FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00BK/LSC/2018/0449**
Property	**:**	**45 Wilton Crescent and 45 Belgrave Mews, London SW1X 8RX**
Applicant	**:**	**Achara Tripipatkul**
Representative	**:**	**Mr Simon Williams of Counsel instructed by WH Lawrence Solicitors**
Respondent	**:**	**Mr Dimitris Paraskevas**
Representative	**:**	**Mr Justin Bates of Counsel instructed by Anthony Gold Solicitors**
Type of application	**:**	**For the determination of the reasonableness of and the liability to pay a service charge**
Tribunal members	**:**	**Judge N Hawkes** **Mr W R Shaw FRICS** **Mr J Francis QPM**
Venue and dates of hearing	**:**	**10 Alfred Place, London WC1E 7LR on 18, 19, 20 and 21 November 2019**
Date of decision	**:**	**16 January 2020**

DECISION

Decisions of the Tribunal

(1) The Tribunal makes the determinations as set out under the various headings in this Decision.

(2) The parties shall, by **14 February 2020**, file an agreed schedule, to be published together with this decision, setting out the calculations which follow from the Tribunal's determinations and specifying (i) the amount of the service charges which are payable to the Applicant before the Respondent's set off is taken into account; (ii) the amount of the Respondent's set off; and (iii) the date on which the set off becomes equal to the service charge arrears. Alternatively, if the parties are unable to agree the relevant calculations, they should file a statement setting out any issues which remain in dispute (together with the reasons for the dispute) by **14 February 2020.**

(3) The parties shall, by **14 February 2020**, file a statement setting out any issues remaining in dispute concerning the Respondent's application for an order pursuant to section 20C of the Landlord and Tenant Act 1985 (see paragraph (4) of the Directions dated 8 January 2019) and/or concerning any application for an order pursuant to paragraph 5A of Schedule 22 to the Commonhold & Leasehold Reform Act 2002.

The application

1. 45 Wilton Crescent and 45 Belgrave Mews, London SW1X 8RX ("the Building") is an early 19th century property which has been divided into five residential dwellings. 45 Wilton Crescent ("the House") has been divided into four flats and there is also a mews house to the rear ("the Mews").

2. The Applicant is the freehold owner of the Building. She lives in the top floor flat in the House and two of the other flats in the House are owned and/or controlled by the Applicant or by companies which are connected to her. The Respondent is the lessee of a flat on the first floor, ground floor and rear lower ground floor of the House ("the Flat"). The Mews is occupied by a lessee who is independent from the Applicant.

3. The Applicant seeks a determination pursuant to section 27A of the Landlord and Tenant Act 1985 ("the 1985 Act") as to the amount of service charges which are payable by the Respondent in respect of proposed major works to the House.

4. At a directions hearing which took place on 8 January 2019, it was decided that the Tribunal would also determine a set off on the part of the Respondent in respect of alleged breach of covenant on the part of the Applicant.

The hearing and inspection

5. The Applicant was represented by Mr Williams of Counsel and the Respondent was represented by Mr Bates of Counsel at the hearing.

6. The Tribunal received a hearing bundle comprising eight lever arch files prior to the hearing and a ninth lever arch file was provided at the commencement of the hearing.

7. The Tribunal heard oral evidence of fact on behalf of the Applicant from:

   (i) Mr Andy Hall, Managing Director of Tyburn Consulting (a company which has been retained in order to assist the Applicant in carrying out work to the House);

   (ii) Mr Alistair McGlashan of McGlashans Property Services (a company which has assisted the Applicant on an informal basis in relation to the Building since she purchased the freehold in 2010 and which became the Applicant's managing agent in 2018).

8. The Tribunal heard oral evidence of fact on behalf of the Respondent from the Respondent, Mr Paraskevas.

9. The Tribunal heard oral expert evidence on behalf of the Applicant from:

   (i) Mr Will Borg, Managing Director of ConstultaLift Limited, a Vertical Transportation Consultant.

   (ii) Mr Morris BSc (Hons) MRICS AIOSH, a Chartered Building Surveyor.

   (iii) Mr Richard Kay FRICS, a Chartered Valuation Surveyor.

10. The Tribunal heard oral expert evidence on behalf of the Respondent from:

    (i) Mr Martin Skinner BSc CPhys ARCS MIET MinstP a Building Services Engineer.

    (ii) Mr Ivan Coffey FRICS, a Chartered Building Surveyor.

    (iii) Mr Adams Cairns BSc FRICS, a Chartered Valuation Surveyor.

11. As stated above, at the directions hearing it was decided that the Tribunal would determine a set off in respect of alleged breach of repairing covenant on the part of the Applicant. At the commencement of the hearing, it was initially proposed on behalf of the Respondent that the Tribunal Judge should sit as a Judge of the County Court in order to determine the Respondent's County Court claim for damages for breach of repairing covenant. This was on the basis that judgment could then be entered if the sum found to be due to the Respondent exceeded the value of the service charges which form the subject matter of the Applicant's application.

12. The Tribunal was not satisfied that there are any County Court proceedings in existence; no County Court issue fee having been paid and there being no Notice

of Issue of any County Court proceedings and no Particulars of Claim. The damages claim was said to be worth over £200,000 and the County Court issue fee would therefore have been £10,000.

13. Further, the Tribunal was not satisfied that it would have been appropriate as a matter of case management, in the circumstances of the present case, to adopt the proposed course of action at the final hearing when no provision for it had been made at the directions stage.

14. In any event, both parties ultimately agreed that the Tribunal determination sought in respect of the breach of covenant issue will be clearly limited in time up until the date, if any, on which the Respondent's damages claim is equal to the amount of service charges which the Tribunal finds to be payable. The Respondent's right to pursue any damages claim in respect of any other period of time will be preserved. On this basis, the proposal that the Tribunal Judge should sit as a judge of the County Court was not pursued.

15. It also was agreed that the parties' experts would carry out the relevant calculation and the other calculations arising from the Tribunal's determinations on matters of principle following receipt of the Tribunal's decision.

16. On 18 November 2019, prior to the start of the hearing, the Tribunal inspected the Flat, the exterior and internal common parts of the House, a flat roof at first floor level, the lift (including lift machinery located within the Applicant's flat), and the exterior of the Mews.

The issues

17. At the conclusion of the hearing, the parties confirmed that the issues which remain outstanding and which the Tribunal is asked to determine are the method of apportionment of the service charges, the reasonableness and/or payability of certain specific service charge items (the relevant lines of the Scott Schedule were identified orally during closing submissions), and the Respondent's proposed set off.

18. The Respondent's assertion that that no service charge demands, save for those relating to insurance premiums, have been made since the commencement of the Respondent's lease was not challenged and it was agreed that the costs which are referred to at paragraphs 25-27 of the Respondent's skeleton argument are now barred by reason of section 20B(1) of the Landlord and Tenant Act 1985.

19. Having heard evidence and submissions from the parties and having considered the documents to which it was referred, the Tribunal has made determinations on the various issues as follows.

Apportionment

20. The lease provides that the service charge payable by the Respondent is a "fair proportion" of the relevant costs "decided from time to time by the Landlord …" It is common ground that the effect of section 27A(6) of the 1985 Act is that, in the absence of agreement, it is for the Tribunal to determine what would be a "fair proportion": *Leaseholders of Ivory House and Calico House v Cinnamon (Plantation Wharf) Ltd and others [2019] UKUT 421 (LC)*, at [45]-[50] (in particular, [47], quoting from the earlier decision *in Gater v Wellington Real Estate Limited [2015] [2014] UKUT 561*.

21. Mr Williams submits that, when considering what would be a fair proportion of the relevant costs, the Mews should be excluded from consideration because it has a full repairing lease. He notes that it was observed during the course of the inspection that the façade of the Mews has recently been repainted.

22. Mr Williams submits that, with the exception of the costs relating to the lift, the fairest means of apportioning the service charge is by reference to the floor area of the flats which are contained within the House. In respect of the lift, he proposes that the costs are divided equally between the three flats which have the right to use the lift (that is the flats in the House excluding the basement flat) or, alternatively that there is a weighting based on floor level.

23. Mr Bates states that the Mews should be taken into account because it is included in the definition of "Building" in the Respondent's lease (notwithstanding that it is excluded from the definition of "Building" in the leases of the two other flats in the House). He submits that the basement flat should pay a high proportion of the external works to the lower part of the House because it will derive the most benefit from these works; that the Respondent should not be required to contribute anything to the cost of the work to the lift; and that the other costs should be split equally between five dwellings.

24. It is common ground that the Respondent has a right to use the lift but Mr Bates pointed to various potential practical and legal difficulties in ensuring that the lift stops at the first floor of the Respondent's Flat (including that a successor landlord might refuse to grant a licence to alter and potential practical difficulties in re-routing the electrical installations within the Flat). He also stated that, should the Tribunal come to a conclusion which means that the Respondent is liable to contribute to the cost of the lift work, the Respondent would require that the lift work be carried out in such a way as to leave him with the possibility of accessing the lift from the first floor at a future date.

25. The Tribunal was referred to the RICS Service Charge Residential Management Code (3rd Edn) which has been approved by the Secretary of State under section 87 of the Leasehold Reform, Housing and Urban Development Act 1993, and which includes provision that:

"Depending on the terms of the lease, the basis and method of apportionment, where possible, should be demonstrably fair and reasonable to ensure that

individual occupiers bear an appropriate proportion of the total service charge expenditure that reflects the availability, benefit and use of services."

26. As regards the lift, the Tribunal determines that 10% of the relevant costs is the fair proportion which is payable by the Respondent. In reaching this conclusion, the Tribunal has had regard to the fact that the Respondent has the right to use the lift. However, we have also taken into account the fact that the main entrance to the Respondent's Flat is located at ground floor level and that there are potential practical and legal difficulties in ensuring that the lift will stop at first floor level (noting that the evidence of practical difficulties is limited).

27. As regards the remaining charges, the Tribunal accepts the submissions of Mr Williams. The Mews will not benefit from the Applicant's proposed works and the Tribunal is satisfied that the Mews should therefore be excluded from consideration. We consider that the fairest way of assessing the benefit of the proposed work to the flats in the House is by reference to floor area. We do not consider that it is practical to further break down the costs in order to determine the relevant benefit of different items of work to different flats. Accordingly, the Tribunal finds that 31.82% of these service charge costs is the fair proportion which is payable by the Respondent.

The disputed Scott Schedule Items

28. The Tribunal makes the following findings in respect of the disputed Scott Schedule Items:

    (i) Item 82: The Tribunal accepts the evidence of both lift experts that the lift requires replacement and is satisfied on the evidence that these costs are reasonable and payable. Provision should be made for the lift to be able to stop at first floor level if at some later time this is desired and practicable.

    (ii) Items 134 and 587: Mr Coffey gave evidence that the scaffolding is likely to be provided by a subcontractor and that, because this item appears expensive, a review of these costs should be requested. Mr Morris stated that, because the works have been tendered as a single package in a competitive tender, the scaffolding costs should not be viewed in isolation but rather they should be viewed as part of the package which has been provided by the most cost-effective contractor. Further, no alternative quotations are relied upon as showing that the proposed costs fall outside a reasonable range. The Tribunal prefers the evidence of Mr Morris on this issue and finds that these costs are reasonable and payable.

(iii) Item 182: The Tribunal finds that this contingency sum is reasonable having regard to the nature and size of the project.

(iv) Item 209: This item concerns lift refurbishment work and should be removed because it is agreed that the lift is to be replaced rather than refurbished.

(v) Item 234: This is a provisional sum which cannot be spent without further approval and, until the area has been opened up, there will be a significant degree of uncertainty concerning the extent of the work ultimately required. In all the circumstances, the Tribunal finds that this sum is reasonable and payable.

(vi) Item 242: The Respondent indicated that he would not contest this item if found liable to contribute to the cost of work to the lift and the Tribunal is satisfied that these costs are reasonable and payable.

(vii) Items 246, 319, 321 and 351: The Tribunal accepts the evidence and reasoning of the Applicant's lift expert and finds that these costs are reasonable and payable.

(viii) Item 593: The Tribunal accepts on the balance of probabilities that this work is likely to be necessary and is satisfied on the evidence that these costs are reasonable and payable.

(ix) Item 601: The Tribunal accepts that there is force in Mr Coffey's statement that where areas are visible the proposed work should be accurately specified. However, the Tribunal considers that the sum of £500 is likely to be reasonable having regard to the nature of the proposed work and finds, on balance, that this sum is reasonable and payable.

(x) Item 605: The stair balustrade to the basement is incomplete and not constructed to current safety standards. A provisional sum of £4,000 should be included for works to replace the existing pending further quotes.

(xi) Items 629 and 637: No alternative quotation has been provided and the Tribunal considers that it is reasonable for Portland stone to be used having regard to the nature and location of the property. The Tribunal finds that these costs are reasonable and payable.

(xii) Item 645: A reduction from £2,500 to £500 was agreed at the hearing.

(xiii) Item 651: It is common ground that the work should be carried out to a standard appropriate for a high-class property in a high-class area. The Tribunal considers that the door should be replaced in order to ensure durability and an appropriate finish. The Tribunal finds that these costs are reasonable and payable.

(xiv) Items 657 and 665: The parties agreed to omit these items because work has been carried out.

(xv) Item 717: The Tribunal accepts that it is reasonable for this item to be replaced in order to ensure both longevity and an appropriate finish. The Tribunal finds that these costs are reasonable and payable.

(xvi) Items 743 and 749: The Tribunal prefers the Applicant's evidence and reasoning and finds that these costs are reasonable and payable.

(xvii) Item 757: The Tribunal finds that this provisional sum should be reduced to £1,000 in order to reflect the fact that the roof was repaired in 2009 (it is assumed that the 2009 roof work was carried out with reasonable skill and care).

(xviii) Items 767, 775 and 777: The Tribunal prefers the evidence and reasoning of Mr Morris and finds that these costs are reasonable and payable.

(xix) Items 781, 906, 973 and 979: The Tribunal prefers the Applicant's case on this issue and is of the view that it is reasonable to carry out this work having regard to the fact that this is a high-class building in a high-class area. The Tribunal finds that these costs are reasonable and payable.

(xx) Item 805: The Tribunal considers that it would be preferable for this work to be specified but finds, on balance, that it is reasonable to allow the proposed provisional sum of £1,000.

(xxi) Items 809, 811 and 813: the Tribunal prefers the evidence of Mr Coffey that this work is not required and finds that the relevant costs are not payable.

(xxii) Item 822: The parties have agreed that this item is to be omitted.

(xxiii) Items 856-866: The Tribunal considers that this work should be carried out in order to ensure both an appropriate finish for a high class building and appropriate longevity. Accordingly, the Tribunal finds that these costs are reasonable and payable.

(xxiv) Items 876-890: Having inspected the common parts, the Tribunal is not satisfied that the carpet which is currently in place could be brought up to an appropriate standard by cleaning. The Tribunal prefers Mr Morris's evidence and reasoning and finds that these costs are reasonable and payable.

(xxv) Items 927 to 953: The Tribunal is not satisfied that this work is required because it is not satisfied that the existing services cupboard requires replacement.

The Respondent's proposed set off

Whether the Applicant is in breach of covenant

29. The Applicant's obligations are set out at Part 2 of Clause 5 of the Respondent's lease. There is an absolute covenant on the part of the Applicant to provide the services which are specified in Part 3 of the Schedule to the lease and a duty to use reasonable endeavours to provide the services which are specified in Parts 4 and 5.

30. The "absolute duty" includes:

(a) keeping the Building (i.e. 45 Wilton Crescent and 45 Belgrave Mews) in "good and substantial repair and decoration", including internal walls and staircases;

(b) decorating the exterior parts of the Building.

31. The "reasonable endeavours" duties include:

(a) the provision of such lifts (if any) as are in the Building at the date of this Lease and their repair, maintenance and renewal.

32. In 2012, the Applicant consulted on a programme of works (including the internal redecoration of the House and replacement of the lift) because she considered them to be "required pursuant to the covenants" in the lease.

33. In 2015, the Applicant again consulted (this consultation included both the proposed 2012 works and proposed external redecorations to the House) because this work was "required pursuant to the covenants" in the lease. A further consultation was carried out by the Applicant in 2017.

34. Paragraphs 41(a) to (g) of the Respondent's written closing submissions are agreed. These paragraphs summarise the history as follows:

"(a) there were external redecorations done in 2009/2010;

(b) by 2012, the internal common parts and lift had been identified as needing works (including replacement of the lift);

(c) there was no attempt to complete the statutory consultation process or to raise any of the necessary funds from the leaseholders;

(d) by 2015, the condition of the building had deteriorated and now, in addition to the 2012 works, at least the lower external part of the building was showing signs of disrepair;

(e) although a tender specification was produced (because Mr Coffey commented on it), no further attempt was made to complete the statutory consultation process or to raise any of the necessary funds from the leaseholders;

(f) by 2017, the external disrepair has worsened and the whole of the exterior common parts now needs work;

(g) despite obtaining three tenders and completing a tender analysis in October 2018, no contract has been let; no funds raised or demands made and those tenders have now expired."

35. The Tribunal observed the lack of repair and maintenance which gave rise to these consultation notices when it carried out its inspection. The Respondent gave evidence, which the Tribunal accepts, that during the relevant period there have been various instances of water penetration into his Flat. The Tribunal observed damage to the interior of the Respondent's Flat, caused by water ingress, when it carried out its inspection.

36. The Respondent was cross-examined on the issue of whether the commencement of the Applicant's proposed works was delayed by virtue of a preference on the part of the Respondent:

(i) to have a meeting with the Applicant "principal to principal" in order to discuss the proposed works in the first instance without lawyers present;

(ii) to avoid disruption and dust at times when his elderly mother was visiting from Greece;

(iii) not to carry out the proposed work when the Respondent was carrying out extensive work to his Flat in around 2012 to 2014; and

(iv) not to carry out the proposed work at a time when the value of the pound had dropped significantly (on the basis that this would adversely affect the cost of materials).

37. The Respondent asserts that he had wished to agree a plan for the work to be carried out in a manner that would have had the least impact and he strongly denies that he is responsible for the delay which has occurred. There is some evidence that the Respondent sought to chase up the carrying out of the work. In any event, it is common ground that the relevant covenants in the lease make no provision for the Applicant to delay carrying out the work on the basis that discussions are taking place which have not resulted in an agreement (or on the basis of the Respondent's conduct in general).

38. Having considered the agreed factual history, the witness evidence, and the Tribunal's own findings on carrying out its inspection, the Tribunal is satisfied and finds as a fact that the Applicant is in breach of covenant in that (i) she has failed to keep the House in good and substantial repair and decoration and (ii) she has failed to use her best endeavours to repair, maintain and renew the lift. The extent of the delay in complying with the relevant covenants will be considered below.

Mitigation

39. The Applicant submits that, by expressing the preferences set out above (it should be noted that there are disputes of fact between the parties concerning precisely what occurred), the Respondent contributed to the delay in carrying out the proposed work and that he therefore failed to mitigate his losses.

40. The Tribunal does not accept this argument because the Respondent had no power to prevent the Applicant from carrying out the proposed work and no power to prevent the Applicant from making any necessary applications to the Tribunal when the parties failed to reach an agreement.

The increase in the cost of the work

41. It is common ground that where a landlord has delayed in carrying out work, and that delay amounts to a breach of covenant on the part of the landlord, then a leaseholder is entitled to both general damages and an amount equal to the additional cost of the work, having regard to the delay, *Daejan Investments Ltd v Griffin [2014] UKUT 0206 (LC)*, at [89]:

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

42. The experts agree that the appropriate way of determining the increase in price resulting from any delay is to apply the BCIS Regional Tender Price Index for London.

43. Of the work which the Applicant now proposes to carry out (save for the lift works), the Tribunal finds that the work which was set out in the 2012, 2015 and 2017 consultation notices should have been carried out as at the dates of these notices. The Applicant was under an "absolute duty" to carry out this work and it is work to areas of the House which have been retained by the Applicant.

44. As regards the proposed work to the lift, certain work to the lift was included at the time of the 2012 consultation notice. However, the Tribunal recognises that the Applicant was under a "reasonable endeavours" duty rather than an absolute duty to maintain/replace the lift. In recognition of this and doing its best on the basis of the limited evidence available, the Tribunal finds that the work to the lift should have been completed by a date mid-way between the dates of the 2012 and the 2015 consultation notices.

45. As agreed at the hearing, the experts will calculate the increase in the cost of the work resulting from the delay.

General damages

46. In *Earle v Charalambous [2006] EWCA Civ 1090*, at [32] the Court of Appeal stated:

"A long-lease of a residential property is not only a home, but is also a valuable property asset. Distress and inconvenience caused by disrepair are not free-standing heads of claim, but are symptomatic of interference with the lessee's enjoyment of that asset. If the lessor's breach of covenant has the effect of depriving the lessee of that enjoyment, wholly or partially, for a significant

period, a notional judgment of the resulting reduction in rental value is likely to be the most appropriate starting point for assessment of damages."

47. Generally, the notional reduction in the rent will not be capable of precise estimation and it will be a matter for the judgment of the Court or Tribunal, rather than a matter for expert valuation evidence. However, the facts of each case must be looked at carefully and the present case concerns an unusual flat of high value which is situated in Belgravia.

48. The Respondent gave evidence, which was not challenged, that the value of the Flat has fluctuated from approximately £11 million to approximately £7 million during the relevant period and both experts agree that the Flat is very different in character from other flats in the locality.

49. In the unusual circumstances of the present case, the Tribunal found the expert valuation evidence which was produced by both parties on the issue of the notional reduction in the rental value of the Flat to be helpful. Further, having regard to the potential value of the Respondent's set off, the Tribunal accepts that it was proportionate for this valuation evidence to have been obtained in the circumstances of the present case.

50. The experts are working from a notional valuation date of March 2017, but they agree that, once the Tribunal decides the notional rental value as at that date, the Savills Prime Residential Rental Value Index can be used in order to identify the rent in any earlier period. The figures referred to below are those which are applicable as at the valuation date.

51. The experts agree that the notional rental value of the Flat in its current condition is £1,530 per week. Mr Kay is of the opinion that the notional rental value of the Flat, if the Applicant's repairing covenants had been complied with, would be £1,800 per week and Mr Adams-Cairns is of the opinion that the appropriate figure is £3,000 per week.

52. The Flat is situated over three floors and its main entrance is via the front entrance hall of the House. The Flat is currently arranged so as to have one bedroom and three reception rooms. There are three shower rooms, a kitchen, and the Flat also has the benefit of a garage which is currently being used as additional living space, and which provides the Flat with a separate entrance.

53. Neither expert has been able to identify any flat which is directly comparable to the Respondent's Flat. Mr Kay has derived his valuation by carefully processing a large volume of data which he has considered on a pound per square foot basis. He has relied upon market evidence relating to over 100 "comparable" properties. By contrast, Mr Adams-Cairns has considered a much smaller pool of flats which are as similar as possible to the Respondent's Flat and he has placed greater weight upon his professional experience and judgment than on obtaining extensive data.

54. Mr Adams-Cairns gave evidence that the Respondent's Flat is a "show off flat" which would appeal to an "elite market" and that the poor state of the exterior and internal common parts of the House would cause this market to lose all interest in the Flat. He stated that the potential rental market has therefore moved from "an elite market" to "a domestic market" and he has considered the notional rent and the reduction in the notional rent on this basis.

55. On Mr Adam-Cairns' evidence, the elite market would be willing to pay £3,000 per week in order to rent the Flat if the Applicant's covenants were complied with. He accepted that the domestic market would be willing to pay a rent of £1,530 per week with the Flat and the House in their current condition.

56. Mr Kay agreed that an elite market for exceptional flats exists and that this market would lose all interest in such a flat if the exterior and the common parts of the building in which the flat is situated were not in good repair and decorative condition.

57. In Mr Kay's view, the Respondent's Flat is not, however, an exceptional flat of this type and the nature of the potential rental market for the Flat therefore did not change by reason of the Applicant's breaches of covenant. On Mr Kay's evidence, the nature of the market has at all times remained the same and a potential tenant would expect a discount from £1,800 per week to £1,530 per week on account of the breaches of covenant.

58. The experts gave evidence simultaneously and they were asked to expand upon the areas of dispute.

59. Mr Adams-Cairns placed weight on the fact that the Flat is primarily situated on the first floor and the ground floor of the House, with the benefit of the additional garage area to rear lower ground floor which is currently being used as living space.

60. He stated that about 32 of the comparables which are relied upon by Mr Kay are either lower ground or ground and lower ground floor flats, with no space at first floor level, and that this will have lowered Mr Kay's average rental value.

61. Mr Adams-Cairns stated that, additionally, some of Mr Kay's comparables are on the second floor or above and that such flats typically have lower ceilings and lower rental values than first floor flats. He noted that none of the comparables relied upon by Mr Kay have a garage (although two have parking rights) and that none have three reception rooms. In his view, Mr Kay's portfolio was not representative of the Flat.

62. Mr Adams-Cairns gave evidence that there is a narrow market for an exceptional property such as the Respondent's Flat but that this market exists. He noted that a prospective tenant would potentially be able to also rent the furnishings which are atypical and he stated that this would appeal to the target market.

63. Mr Kay gave evidence that the uniqueness of the Respondent's Flat is likely to reduce the pool of potential tenants and that this would merit making a discount. He placed weight on the fact that the Flat is currently arranged as a one bedroom flat with three reception rooms. He accepted that there are reception rooms which could potentially be converted to bedrooms but noted that there is no bathroom, only shower rooms. He relied upon the fact that the Flat does not have air conditioning and noted that no significant refurbishment has been undertaken internally for at least five years.

64. In considering how the notional reduction in the rent attributable to the Applicant's breaches of covenant has varied over time, both experts proposed adopting a straight line from zero on the date of the 2012 consultation notice to the full notional reduction in the rent as at the date of the 2015 consultation notice (continuing at the full rate thereafter).

65. On being questioned about this, Mr Adam-Cairns accepted that the rate of change of the notional loss of rent would not have been linear. On his evidence, there would have been a point in time at which the potential market would have switched from an elite market to a domestic market. However, in the opinion of both experts, adopting a linear approach is the best that can be achieved on the basis of the limited available evidence. There is no clear evidence concerning the condition of the Flat and the House at different points in time over the years.

66. Mr Williams invites the Tribunal to prefer the evidence of Mr Kay as regards the notional rental value of the Flat in the absence of any breach of repairing covenant on the part of the Applicant. He submits that Mr Kay is methodical in his approach.

67. He invites the Tribunal to find that, from 2015 onwards when the exterior of the House required redecoration, the state of the House has not changed significantly. He accepted that the Applicant was responsible for a leak which occurred in 2012 and submitted that damages should be awarded in the sum of 1% of the notional rent for a period of approximately two months during which he estimates that the leak was unresolved.

68. Mr Williams invites the Tribunal to find that there is insufficient evidence that water penetration which occurred in 2013 and 2015 was the responsibility of the Applicant. He states that the only other leak is one which occurred in the winter of 2018/19, which resulted in the damage to the dining room of the Flat.

69. This leak was reported in February 2019, repairs were carried out by the Applicant in July 2019, and the plaster is now drying out. In respect of this leak, Mr Williams proposes a 1% notional reduction in the rent for a period of 11 months.

70. Mr Williams submits that, aside from the water penetration, there was negligible loss prior to 2015. As regards the period from the date of the 2015

consultation notice onwards, Mr Williams submits, relying upon *Moorjani v Durban Estates [2016] 1WLR 2265,* that a significant reduction should be made to reflect the Respondent's absences from the Flat.

71. The Respondent gave evidence that, during the relevant period, he has occupied the Flat for approximately 4 months of the year, on average. He gave evidence that he was in Greece, in order to be with his mother, for a period of 6 months before she died. However, he also gave evidence that, due to a medical condition, he currently spends more than 4 months of the year at the Flat and Mr Williams very properly accepted that this is likely to balance out the 6 month period of absence. Accordingly, the Tribunal will proceed on the basis that the Respondent has occupied the Flat for an average of 4 months of the year.

72. Mr Williams invites the Tribunal to make a reduction in the notional rent of 35% in respect of the period of 8 months of the year during which the Respondent is absent from the property.

73. Mr Bates invites the Tribunal to prefer the evidence of Mr Adams-Cairns as regards the notional rental value of the Flat in the absence of any breach of repairing covenant on the part of the Applicant. He states that valuation is an art rather than a science, that it includes an element of judgment and professional knowledge, and that Mr Adams-Cairns has adopted the better approach.

74. Mr Bates notes that the Flat is situated in one of the most expensive and exclusive parts of London and submits that it is an exceptionally large and attractive flat with ample living space (capable of being configured as anything from a 1 bedroom flat to a 3 bedroom flat). He contends that the garage alone makes it unlike any of the 107 comparables suggested by Mr Kay.

75. Mr Bates accepted that the Tribunal is bound by *Moorjani v Durban Estates [2016] 1WLR 2265* but he asked the Tribunal to record that he considers it wrong as a matter of law for any deduction to be made to reflect absences from the property on the part of a lessee.

76. Having inspected the Flat and having heard detailed oral evidence from both experts, the Tribunal prefers the valuation evidence of Mr Adam-Cairns and finds that, if the Applicant's repairing covenants were complied with, the Flat would appeal to the elite rental market.

77. The Flat is currently configured as an exceptionally large and attractive one bedroom flat with entertaining spaces equivalent to those which would usually only be found in a house (but also with the flexibility for current reception rooms to be converted to bedrooms with dedicated shower rooms). There would also be the potential for a prospective tenant to rent the contents of the Flat, including items of sufficient public interest that, on the Respondent's unchallenged evidence, they are on occasion loaned to museums. The

Respondent gave evidence, which the Tribunal accepts, that he has in the past considered letting the Flat furnished.

78. Accordingly, on the basis of the evidence of Mr Adam-Cairns, the Tribunal finds that the notional rent was £3,000 per week on the valuation date and that the notional reduction in rent (subject to any deduction which falls to be made in order to reflect the Respondent's absences from the Flat) was £1,470 per week as at the valuation date.

79. In considering how the notional reduction in the rent attributable to the Applicant's breaches of covenant has varied over time, the Tribunal accepts the expert evidence that a straight line should be applied from zero on the date of the 2012 consultation notice to the full notional reduction in the rent from the date of the 2015 consultation notice (and that the full reduction in the notional rent should apply thereafter). The reality would have been more nuanced but the Tribunal accepts the expert opinion that this is the best which can be achieved on the evidence available.

80. The Tribunal is satisfied, on the balance of probabilities, that the 2012 and the 2018/19 leaks were caused by breaches of the Applicant's repairing covenants. However, on the basis that, to the Respondent's benefit, the full notional reduction in the rent has been applied from 2015 (notwithstanding that there will have been some deterioration in the condition of the House from 2015 onwards) the Tribunal is not satisfied that any further notional reduction in the rent on account of the water penetration is justified.

81. In the *Earle* case, the lessee mitigated his losses by living for part of the relevant period with his parents. In *Moorjani*, the Court of Appeal stated at [39] and [40]:

"39. Fourth, it would be strange if mitigation were the only principle by reference to which the limited use or non-use of leasehold premises during the period of disrepair was relevant. In the present case, Mr Moorjani had vacated Flat 67 to live with his sister rent-free sometime before the 2005 flood for reasons which were, necessarily, unconnected with any breach of covenant by Durban Estates, and the judge concluded that he continued to live with his sister (rent-free) after the 2005 flood for reasons unconnected with that breach. Suppose that the disrepair had (contrary to the judge's findings) rendered Flat 67 uninhabitable. It would be strange indeed if, in those circumstances, Mr Moorjani was entitled to recover 100 per cent of the rental value of the flat during the period of disrepair, whereas Mr Earle (who vacated by way of mitigation) was entitled to a mere 50 per cent, for an equivalent impairment of his rights as lessee. It may be that non-use for reasons unconnected with the disrepair should be regarded as a form of mitigation of loss, even if there is no intention to mitigate, but it will not wholly cancel out the loss constituted by the impairment of amenity, for which the tenant has paid rent, and the lessee a premium, even if he lives elsewhere rent-free.

40. Fifth, and finally, the court is entitled and, I would say, obliged to temper the rigour of those rules which seek to implement the compensatory principle which lies at the heart of the law of damages, where particular circumstances make it just to do so, see generally County Personnel (Employment Agency) Ltd v Alan Pulver & Co [1987] 1 W.L.R. 916 . In particular circumstances, as was acknowledged in the Shine case, this may admit quantification of damages in excess of the current rental value. In Calabar v Stitcher the lessee recovered compensation on account of the damage to her husband's health occasioned by the disrepair. In other cases, it seems to me perfectly legitimate to treat the particular circumstances of the claimant lessee as tending to reduce rather than aggravate his damages, and not merely where the relevant conduct consists of what may conventionally be described as mitigation."

82. The Respondent gave extensive and at times vivid evidence concerning his circumstances, his use of the Flat, and the disruption caused by disrepair during the relevant period. The Tribunal found the Respondent to be an honest witness who did his best to assist the Tribunal and we accept his evidence.

83. In addition to the Flat, the Respondent owns properties in Athens, Monaco and Paris. The Respondent did not spend continuous periods of around 4 months of the year at the Flat but rather he travelled backwards and forwards for reasons which included his professional commitments, his mother's health, and his own health. Accordingly, the Respondent often travelled for reasons which were not within his direct control.

84. The Tribunal considers that it is likely to be more disruptive to have to come and go from a property, which is in disrepair, at unpredictable times throughout the year than it would be to have a settled and continuous period of residence and absence, in respect of which plans could be made in advance. Having carefully considered the Respondent's evidence, the Tribunal finds that the notional reduction in the rent falls to be reduced from 100% to 65% in respect of the 8 months of the year, on average, during which the Respondent was absent from the Flat.

Special damages

85. The Respondent has sought to set off special damages against the service charge arrears. At paragraph 105 of his witness statement, the Respondent states:

"By reason of the above, my belongings have been damaged and I have suffered additional expense because of the disrepair and nuisance including but not limited to £950.00 for redecoration of the common parts in December 2014, £403.20 for change of locks on my Property, purchase of Portland Stone at £55 per square metre, plants bought for common parts, curtains damaged by water penetration/damp, addition cleaning costs and legal costs."

86. The Respondent's claim that he is entitled to set off any special damages against the service charge arrears and his evidence that, by reason of the Applicant's

breach of covenant, he incurred the above losses in the sum of £950 and £403.20 is unchallenged. However, the remainder of the Respondent's special damages claim is insufficiently particularised to enable the Tribunal to make an award.

87. Accordingly, the Tribunal finds that special damages in the total sum of £1,353.20 fall to be set off against the service charge arrears.

Name: Judge N Hawkes **Date:** 16 January 2020

Rights of appeal

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

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

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

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

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

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

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00BK/LSC/2018/0449**
Property	**:**	**45 Wilton Crescent and 45 Belgrave Mews, London SW1X 8RX**
Applicant	**:**	**Ms Achara Tripipatkul**
Representative	**:**	**Mr Graeme Kirk of Counsel**
Respondent	**:**	**Mr Dimitris Paraskevas**
Representative	**:**	**Mr Justin Bates of Counsel**
Type of application	**:**	**Application pursuant to paragraph (2) of the Tribunal decision dated 16 January 2020**
Tribunal members	**:**	**Judge N Hawkes** **Mr W R Shaw FRICS** **Mr J Francis QPM**
Venue	**:**	**10 Alfred Place, London WC1E 7LR**
Date of decision	**:**	**3 August 2020**

DECISION

Covid-19 pandemic: VIDEO HEARING

This has been a remote video hearing which has been consented to by the parties. The form of remote hearing was V: CVP REMOTE. A face-to-face hearing was not held because it was not practicable and all issues could be determined at a remote hearing. The documents that we were referred to are in a bundle of 284 pages, the contents of which we have noted. The order made is described below.

Decisions of the Tribunal

(1) The service charge liability of the Respondent for the proposed works is £120,181, inclusive of VAT. That comprises:

(a) £89,036.04 for the building works;

(b) £22,695.70 for the lift works; and,

(c) £8,448.99 (£7,040.83 plus VAT) for the professional fees.

2) The Respondent has a set off which extinguishes the service charge liability, comprised as follows:

(a) damages arising from the delay in carrying out the building works and lift works, in the sum of £30,257.44 (comprised of £23,574.74 for delays to the building works and £6,682.70 for delays to the lift works);

(b) special damages in the sum of £1,353.20; and,

(c) damages arising from disrepair based on the diminution in notional rental value. These damages extinguished the service charge liability on 23 August 2015.

The application

88. By an application which was determined by a decision dated 16 January 2020 ("the Tribunal Decision"), the Applicant sought a determination pursuant to section 27A of the Landlord and Tenant Act 1985 as to the amount of service charges which are payable by the Respondent in respect of proposed major works to 45 Wilton Crescent and 45 Belgrave Mews, London SW1X 8RX.

89. Paragraph (2) of the Tribunal Decision provides as follows:

> *"(2) The parties shall, by 14 February 2020, file an agreed schedule, to be published together with this decision, setting out the calculations which follow from the Tribunal's determinations and specifying (i) the amount of the service charges which are payable to the Applicant before the Respondent's set off is taken into account; (ii) the amount of the Respondent's set off; and (iii) the date on which the set off becomes equal to the service charge arrears. Alternatively, if the parties are unable to agree the relevant calculations, they should file a statement setting out any issues which remain in dispute (together with the reasons for the dispute) by 14 February 2020."*

90. Following the issue of the Tribunal Decision, the parties corresponded with the Tribunal but they failed to comply with paragraph (2) of the Decision. Accordingly, on 24 March 2020, the Tribunal issued the following Directions:

"Paragraph (2) of the Tribunal's decision dated 16 January 2020 provided that:

'…. if the parties are unable to agree the relevant calculations, they should file a statement setting out any issues which remain in dispute (together with the reasons for the dispute) by 14 February 2020.'

Accordingly, the parties were directed to file a joint statement. It was agreed at the hearing that the calculations would be carried out by the parties' experts. However, no joint statement from the experts setting out the points of agreement and points of disagreement and the competing reasons for the differences in methodology has been filed.

For example, the Applicant contends that the service charge payable by the Respondent is £147,797.31 and the Respondent contends that the service charge which is payable is £72,605.90. However, there is no joint statement from the experts explaining the reasons why they have reached such different figures and setting out the competing arguments in favour of each approach. There are also references to 'general damages' when it was agreed at the hearing that the Tribunal has no power to award damages and can only set off sums up to the amount of the Respondent's service charge liability.

The parties are directed to instruct their experts to communicate with each other and to produce a joint statement setting out with clarity the points of agreement and points of disagreement, the reasons for the differences in methodology and the competing arguments put forward in favour of each approach. Once the parties have clearly identified the areas of dispute between them and the reasons for the dispute, the Tribunal will consider whether or not a remote hearing is necessary (see the Pilot Practice Direction: Contingency Arrangements in the First-tier Tribunal and the Upper Tribunal dated 19 March 2020). The joint statement must be filed by 14 April 2020."

91. There was then further correspondence and further Directions were issued by the Tribunal in an attempt to ascertain the reasons for the ongoing dispute between the parties. Notwithstanding the further correspondence and the further Directions, the Tribunal was not satisfied that the parties had provided the Tribunal with the information required in accordance with paragraph (2) of the Tribunal Decision and the matter was listed for an oral hearing.

The hearing

92. A video hearing in this matter took place on 30 July 2020.

93. The Applicant was represented by Mr Kirk of Counsel at the hearing and the Respondent was represented by Mr Bates of Counsel.

94. Mr Kirk had only recently been instructed and he had not had sight of all of the relevant documents. The Tribunal therefore adjourned in order to give Mr Kirk time to consider the material which he had not seen and in order to enable discussions to take place between Counsel.

95. Constructive discussions then took place and both parties are in agreement with the order of the Tribunal which is set out above. However, in light of the history of this matter, both parties urged the Tribunal to make a formal determination and no consent order was entered into.

The reasons for the Tribunal's decision

96. Following the hearing, the Tribunal wrote to the parties seeking clarification concerning some of the agreed figures which were presented at the hearing.

97. The Respondent explained that the figure of £7,040.83 which had appeared at paragraph (1)(c) of a draft order which was jointly submitted by the parties was in fact a typing error which had not been carried through in the parties' calculations. The Tribunal is satisfied that this is correct.

98. The figures at paragraphs 1(a) to (1)(c) of the Tribunal's order are derived from schedules which have been agreed by the parties' experts ("the Schedules"). The figure at paragraph 2 (a) is also derived from the Schedules. The figure at paragraph 2(b) is in accordance with paragraph 87 of the Tribunal Decision. The figure and the date at paragraph 2(c) are derived from an agreed table of damages.

99. In all the circumstances, the Tribunal is satisfied that the figures contained in its order are either based on agreements which have been reached by the parties' experts or derived directly from the Tribunal's Decision dated 16 January 2020.

Name: Judge N Hawkes **Date:** 3 August 2020

Rights of appeal

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