcharges for 2001-2010 are not payable by the Applicants; and

(b) the gas unit rates for 2006-2010 are payable by the Applicants in full.

91. In relation to the Third Applicant, the tribunal determines that no management fees are payable for the sums disallowed at paragraph 90(a) above.

Reasons for the tribunal's decision

92. The tribunal first considered the effect of the settlement negotiated by Mr Brayham and BDL in early 2013. The tribunal had very little evidence on which to determine this issue. Unfortunately the hearing bundles did not contain all of the relevant correspondence and the

crucial letter, enclosing the settlement cheque, was omitted. There was no witness evidence from the First Applicant or her solicitor, as to the terms of the settlement and Mr Madi was in no position to say what was agreed. Equally Dr Etminan was unable to give direct evidence on the terms, as the settlement was negotiated by Mr Brayham.

93. The tribunal accepts that it is very unlikely that the payment would have been accepted other than on a full and final settlement basis. The limited correspondence in the bundles demonstrates that Mr Brayham calculated the amount of the overcharge and sent a settlement cheque for the precise sum of £1,360.61 was sent to the First Applicant's solicitors and accepted by her. Based on the limited evidence available, the tribunal is satisfied that this payment was accepted in full and final settlement of the claim for gas overcharges. This means that adjusted gas charges, taking account of the settlement sum, were agreed by the First Applicant. It follows that the tribunal is unable to determine these charges, by virtue of section 27A(4)(a) of the 1985 Act.

94. Having dealt with the jurisdiction point, the tribunal then went onto consider the other challenges made by the Applicants. At this point it is appropriate to make a couple of general observations. Firstly the tribunal is not bound by the earlier tribunal decisions relied upon by Mr Madi and the findings in his case are not evidence of facts in this case. Secondly, as stated by Mr Rosenthal, it is not the purpose of section 19 to penalise landlords. Rather the purpose is to protect leaseholders from unreasonable service charges.

95. In relation to VAT and CCL, the tribunal finds that the Respondents failed to spot the overcharging rather than acting deliberately for their own gain. However that does not absolve them from responsibility. They are experienced property companies. At the very least, as acknowledged by Dr Etminan, they should have realised that VAT was being charged at the wrong rate.

96. There is no doubt that VAT was billed at the wrong rate and the CLL was incorrectly charged for the period 2001-2010. VAT should have been charged at 5% and there should have been no CCL. The Respondents paid the bills issued by BG, without realising they were incorrect. The issue is whether the incorrect charges were reasonably incurred for the purposes of section 19, rather than whether the Respondents acted reasonably. It is clear from Mr Bayham's email to BG of 29 October 2010 that he thought the Respondents had acted unfairly in passing on the overcharges to the leaseholders.

97. Viewed objectively, service charge expenditure cannot be reasonably incurred if it is incorrect. It follows that the VAT and CCL overcharges were not reasonably incurred and are not payable. The fact that BG was unwilling to make a full refund and the Respondents agreed a commercial settlement does not alter the position. The Applicants do

not have to pay the incorrect charges, whether or not these charges have been recovered from BG.

98. The position in relation to the unit rates for 2006-2010 is rather different. BG incorrectly billed the Property using commercial rates. However there was no evidence before the tribunal as to the correct, residential rates for the Property. The tribunal has no way of knowing if there was an overcharge and, if so, the amount of the overcharge.

99. Mr Madi's calculations are based on a comparison with the rates billed for his flat, which were higher for 2001-05 and 2011-13 but lower for 2006-10. His argument is that the rates should have been higher throughout, as the Respondents benefit from a bulk discount. However there was no evidence to support this contention and the spike in rates between 2006-10 could be attributable to a number of different factors, including the poor efficiency of the old communal heating system.

100. In the circumstances the tribunal is not satisfied that the unit rates for 2006-10 were unreasonable. It follows that these rates are allowed in full.

101. Given that the VAT and CCL charges have been disallowed, there needs to be a reduction in the corresponding management fee payable by Flat 4. This is equivalent to 15% of its share of the disallowed VAT and CCL charges

Property repairs and maintenance

102. The repairs and maintenance were all undertaken by Mr Stubbenhagen. There was no challenge to the quality of his work or any suggestion that the level of his charges were unreasonable for the work done.

103. In their statements of case the Applicants raised three specific arguments in relation to Mr Stubbenhagen's charges; "*commission*", works to the caretaker's flat and his fees for attending meetings. Mr Madi only dealt with these arguments at the hearing and did not pursue other points raised in the Scott Schedule, such as lack of supporting invoices in the first half of 2012. The tribunal is only determining the three points pursued at the hearing and it is convenient to deal with each of these separately.

Commission (items 4-6, 10-16, 22-24, 28-45, 51-53, 57-61, 66-70, 77-81, 87-90, 94-98, 103-107, 112-119, 124-131, 135-156, 161—167, 172-182, 187-202, 206-214, 217, 218, 223, 225-232, 236-241, 248-249, 254-268, 275-286 and 290-296 in Scott Schedule)

104. This issue was addressed in the statements from Mr Stubbenhagen and Dr Etminan and there was also detailed, oral evidence from both of these witnesses.

Mr Stubbenhagen

105. Mr Stubbenhagen is a builder and has traded as D M Stubbenhagen & Associates for approximately 35 years. He undertook building works for Dr Etminan and Dr Etminan's business for over the 30 years, until 18 February 2014. This included maintenance and repairs at the Property, as well as a number of other properties. Mr Stubbenhagen terminated the business relationship due to a dispute over fees.

106. Mr Stubbenhagen's evidence was that he paid "*commission*" to Dr Etminan from the late 1980s until the end of 2012. This was a percentage of the invoices he raised, paid for receiving the work and was suggested by Dr Etminan. Initially commission was paid at 10% but this varied over time. The commission was mostly paid "*in kind*", with Mr Stubbenhagen undertaking building works to properties personally owned by Dr Etminan or the Respondents at reduced cost. A schedule of these properties was appended to Mr Stubbenhagen's statement, dated 25 August 2015 (appendix 1). In cross-examination it was established that some of these properties had been sold by Dr Etminan/the Respondents and one had been included in error. Further, Mr Stubbenhagen did not provide any specific details of the alleged payments in kind such as the job completed and the reduction agreed.

107. In his statement, Mr Stubbenhagen also referred to one occasion when commission was taken from him in cash. Dr Etminan took him to a branch of Coutts & Co on Cadogan Place and gave him a cheque for £5,000, which was cashed in the bank. Dr Etminan then took the cash from him, in full. There were also occasions when commission was paid in the form of invoice discounts and Mr Stubbenhagen issued credit notes for the amount of the discounts, which enabled him to reclaim the VAT element from HMRC.

108. Mr Stubbenhagen stated that the commission arrangement changed over time. For the years 2006 to 2008, he submitted invoices to the Respondents at half-yearly intervals. Each of these invoices was subject to commission of 15% or more, with payment being made in kind (reduced cost for work on properties belonging to Dr Etminan or the Respondents). In his oral evidence, Mr Stubbenhagen referred to a

notebook in which Dr Etminan recorded details of these payments in kind.

109. Mr Stubbenhagen also submitted invoices at half-yearly intervals for the years 2009 and 2010. His evidence was that in 2009 the invoices were discounted by 15%, meaning he received 85% of the sum originally billed. In the first six months 73 invoices were issued, of which 16 related to the Property. These were cancelled and reissued with the 15% discount and the suffix 'D' after each invoice number. In the second half of the year 161 invoices were underpaid by 15%, of which 13 related to the Property. These invoices were not reissued.

110. The commission arrangement was slightly different in 2010. For the first six months, 73 invoices were issued. Dr Etminan was only willing to pay 37 of these invoices, which he discounted by 20%. 10 of these invoices related to the Property. In the second half of the year, 51 invoices were issued. Dr Etminan was only willing to pay 36 of these invoices, which were subject to a "*de-facto discount*" of 27.1%.

111. For the years 2011 and 2012, the commission reverted to 15% with payments being made in kind. Again the invoices were issued half-yearly.

112. Mr Stubbenhagen is unable to allocate each payment received from the Respondents against maintenance and repair invoices for the Property. This is because Dr Etminan dealt with the invoices on a global basis. Normally, they would meet at the end of each half year when commission was deducted from the combined total of all invoices for the various buildings.

113. Mr Stubbenhagen stated that commission was deducted for all works undertaken until the end of 2012, including works funded by insurers. This arrangement stopped abruptly at the start of 2013, without any explanation from Dr Etminan.

114. The tribunal were referred to email correspondence passing between Mr Stubbenhagen and Dr Etminan in May 2013, regarding the dispute over unpaid fees. In an email dated 01 May 2013, Mr Stubbenhagen stated:

"I would also like to make it clear your commission has always been at an agreed amount of 15%"

In a subsequent email dated 08 May 2013, he stated:

"I have never discussed our arrangement with your 15% commission (until Jim became aware at our last meeting)"

115. The Applicants rely on these two emails, as evidence of a commission arrangement. They also rely on an email that Mr Stubbenhagen sent to Mrs Ryman on 07 April 2014, which included the following paragraph:

"Deductions have been made for over twenty years, as 15% short payments or as works to Dr Etminan's personal property. From 2010 the 15% deduction was allocated towards works in Flat 3, 40 Pont Street and Flat 6, 34 Pont Street as part payment."

116. The Applicants also rely on an undated letter concerning the 2010 invoices. This appears to have been sent by Mr Stubbenhagen to Dr Etminan and referred to various payment options, including payment in full with "*15% credited* to *your building works account*".

117. The Applicants seek a 15% reduction in the cost of all maintenance and repairs for the Property, for the years 2001 to 2012. Again, Mr Madi relied on the decision for his flat, where the tribunal accepted Mr Stubbenhagen's evidence and deducted 15% from the cost of maintenance and repairs.

118. Mr Stubbenhagen was cross-examined at some length regarding the commission arrangement and the schedules that were appended to his witness statement. Appendix 2 listed the various invoices raised by Mr Stubbenhagen during the first six months of 2009 together with 7 invoices from an earlier period and details of payments received. This was based on his records but was prepared by Mr Madi. Mr Stubbenhagen's evidence was that the Respondents only paid 85% of the listed invoices but charged 100% to the leaseholders. He therefore reissued 'D' invoices for the sums actually paid, which Dr Etminan refused to accept. In fact the sums deducted by the Respondents were less than 15% of the invoices. For example the amount of invoice number 1803 was £724.50 whereas the sum paid was £630. The shortfall of £94.50 amounts to 13.04% of the invoice.

119. The total amount of the invoices in Appendix 2 is £40,560.25 and the total amount of the payments is £35,269.78 (86.96%). Mr Stubbenhagen said that payment was made by way of two cheques; one for £30,000 dated 06 July 2009 and one for £5,281.90 dated 01 October 2009. However the total of these two cheques is £35,281.0, rather than £35,269.78. Further the Respondents contend that two of the invoices (numbered 1634 and 1640) were paid directly by the Respondents' insurers, which Mr Stubbenhagen denied.

120. Appendix 3 listed the various invoices and payments for the second half of 2009. The total amount of the invoices is £52,072 and the total sum paid is £44,261.20. The difference between these two figures is £7,810.80, which amounts to 15%. However there were discrepancies between the list and a schedule of invoices and payments that Mr

Stubbenhagen supplied to the Respondents on 17 January 2014, in connection with Mr Madi's case.

121. Appendix 3 also included a credit note addressed to the First Respondent, dated 30 December 2009 in the sum of £6,504.75 plus VAT (total £7,480.46), which does not reconcile with the figures in the list. The heading on the credit note is "*Re: Discount 3rd qtr invoices*", which is instructive.

122. Appendix 4 listed the various invoices and payments for the first half of 2010. This shows that a number of invoices were unpaid and the remaining invoices were partially paid. The total amount of the invoices is £17,246.71 and the total sum paid is £7,862.15. The difference between these two figures is £9,384.67, which amounts to 54.4%. However if one strips out the unpaid invoices then the difference is 20%.

123. Appendix 4 also included a copy of the payment cheque dated 14 December 2010, which was actually for £7,862.17 and a hand-written covering note, showing how Dr Etminan had calculated the payment. The hearing bundle contained two different versions of the note; one headed *"Half year invoices:"* and one headed *"Half year invoices: Payment on account"*. Given this disparity, the tribunal allowed Mr Stubbenhagen to produce the original note, which bore the former heading. This suggests that Dr Etminan had added the words "*Payment on account*" on his copy.

124. Appendix 5 listed the various invoices and payments for the second half of 2010. Again this shows that a number of invoices were unpaid. However the remaining invoices were all paid in full. The total amount of the invoices is £15,270.35 and the total sum paid is £11,127.30. The difference between these two figures is £4,143.05, which equates to 27.1%. In cross-examination, Ms Stubbenhagen stated that the calculations had been undertaken by Mr Madi, who had also drafted his statement. He did not know what was meant by the description "*de-facto discount*" used in his statement.

125. Mr Stubbenhagen stated that his relationship with Dr Etminan has completely broken down, as a number of his invoices have not been paid. He has instructed solicitors to try and recover the unpaid fees and a letter before action has been sent to the Respondents. Mr Stubbenhagen accepted that he would not be giving evidence against the Respondents if his fees had been paid.

Dr Etminan

126. Dr Etminan is the sole director and shareholder of both of the Respondent companies. He has lived outside the UK since late 2009

and the day to day management of the companies is undertaken by employees.

127. Dr Etminan referred to the tribunal hearings for Mr Madi's flat, which took place on 26 February and 27 May 2014. He did not attend either hearing. The First Respondent was represented by Mrs Ryman at the first hearing but she was unable to attend the second hearing, as she was in the final stages of pregnancy. Dr Etminan was unable to attend the second hearing due to ill-health. Mr Stubbenhagen gave his evidence at the second hearing, which mean that this evidence was not challenged. Dr Etminan believes that his oral evidence would have been critical to the outcome of that hearing.

128. In his statement, Dr Etminan referred to Mr Stubbenhagen as a "*maintenance contractor*", who also undertook routine property inspections and acted as a 24-hour emergency contact for leaseholders. He provided a complete maintenance service but would subcontract some of the work. All invoices were issued by Mr Stubbenhagen. Where a subcontractor was used, he would charge a mark-up for his time spent in arranging and assisting with the works.

129. Dr Etminan was adamant that there has never been an arrangement to pay 15% commission to Mr Stubbenhagen, either in kind or by discounting invoices. Equally he has never received any cash payments from Mr Stubbenhagen. Dr Etminan stated that he had opened a bank account with Coutts for the refurbishment of a property at 73 Cadogan Square in 2006. He gave Mr Stubbenhagen a chequebook for this account. He had accompanied Mr Stubbenhagen to the Coutts branch at Cadogan Place on several occasions, to cash cheques for building materials. There was also an occasion when they both went to the branch to increase the credit limit on this account.

130. Dr Etminan accepted that Mr Stubbenhagen had undertaken various works to properties belonging to him and the Respondents but denied there had been any reduction in the cost of these works, as payments in kind. He also pointed out that some of these properties had been sold before the alleged payments in kind.

131. Dr Etminan stated that he had never seen the 'D' invoices for the first half of 2009. He queried why Mr Stubbenhagen had not sent these invoices to him or Mr Bayham at the Respondent's offices. Dr Etminan also stated that he had never seen the credit note for the second half of 2010.

132. In relation to the payment of £7,862.15 made for the first half of 2010, Dr Etminan explained that this was a payment on account and he had noted this on his copy of the covering note. This was in response to a request from Mr Stubbenhagen's assistant for an urgent payment, to

ease cashflow problems. Dr Etminan did not have time to check the various invoices so simply paid 80% of the agreed invoices, on account.

133. Dr Etminan accepted that he had withheld payment of some of the invoices and that a letter of claim had been received from Mr Stubbenhagen's solicitors. He is hoping to negotiate a settlement of the claim but made the point that some of the invoices were contradictory or were unsupported. He is awaiting further information before trying to resolve the claim.

134. In cross-examination, Dr Etminan stated that his relationship with Mr Stubbenhagen soured from the start of 2013. They met in January 2013 to discuss the fees claim but parted on bad terms. Dr Etminan chose to ignore the references to 15% commission in the emails of 01 and 08 May 2013. He felt that Mr Stubbenhagen was trying to blackmail him.

135. Dr Etminan was unsure whether he had ever seen Mr Stubbenhagen's email to Mrs Ryman of 07 April 2014, but accepted he should have seen it. He believes that this and the earlier emails were drafted by Mr Madi. Dr Etminan stated that he had not seen the undated letter regarding the 2010 invoices until its disclosure within these proceedings.

136. Dr Etminan was cross-examined regarding works undertaken by Mr Stubbenhagen at Flat 4, 40 Pont Street. The works were requested by the leaseholder but were invoiced to the First Respondent. The invoice was for £12,204 (including VAT) but the sum paid by the First Respondent was only £9,763.20, which amounts to 80% of the invoice. Dr Etminan explained that he arranged the works for the leaseholder, who lives in Italy and negotiated a price of £9,763.20 with Mr Stubbenhagen. The amount of the invoice was incorrect and the First Respondent simply paid the sum agreed. The works were invoiced to the First Respondent, as the leaseholder did not want to use Mr Stubbenhagen. Dr Etminan thought that the sum paid by the leaseholder was the sum paid to Mr Stubbenhagen (£9,763.20).

137. Dr Etminan was also cross-examined regarding the appendices to Mr Stubbenhagen's statement and the various invoices and payments for 2009 and 2010. He was unable to recall how he had calculated the payments made for the first half of 2009 and said that he had never sat down and discussed these invoices with Mr Stubbenhagen. He did not know why 7 invoices had been added in from a previous period.

138. In relation to the second half of 2009, Dr Etminan stated that he had withheld payment for a number of invoices that were disputed. He could not explain why he had only paid 85% of the remaining invoices. For the first half of 2010, a deduction of 20% had been made as the Respondents were making a payment on account. Dr Etminan was

adamant that the deduction was not commission and accepted that the balance of 20% was due to Mr Stubbenhagen.

139. On questioning from the tribunal, Dr Etminan stated that the full amount of the invoices had been billed to the service charge accounts in the first 6 months of 2010, rather than the 80% actually paid, as he intended to pay Mr Stubbenhagen. The same was true of the other discounted payments in 2009 and 2010. The invoices were billed to the service charge accounts in full, rather than the amounts paid. There has been no adjustment to the accounts to reflect the underpayments and the leaseholders have not been notified of the underpayments.

140. At this stage the tribunal adjourned the hearing, to enable Mr Rosenthal to seek instructions on the underpayments for 2009-10. After the hearing resumed, he explained there were no invoices for the Property that had been withheld in full. Rather the disputed invoices relate to other properties belonging to the Respondents. The underpayments for the Property for the first half of 2010 amount to £508.78 (20% of £5,278.35). A very similar sum (£509.28) had been demanded in the letter of claim from Mr Stubbenhagen's solicitors, dated 16 June 2015. Mr Rosenthal stated that this sum had been admitted in the letter of response, which was not in the hearing bundles. The letter of claim did not seek any other underpayments for the Property. The total sum claimed in the letter was £244,912.66.

141. The underpayment of £508.78 has been billed to the service charge account for the Property, which raises the issue of whether this is an unreasonable charge for section 19 purposes.

Submissions on commission

142. Mr Rosenthal's starting point was that an allegation of secret commission payments was very serious. A tribunal or court should be very slow to making findings that could incriminate a party, without good supporting evidence.

143. Mr Rosenthal also made the point that it was rare for the tribunal to deal with this type of stark factual dispute. In effect the Applicants are alleging fraud and he invited the tribunal to make a finding whether a fraud had been perpetrated. He referred to paragraph 775 in Halsbury's Law of England (Volume 11), which dealt with the standard of proof. In civil cases this is the balance of probabilities but "*..the more serious the allegations, the more cogent is the evidence required to overcome the unlikelihood of what is alleged and thus to prove it*".

144. In summary, Mr Rosenthal's case was that there was insufficient evidence to establish any fraud. For the period up to 2006 there was no evidence of any commission payments whatsoever. For 2006 to 2008

it is alleged that payments were made in kind but again there is no supporting evidence. For 2009-10, it is alleged that commission was paid by way of discounts on invoices but there were various inconsistencies in Mr Stubbenhagen's evidence and the documents. The underpayments for the first half of 2009 were not 15%, as claimed by the Applicants. It may be that the underpayments arose as the invoices were paid net of VAT. It is common ground that there is a dispute over Mr Stubbenhagen's fees and this dispute involved certain underpayments. However this is not sufficient evidence to establish secret commission payments.

145. Mr Rosenthal invited the tribunal to accept Dr Etminan's explanation for not responding to the commission allegations in the correspondence from Mr Stubbenhagen. He also suggested that the latter's evidence had been "*coloured*" by the dispute over unpaid fees.

146. Mr Rosenthal reiterated that findings made by the tribunal in Mr Madi's case are not evidence of facts in this case. He also reiterated that in the earlier case, Mr Stubbenhagen's evidence had not been challenged. He referred to the Lands Tribunal's decision in ***Arrowdell v Consiston Court (North) Hove Limited [2006] LRA/72/2005*** and the Upper Tribunal's decision in ***Sinclair Gardens Investments (Kensington) Limited Re: 7 Grange Crescent [2014] UKUT 0079 (LC)***. These distinguish between findings of fact by this tribunal and findings by the Lands/Upper Tribunal. Mr Rosenthal submitted that this case should be decided purely on its evidence and facts.

147. Mr Madi suggested that the facts in this case can be distinguished from those in ***Arrowdell*** and ***Sinclair Gardens***. However he did not feel able to comment on the significance of these decisions, given his lack of legal training.

148. Mr Madi referred the tribunal to similarities between his case and this case. He acknowledged that Mr Stubbenhagen's evidence was not challenged in his case and accepted that the commission issue should be heard afresh. However there was sufficient evidence, both oral and written, to establish the commission arrangement on the balance of probabilities. Mr Madi suggested that the Applicants had presented sufficient evidence to shift the burden of proof to the Respondents. He also made the point that the tribunal was hearing an application under section 27A rather than deciding a criminal case in the Crown Court.

149. Mr Madi's primary submission was that all of the invoices issued by Mr Stubbenhagen should be reduced by 15% for the entire period from 2001 to 2012. His fall-back position was that the underpayment in the first half of 2010 (£508.78) should be disallowed, as it was unreasonable for the purposes of section 19.

The tribunal's decision

150. In relation to all three Applicants, the tribunal determines that:

(a) the repair and maintenance costs are payable in full for the periods 2001 to 2008 and 2011 to 2012, inclusive; and

(b) the following repair and maintenance costs are payable for the period 2009 to 2010:

January to June 2009 - £5,625.00

June to December 2009 - £3,763.39

January to June 2010 - £2,035.09

June to December 2010 – £1,744.88

151. In relation to the Third Applicant, the tribunal determines that no management fees are payable for the underpayments disallowed at paragraph 150(b) above.

Reasons for the tribunal's decision

152. There was conflicting evidence from Mr Stubbenhagen and Dr Etminan. What is not in dispute is that Mr Stubbenhagen undertook work for Dr Etminan and his business for over 30 years and they fell out in early 2013 over a claim for unpaid fees. Neither witness was entirely convincing. There were inconsistencies in some of the figures put forward by Mr Stubbenhagen and Dr Etminan was unable to provide a satisfactory explanation for all of the underpaid invoices.

153. The tribunal accepts that allegations of fraud must be supported by convincing evidence. It also accepts Mr Rosenthal's submission that the findings in Mr Madi's case are not evidence of facts in this case. The former involved different leaseholders and a different property. Crucially Mr Stubbenhagen's evidence was not challenged so it is unsurprising that it was accepted by the tribunal. In this case the evidence was challenged and in many cases the challenges were effective.

154. The relationship between the two witnesses has broken down due to the dispute over fees. Mr Stubbenhagen's claim is for a figure in excess of £240,000. He candidly admitted that he would not be giving evidence against the Respondents if these fees had been paid. It is likely that this dispute coloured the testimony from both witnesses.

155. The former business arrangement between Dr Etminan and Mr Stubbenhagen was unorthodox. Invoices were raised every six months, rather than when a specific job had been completed. Bulk payments were made that covered a number of different properties, which has made it difficult to clearly identify the invoices that had been paid. Between 2009 and 2010 a number of invoices went unpaid or were underpaid.

156. It is clear that Dr Etminan and the Respondents provided Mr Stubbenhagen with a great deal of work, which generated a lot of fees. Given this fact it is entirely plausible that Mr Stubbenhagen undertook some personal work at reduced rates, by way of a "*thank you*". However this does not mean that any reductions amounted to payments in kind or secret commissions. There was no specific evidence of the alleged reductions, such as the amount of the reductions, how these had been calculated or how they referred to works invoiced for the Property. In the absence of such evidence, the Applicants have not established that commissions were paid for 2001-08 and 2011-12. It follows that there is no reduction in Mr Stubbenhagen's charges for these periods.

157. In relation to the years 2009-10, there is evidence of invoices that have not been paid or which have been underpaid. None of the unpaid invoices relate to the Property. The issue is whether the underpaid invoices reflect a commission arrangement between Mr Stubbenhagen and Dr Etminan. The tribunal attached little weight to the correspondence from Mr Stubbenhagen in 2013 that referred to "*commission*", as the parties' relationship had broken down by then. Further the alleged commission arrangement was never acknowledged by the Respondents.

158. Mr Stubbenhagen claims that he paid commission at 15% whereas it was only in the second half of 2009 that invoices were underpaid by this amount. In the first half of that year the underpayments were 13.04% and in 2010 the underpayments were 20% and 27.1%, respectively. Further it is notable in the second half of 2009, Mr Stubbenhagen issued a credit note for £7,840.46 headed "*Discount 3rd qtr invoices*". This suggests that he simply agreed a reduction in the invoices, rather than paying this sum as commission. If a commission was paid then the logical way of evidencing this would be by way of a payment or debit slip.

159. The tribunal is not satisfied that commission was paid for the years 2009-10. However that is not the end of the matter. Clearly there were underpayments on Mr Stubbenhagen's invoices for the Property. Dr Etminan confirmed that the full amount of the invoices had been billed through the service charge accounts and there has been no credit for the underpayments. It may be that some of these underpayments arose because the Respondents made payments on account. Dr Etminan said

that balancing payments would be made but the invoices were raised 5-6 years ago. There was no satisfactory explanation for this time lapse.

160. It is clearly unreasonable for the Applicants to pay more for works than Mr Stubbenhagen has received. Their service charges should be based on the sums actually paid. It follows that the amount of the each underpayment in 2009-10 is disallowed.

161. The tribunal compared the figures in the six-monthly service charge accounts with the appendices to Mr Stubbenhagen's statement. For the first half of 2009, the sum charged in the accounts for repairs and maintenance was £6,468.75 whereas the sum paid was £5,625. For the second half, the sum charged in the accounts was £4,427.50 whereas the sum paid was £3,763.39. For the first half of 2010, the sum charged was £2,543.87 whereas the sum paid was £2,035.09. For the second half, the sum charged (£1,744.88) was the same as the sum paid.

162. Given that the underpayments in 2009-10 have been disallowed, there needs to be a reduction in the corresponding management fee payable by Flat 4. This is equivalent to 15% of its share of the disallowed underpayments.

163. For the sake of completeness, it is worth spelling out that the tribunal makes no finding of fraud on the part of Dr Etminan or the Respondents.

Works to the caretaker's flat (items 35-43 in Scott Schedule)

164. At the hearing Mr Madi explained that this issue relates to works undertaken in 2002 and solely concerns the First Applicant, as she was the only one who owned a flat at that time. The total cost of the works was £10,281.25.

165. The First Applicant's case is that the works were a refurbishment and/or upgrade of the caretaker's flat and do not fall within paragraph 6 of the third schedule to the original underlease of Flat 1. This is solely a question of lease construction. Mr Madi relied on the description of the works on the various invoices.

166. The Respondent's case is that the works were required to put the flat into repair and are contractually recoverable. At the hearing, Mr Rosenthal referred the tribunal to the service charge provisions in the recitals to the original underlease together with clause 3(6). The combined effect of these sections is that the First Applicant was required to pay 3/11^{ths} of the cost of complying with the Lessee's obligations in the head-lease. Clause 2(3)(a) of the head-lease requires the Lessee to repair and maintain the demised premises, which includes the caretaker's flat.

167. Mr Rosenthal also referred the tribunal to paragraph 44 of Mr Stubbenhagen's statement, as evidence of the need for the works and which is set out below:

Caretaker's flat: I can confirm that in 2002, I carried out the works to the caretaker's flat at 69 Cadogan Square. The flat was in a total state of disrepair. The works undertaken by me were the fitting of a new kitchen, general refurbishment and also works to the Boiler Room to the rear of the caretaker's flat as requested. In 2008, I fitted a new bathroom

168. The installation of the new bathroom in 2008 was not pursued at the hearing.

The tribunal's decision

169. In relation to the First Applicant, the tribunal determines that the works to the caretaker's flat are payable in full.

Reasons for the tribunal's decision

170. It is clear from the terms of the under-lease that the First Applicant was required to pay 3/11ths of the cost of complying with the Lessee's covenants in the head-lease.

171. There was no evidence from the First Applicant. It appears from the invoices that the works involved treatment for dry and wet rot, stripping out, damp treatment, reinstatement, re-tiling and re-plumbing in the kitchen and the replacement of kitchen units and other fittings. Mr Stubbenhagen described the flat as being in *"..in a state of total disrepair"*.

172. The tribunal is satisfied that the works were repairs rather than improvements and fell within the Lessee's repairing covenant in the head-lease. It follows that the First Applicant was required to pay 3/11ths of the cost of the works.

Mr Stubbenhagen's attendance at meetings (items 75, 76, 88, 215, 216, 224, in Scott Schedule)

173. The Applicants' case is that Mr Stubbenhagen's fees for attending various site meetings are unreasonable and should be disallowed. They described these meetings as "*management meetings*" and argue that Mr Stubbenhagen's attendances were part of the management function and should be covered by the management fees. They rely on the decision in ***Flat 5, 34 Pont Street*** where various meeting fees were disallowed.

174. In his statement, Mr Stubbenhagen explained that he attended the various meetings on behalf of the First Respondent, with a view to reporting back to them.

175. In the Scott Schedule, the Respondents denied that the meetings were management meetings; rather they suggested that Mr Stubbenhagen attended the meetings as an expert. In their statement of case they described how Mr Stubbenhagen's met with contractors for maintenance or repair projects and advised the First Respondent on the contracts.

The tribunal's decision

176. The tribunal determines that the meeting fees are disallowed in full.

177. In relation to the Third Applicant, the tribunal determines that no management fees are payable for the disallowed meeting fees.

Reasons for the tribunal's decision

178. The invoices confirm that Mr Stubbenhagen's fees relate to site meetings with third parties, relating to repair and maintenance issues at the Property. For example invoice number 1124 refers to a "*Site meeting with Graham Goodwin Structural Engineer..*" and invoice number 2090 refers to a "*...meeting on site with Asbestos removal company*". The issue for the tribunal is why he attended these meetings.

179. Mr Stubbenhagen is an experienced building contractor but is not a qualified surveyor. There was no suggestion that he supervised the maintenance and repairs works. Rather he attended the various meetings in a management capacity and then reported back to the Respondents. Accordingly his fees should be subsumed within any management fees and are not payable by the Applicants.

180. Given that the meeting fees have been disallowed, there needs to be a reduction in the corresponding management fee payable by Flat 4. This is equivalent to 15% of its share of the disallowed meeting fees.

Application under s.20C and refund of fees

181. At the end of the hearing, Mr Madi made an application for a refund of the fees paid by the Applicants in respect of the application (£250) and

hearing (£190)[1]. Having heard the submissions from the parties and taking into account the determinations above, the tribunal orders the Respondents to refund these fees within 28 days of the date of this decision.

182. In their statements of case, the Applicants applied for an order under section 20C of the 1985 Act and Mr Madi repeated this application at the end of the hearing. Having heard the submissions from the parties and taking into account the determinations above, the tribunal determines it is just and equitable in the circumstances for an order to be made under section 20C of the 1985 Act, so that the Respondents may not pass any of their costs incurred in connection with these proceedings through the Applicants' service charges.

183. Although the Applicants did not succeed on all issues, the tribunal has made a number of reductions in the disputed service charges. Furthermore some of the issues were agreed by the Respondents prior to the hearing. Much of the tribunal hearing was spent on the commission claim. There was insufficient evidence to establish any commission payments by Mr Stubbenhagen but there was clear evidence of underpayments for 2009-10. Furthermore the commission claim flowed from the unorthodox business arrangement between Dr Etiminan and Mr Stubbenhagen.

184. In the circumstances the Applicants were justified in pursuing their application to the tribunal and it is appropriate that the Respondents refund the application and hearing fees. Further it would be inequitable for the Applicants to pay any part of the Respondents' costs of resisting these proceedings, via their service charges.

The next steps

185. Now that the disputed service charges have been determined, it is for the parties to calculate and try and agree the adjusted service charges for each flat. If the parties are unable to agree the figures then they should refer the matter back to the tribunal within 28 days of the date of this decision.

Name: Tribunal Judge Donegan **Date:** 15 November 2015

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[1] The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 SI 2013 No 1169

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 20

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

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

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

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

(4) The Secretary of State may by regulations provide that this section applies to a qualifying long term agreement—
(a) if relevant costs incurred under the agreement exceed an appropriate amount, or
(b) if relevant costs incurred under the agreement during a period prescribed by the regulations exceed an appropriate amount.

(5) An appropriate amount is an amount set by regulations made by the Secretary of State; and the regulations may make provision for either or both of the following to be an appropriate amount—
(a) an amount prescribed by, or determined in accordance with, the regulations, and
(b) an amount which results in the relevant contribution of any one or more tenants being an amount prescribed by, or determined in accordance with, the regulations.

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

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

Section 20C

(1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court, residential property tribunal or the Upper Tribunal, or in connection with arbitration proceedings, are not to be regarded as relevant costs to be taken into account in

determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.

(2) The application shall be made—
- (a) in the case of court proceedings, to the court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to a county court;
- (aa) in the case of proceedings before a residential property tribunal, to that tribunal;
- (b) in the case of proceedings before a residential property tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any residential property tribunal;
- (c) in the case of proceedings before the Upper Tribunal, to the tribunal;
- (d) in the case of arbitration proceedings, to the arbitral tribunal or, if the application is made after the proceedings are concluded, to a county court.

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

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.