FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Tribunal Case reference	**:**	**CHI/00HC/LSC/2022/0017**
County Court claim	**:**	**H5QZ1K5Y**
Properties	**:**	**55A Marine Parade, Brighton, BN2 1PH**
Applicant	**:**	**54 and 55 Marine Parade Residents Association (Brighton) Limited**
Representative	**:**	**Mr. Tony Groome**
Respondents	**:**	**Mr. Jesmond Testa**
Representative	**:**	**---**
Type of application	**:**	**Transferred Proceedings from County Court in relation to Service Charges**
Tribunal member(s)	**:**	**Judge J Dobson** **Mr. P Turner- Powell FRICS**
County Court Judge	**:**	**Judge J Dobson**
Date of Hearing	**:**	**10th and 11th November 2022**
Date of Re- convene	**:**	**2nd December 2022**
Date of Decision	**:**	**15th March 2023**

DECISION

Those parts of this decision that relate to County Court matters will take effect from the 'Hand Down Date' which will be the date this decision is sent to you.

Summary of the Decision of the Tribunal

1. **The Residential Lease service charges claimed by the Applicant in the proceedings are payable and reasonable in the sum of £1204.47, being estimated on account service charges for the 2016- 2017 accounting year.**

2. **The Respondent is not entitled to set off against those estimated on account charges**

Summary of the Decision of the County Court

3. **The Applicant succeeds in the sum of £1204.47 plus interest of £417.35, total £1621.82 in respect of the claim.**

4. **The Respondent's Counterclaim succeeds in the sum of £70,000.**

5. **The Applicant shall pay the net sum of £ 68,378.18 damages to the Respondent in respect of his counterclaims by 12th April 2023.**

6. **As to costs, those will be summarily assessed if not agreed following receipt of any representations from the parties.**

Background

7. The Applicant (company number 05698613) is the freeholder and the Respondent the lessee of Flat 5/ 55A Marine Parade, Brighton, BN2 1PH ("the Property"). The Respondent became the lessee of accommodation on the ground floor under a lease ("the Lease") in March 2007 and the lessee of the basement and sub- basement below that ground floor under a separate lease ("the Basements Lease"), having become so on 21st June 2016. The Applicant is registered as the freeholder of a building described as 54/55 Marine Parade ("the Building"), of which the Property forms part.

8. 54/55 Marine Parade is a former pair of white stucco covered townhouses comprising a further four floors above the ground floor and which face onto the seafront at Brighton, subsequently divided into seventeen flats. It is located on the corner of Marine Parade to the front and Atlingworth Street to the east. The Property is a residential flat

principally on the ground floor although also since 2016 including the areas on the basement and sub- basement separately leased. That ground floor area originally comprised an enclosed porch, a hallway, a lounge (described on the plan as the drawing room), a small kitchen, one bedroom with en-suite, an internal hall, two smaller bedrooms and a further bathroom. The front portion of the flat containing the kitchen), the second and third bedrooms and bathroom was contained in an area built forward from the remainder of the townhouses and it has been said was formerly used as shop premises. The corresponding townhouse to the other corner of Atlingworth Street and Marine Parade appears to have been built out in the same manner.

9. It is common ground that the Property has been reconfigured by the Respondent to the porch, a hallway, a lounge, a large dining-kitchen, two bedrooms with en-suites, an internal hall and a WC.. The alterations to the ground floor have incorporated the basement, intended to be a games room, and the sub-basement into the Property.

10. The Tribunal and Court refer to the portion of the Property built forward from the original front of the Building as the "Front Extension", doing so adopting the description used by the parties. It also merits identifying that there are two areas above the Front Extension. Firstly, there is a small balcony (the "Balcony"), which the Court considers was very likely built at the same time as the Building- and which is similar to the balconies shown in photographs to the front of other buildings on Marine Parade. The Applicant refers to that as the "Upper Terrace" in the Reply of Applicant to Respondent's Amended Claim & Defence to Counter-Claim but that appears to reflect the Applicant's assertion that there is another area of terrace and that term is not adopted in this Decision. Secondly, there is the flat roof above the Front Extension ("the Flat Roof") in relation to which there was a good deal of discussion, and which the Applicant has referred to as the "Lower Terrace", although the Tribunal and Court do not adopt that term either. That Flat Roof is by far the larger area. Photographs demonstrate that the Balcony is a slightly higher level than the Flat Roof.

11. The Applicant is a lessee owned company. The members are the lessees of various flats within the Building. One share can be issued to the lessee of each flat, although it is said that 2 lessees declined shares such that there are 15 shareholders in the event. The Respondent is one such shareholder. The Applicant employs a managing agent to manage the Building day-to-day, currently Eightfold Agency, although the particular company of managing agents has changed from time to time over the years and was, for example, Graves Jenkins back in 2016.

Procedural History

12. In October 2021, the Applicant filed a claim in the County Court under Claim No. H5QZ1K5Y in respect of sums said to be due from the Respondent lessee. The claim related to unpaid service charge, interest

and costs. The stated value of the claim on the Claim Form was ££6155.48, excluding the court fee paid which reflected that value and excluding legal costs on issue. The bundle included a separate demand for a contribution to a reserve fund but that did not form part of the claim.

13. The Respondent filed a Defence and Counterclaim dated 29th October 2021, although subsequently amended on 5th May 2022 and including an argument that any service charges otherwise due are not due because of a breach of covenant on the part of the Applicant and so set-off against the value of the Applicant's claim plus a counterclaim for the sum of £90,000. The subsequent amendments have not altered the value of the Counterclaim. No additional fee was paid when filing the original or amended documents in respect of any other remedy.

14. The case was transferred to the administration of the Tribunal and for the determination by the Tribunal of the payability and reasonableness of the residential service charges and determination by the Tribunal Judge sitting as a County Court Judge of the Court elements, pursuant to the Order of Deputy District Judge Jabbour dated 12th January 2022.

15. There have been various sets of Directions given. The County Court elements of the case were initially allocated to the multi- track. The final hearing was listed for two days. However, it was noted prior to the final hearing that notwithstanding the value, the other factors relevant pursuant to 26.8 of the Civil Procedure Rules would appear to weigh towards allocation to the fast track and that one day was sufficient to try the County Court aspects. The Applicant was directed to provide a bundle for the final hearing and did so. The bundle comprises, including the index, of some 714 pages. Very helpfully, the documents were hyperlinked in the Index.

16. In addition to the Claim Form and the Defence and Counterclaim- and indeed the Amended Defence and Counterclaim- the Applicant filed a document named Reply of Applicant to Respondent's Amended Claim & Defence to Counter-Claim in response to the Amended Defence and Counterclaim, which is referred to below as "the Reply". The Respondent replied to that with Comments of the Respondent in response to the Reply of Applicant to Respondent's Amended Claim & Defence to Counter-Claim, in effect a reply to the defence of the Applicant to the Counterclaim, although the document is termed the Respondent's "Comments" below for ease of distinction from other documents.

17. It was necessary to arrange for the Tribunal to reconvene to consider matters further, which occurred on 2nd December 2022. Necessarily matters remained in abeyance until then. That reconvene revisited key evidence regarding, and considered the question of inviting additional submissions as referred to further below in relation to, the Tribunal

elements, although in the event concluded that no further submissions were required for reasons explained below.

18. This case suffers from the difficulty that such a long period of time is involved, with different situations existing in different parts of the period and the quantity and quality of evidence varying significantly from one time to the next and from the limited extent to which the parties agree about any of the relevant aspects. Those features have required discussion of several matters and quite a number of findings of fact and the length of the Decision itself reflects that.

19. The Tribunal and Court nevertheless sincerely apologise for the delay in the provision of this Decision since the reconvene, which exceeded any expectations.

20. Whilst the Court and Tribunal make it clear that they have read the bundles in full, many of the documents are not referred to in detail, or in many instances at all, in this Decision, it being unnecessary to so refer. Where the Court and/ or Tribunal does not refer to pages or documents in this Decision, it should not be mistakenly assumed that they have been ignored or left out of account. Insofar as reference is made to any specific pages from the main bundle (that provided on behalf of the Applicant), that is done by numbers in square brackets [ ], as occurs in the preceding paragraphs where appropriate, and with reference to PDF bundle page- numbering.

21. This Decision seeks to focus on the key issues and, not least given there are several different elements to this case, does not cover every last factual detail. The omission to therefore refer to or make findings about every statement or document mentioned is not a tacit acknowledgement of the accuracy or truth of statements made or documents received. Many of the various matters mentioned in the bundle or at the hearing do not require any finding to be made for the purpose of deciding the relevant issues in the case. Findings have not been made about matters irrelevant to any of the determinations required. Findings of fact are made in the balance of probabilities.

The Lease

22. A copy of the original lease was provided within the bundle. That lease is dated 5th September 2000. The parties to this dispute were in neither instance the original contracting parties. The term of the lease is 99 years from 25th December 1998. 54/55 Marine Parade is described in the Lease as "the Building", the term the Tribunal and Court adopts. The Lease defines "the Property" as the Building and other external areas, defining as "the demised premises" such of "the Property" as was demised by the Lease- although the term "demised premises" is not one adopted in this Decision. That has some relevance insofar as other clauses in the Lease (and the Basements Lease) refer to such terms.

23. A new Lease was granted dated 21st June 2016. The contracting parties are the parties to this dispute. The new Lease was said to be made on the same terms and subject to the same covenants, provisos and conditions as contained in the original except in relation to the rent payable and the extended term of the Lease and a variation to wording in relation to insurance.

24. "The Lease" as termed above accordingly refers to such lease as was in force at the given time, whether the original prior to 21st June 2016 or the new lease thereafter. As operative provisions of each of those leases were the same, the specific one of the two in place at the given time is of no direct relevance. The Court and Tribunal do not find it necessary to refer hereafter to anything other than "The Lease" to refer to both individually and collectively.

25. The sums expended or reserved for periodical expenditure in fulfilling the relevant obligations, contained in the Fifth Schedule, of the Applicant are termed "the Maintenance Expenses". Those are provided to cover the "maintenance and proper management", which is stated to include, amongst various other matters:

> "1. Repairing rebuilding repointing improving or otherwise treating as necessary and keeping the Maintained Property and every part thereof in good and substantial repair order and condition and renewing and replacing all worn and damaged parts thereof".

26. The parts for which the Applicant has obligations is defined as "The Maintained Property", principally the communal areas and, as set out in the First Schedule:

> "the structural parts of the Building including the external decorative surfaces of window frames doors door frames and the window frames the roofs gutters rainwater pipes foundations floors all walls bounding individual flats therein and all external parts of the Building and all Service Installations not solely used for the purpose of one Flat (but not including non-structural walls within the Flats the interior joinery plaster work tiling and other surfaces of floors ceilings and walls of the Flats and Service Installations which exclusively serve individual flats or the exterior doors of the Flats except the external surfaces of them)"

27. The Eighth Schedule at paragraph 4.1 provides in respect of works by the Applicant as follows:

> "Save for any damage or loss caused by the negligence or wilful default of the Lessor its servants agents or contractors the Lessor shall in no way be held responsible for any damage caused by any want of repair to the Property or defects therein for which the Lessor is liable hereunder unless and until notice in writing of any such want of repair or defect has been given to the Lessor and the Lessor has failed to make good or remedy such want of repair or defect within a reasonable time of receipt of such notice"

28. The floors, ceilings, walls and doors bounding the ground floor flat are said to be included in the Property, although only the inner half of such floors ceilings and walls as also form the boundary of another flat in the Building and where structural walls and ceilings and floors other than their surfaces, are Maintained Property.

29. The contribution of the Respondent to service charges is provided for in the Sixth Schedule and is stated to be 10.21% of the Maintenance Expenses as certified by an accountant. Paragraph 2 of the Sixth Schedule requires that an account of the Maintenance Expenses for the period ending 30th during each year will be prepared and, as soon as reasonably practicable, served by the Applicant on the lessees with an accountant's certificate.

30. The service charge mechanism provides (paragraph 3.1 of the Sixth Schedule) for two instalments on account of the estimated service charges for the given year to be paid, each half of the required contribution, and with one part on 1st October and the other part on 1st April of the given service charge year. That estimate may be given by the Applicant, managing agents or accountants. There is provision (paragraph 3.2) for a balancing credit or charge following the end of the service charge year once the actual expenditure is known and the account and certificate has been provided to the lessee by the Applicant. A balance charge shall be paid within 21 days: a credit may be paid to the lessee or be added to the reserve fund. All of that is a common type of arrangement. Interest is payable at 5% above the base rate (paragraph 5.) on all sums unpaid.

31. The obligation on the Respondent to make the relevant payments is contained in Part One of the Seventh Schedule, paragraph 6. That Schedule also provides (8.) for the Respondent to:

> "repair and keep the demised premises ..... and all landlord's fixtures and fittings therein and all additions thereto in good and substantial repair and condition"
>
> and (13.):
>
> "to make good any damage to any part of the Property caused by any act or omission or negligence of any occupant of or person using the demised premises".

32. Further, the Schedule provides that the Respondent must:

> "Not to cut maim or injure nor to make any breach in any part of the structure of the demised premises not without the previous consent in writing of the Lessor or its agents to make any alteration whatsoever to the plan design or elevation of the demised premises not to make any openings therein nor to ..... Provided Always that no consent shall be required for any internal non-structural alterations or additions..."

33. The Lease more generally provides for the parties to perform their obligations.

34. The Basements Lease was also included within the bundle and dated 8th July 2010. That was granted by the Applicant to the Respondent as the original contracting parties and is described as relating to "Basement and Sub- Basement Flat" for a premium of £8000.00. The areas demised are described as "Basement Flat 54/55 Marine Parade". The operative provisions of the Basements Lease are the same or substantively the same as those contained in the Lease and hence need not be set out. The Respondent's share of the Maintenance Expenses is not increased from that provided for in the Lease.

The Construction of Leases

35. It is well- established law that the Leases are to be construed applying the basic principles of construction of such leases, and where the construction of a lease is not different from the construction of another contractual document, as set out by the Supreme Court in *Arnold v Britton* [2015] UKSC 36 in the judgment of Lord Neuberger (paragraph 15):

> "When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean", to quote Lord Hoffmann in Chartbrook Ltd v Persimmon Homes Ltd [2009] UKHL 38, [2009] 1 AC 1101, para 14. And it does so by focussing on the meaning of the relevant words, in this case clause 3(2) of each of the 25 leases, in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions."

36. Context is therefore very important, although it is not everything. Lord Neuberger went on to emphasise (paragraph 17):

> "the reliance placed in some cases on commercial common sense and surrounding circumstances (e.g. in Chartbrook [2009] AC 1101, paras 16-26) should not be invoked to undervalue the importance of the language of the provision which is to be construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most likely to be gleaned from the language of the provision. Unlike commercial common sense and the surrounding circumstances, the parties have control over the language that they use in a contract. And again save perhaps in a very unusual case, the parties must have been specifically focusing on the issue covered by the provision when agreeing the wording of that provision."

The Hearing

37. The Tribunal members sat at Havant Justice Centre. The other attendees appeared remotely.

38. Mr. Groome represented the Applicant company. He is a solicitor by profession and currently Head of Legal for what he described in his witness statement as a private family company with a diverse range of business interests. Mr. Groome is not, and has never been, a director of the Applicant but he stated that he was instructed by the Directors. No Notice of Acting was filed and so it is now less than completely clear on what basis Mr Groome was able to represent in the County Court. However, no point was taken about that in the hearing. Mr. Groome occupies Flat 8, the flat immediately above much of the Property.

39. The Respondent represented himself. The Tribunal and Court understood him to own a number of other properties and be in the business of property development or similar. Whilst setting out information as to the parties and representatives, it is perhaps an opportune time to mention that the Respondent was a director of the Applicant from September 2013 until February 2018.

40. The Respondent was accompanied by Mr. Clive Williams, a friend. A C.V. had been provided for him to facilitate consideration of whether he was suitable at act as a "McKenzie Friend" for the purpose of the County Court aspects, the limits on representation and assistance in the County Court not applying in the Tribunal. The Court and Tribunal had been made aware in advance and relevant Directions had been given for a C.V. amongst other matters. Consideration started to be given to Mr. Williams' role.

41. However, the Respondent experienced difficulties with the video link. There was quite a delay before further progress could be made due to technological issues. Following resolution of that, it was identified that Mr. Williams had previously been professionally involved with the Property as an architect. Nevertheless, the Court determined that Mr. Williams could remain as a McKenzie Friend to provide assistance to the Respondent. The limits of his role were explained.

42. It was also discussed that the Respondent had sought to further amend his Counterclaim but by application to the Tribunal and not by Court application with payment of the requisite Court fee. The Respondent was limited to the version contained in the bundle, although in the event that has not had the significance it was perceived it might have at that point.

43. Oral evidence was received from both Mr. Groome and in particular from the Respondent, who was cross-examined at some length. His own cross- examination of Mr. Groom was relatively short. The Tribunal asked various questions of both witnesses seeking clarification of matters advanced. The Tribunal additionally received written

evidence from both of Mr. Groome and the Respondent. Both Mr. Groome and the Respondent gave oral closing submissions.

44. The Tribunal and Court are grateful to both Mr. Groome and Mr. Testa for their assistance with this case.

45. The bundle also contained a written expert report from Mr. Patrick Rogo MRICS dated September 2022 on behalf of the Applicant and one from Mr. Michael Redmond MRICS dated 22nd February 2022 on behalf of the Respondent. In addition, a number of other reports and documents in relation to repair of the Property and the Building were included in the bundle and notably there were the following:

- a letter from a building contractor Mr. J L Ford dated 5th February 2009;
- a report from a chartered surveyor/ structural engineer Mr. Peter Dalton MRICS, MIStructE, MCIOB dated 11th February 2009;
- a letter/ report from Mr W H C Grumitt, a chartered surveyor dated 18th March 2010
- a long letter/ report from Mr. Mark Sztyber MRICS dated 21st October 2013
- a report from Mr. Leo Horsfield MRICS, so a further chartered surveyor, dated 29th November 2016 (and commissioned by the Applicant in respect of the Property and another flat);
- a report from another chartered surveyor/ structural engineer Mr. David Smith, MRICS, in November 2017 and .

46. The Tribunal and Court therefore had the advantage of contemporaneous documentation from persons not experts in these proceedings but with knowledge of buildings as at various points in the history of the condition of the Property. Mr. Redmond also referred to the above reports and other documents.

47. The Court did face the issue that the reports of Mr. Rogo and Mr. Redmond were not entirely in agreement and that neither expert was present to clarify any part of their expert evidence. Neither had either expert been asked any questions by either of the parties, much as it was apparent that neither side accepted that which the other's expert stated.

48. That could have been a significant issue. In the event it was not. Given the matters they each considered and the other available evidence, the Court was amply able to make findings as to the condition of the Building and the Property insofar as required, doing so with some care and mindful of the areas of disagreement between the experts.

49. It should be recorded that the parties did not seek to rely at the hearing on any case authorities or on any other matters of law. Nevertheless, this Decision refers to caselaw both above and below. Careful consideration was given, including at the Tribunal re- convene referred to above and subsequently by the Court, to whether submissions ought to be sought from the parties in relation to any of the statute and

caselaw to which the Tribunal and Court refer. The Tribunal and Court concluded, with some caution, that the relevant statute law is frequently encountered and applied by the Tribunal and Court and that the assistance of the parties was not required in relation to that. In respect of the more balanced question of caselaw, it was concluded that all of the cases to which reference is made are well- established authorities- several very long- established- for the propositions referred to, which have not in the experience of the Tribunal and Court been identified as controversial by legal and other representatives or other parties in previous cases, and so it was determined not necessary to seek submissions on those authorities.

The Tribunal matters

The jurisdiction of the Tribunal

50. The Tribunal has power to decide about all aspects of liability to pay service and administration charges in relation to residential properties and can interpret the lease where necessary to resolve disputes or uncertainties. For the avoidance of doubt, the Tribunal has no jurisdiction in respect of solely commercial premises. Service charge is in section 18 defined as an amount:

> "(1) (a) which is payable, directly or indirectly, for services, repairs, maintenance[, improvements] or insurance or the landlord's costs of management and
> (2) the whole or part of which varies or may vary according to the relevant costs."

51. The Tribunal can decide by whom, to whom, how much, when and how a service charge is payable (section 27A). Section 19 provides that a service charge is only payable insofar as it is reasonably incurred and the services or works to which it relates are of a reasonable standard. The Tribunal therefore also determines the reasonableness of the charges. The amount payable is limited to the sum reasonable.

52. The Tribunal may take into account the Third Edition of the RICS Service Charge Residential Management Code ("the Code") approved by the Secretary for State under section 87 of the Leasehold Reform Housing and Urban Development Act 1993 and effective from 1 June 2016. The Approval of Code of Management Practice (Residential Management) (Service Charges) (England) Order 2009 states: "Failure to comply with any provision of an approved code does not of itself render any person liable to any proceedings, but in any proceedings, the codes of practice shall be admissible as evidence and any provision that appears to be relevant to any question arising in the proceedings is taken into account."

53. There are innumerable case authorities in respect of several and varied aspects of service charge disputes, but most have no obvious direct relevance to the key issue in this dispute. In a number of case

authorities, for example *Knapper v Francis* [2017] UKUT 003 (LC) (although in that case there were more specific points) it has been held that where service charges demanded were so demanded on account, the question is whether those demands were reasonable in the circumstances which existed at that date. It is for a landlord to demonstrate the reasonableness of any estimate on which the on-account demands are based, see for example the case of *Wigmore Homes (UK) Ltd V Spembly Works Residents Association Ltd* [2018] UKUT 252 (LC). *Cos Services Ltd v Nicholson and another* [2017] UKUT 382 (LC) (and also earlier authorities such as *Carey Morgan v De Walden* [2013] UKUT 0134 (LC)) applies such that there is a two-part approach of considering whether the decision making was reasonable and whether the sum is reasonable.

54. It is also well established that a lessee's challenge to the reasonableness of a service charge (or administration charge) must be based on some evidence that the charge is unreasonable. Whilst the burden is on the landlord to prove reasonableness, the tenant cannot simply put the landlord to proof of its case. Rather the lessee must produce some evidence of unreasonableness before the lessor can be required to prove reasonableness (see for example *Schilling v Canary Riverside Development Ptd Limited* [2005] EW Lands LRX 26 2005 in relation to service charges).

55. The Tribunal is entitled in determining the service charges (or administration charges) payable whether any sum should be off- set in consequence of any breach by the lessor.

Are the Residential Lease Service Charges payable and reasonable?

56. The claim in respect of the Residential Lease made is for service charges said to be due on 1st October 2016 for which payment was requested on 28th November 2016. More particularly £1204.47 is said to be the sum payable on 1st October 2016 as being the first payment on account for the 1st October 2016 to 30th September 2017 service charge year and the remaining £4951.01 is described as the balance of other sums owing as at 28th November 2016. Hence, in considering the payability and reasonableness of the relevant service charges, the Tribunal was required to consider both the 1st October 2016 demand and such previous demands as were made and produced the £4951.01 balance said to be owed to the Applicant by the Respondent from prior to that date. For reasons which are not clear, the Applicant has not claimed for any subsequent years of service charge or for the reserve fund contribution previously asserted in correspondence to be due. and so that does not fall within the scope of this case.

57. As Mr. Groome has observed, the fact that the Respondent was a director of the Applicant at the time of the 1st October 2016 service charges and, the Tribunal infers, at the time of some of the service charges demanded in the relevant period leading up to 1st October 2016

it is a somewhat odd feature of this case and in that role he will have been entitled to be involved in the service charge demands made. The Respondent nevertheless refers to the Applicant as an entity separate to himself, as indeed in law it is.

58. The Respondent in his Defence and Counterclaim relies for the reason that no sum is owed by him on the breaches he asserts were committed by the Applicant. The Defence is therefore, and although not explicitly described as such, one of whether any service charges are payable once any sum which the Respondent is entitled to offset for any breaches by the Applicant have been accounted for. The Respondent's case is not therefore that the service charges were unreasonable, as the Applicant correctly asserts- indeed it pleads the Respondents document is "completely silent" about the service charges. The Applicant also pleads in the Reply that the service charges have never been challenged in correspondence and certainly the Tribunal was not referred to any such correspondence. The Applicant contended that the service charges in 2016 were consistent with the sums demanded in previous and later years. It is also said that the Respondent had paid service charges in full to end of the October 2013 to September 2014 service charge year.

59. However, the Tribunal first addresses the question of whether any service charges have been demonstrated by the Applicant to be payable. The answer to that falls into two parts.

60. A letter was sent [224] by Graves Jenkins, the then managing agents, dated 28th November 2016 with a budget of anticipated expenditure and a request for payment [226] of the 1st October 2016 on account service charge agreed by the directors, who of course at that point included the Respondent. In addition, the request includes the balance brought forward. A Summary of Tenant's Rights and Obligations accompanying the demands has also been provided. The Tribunal finds on the evidence that the 28th November 2016 demand for the 1st October 2016 on account service charges meets statutory requirements and the requirements of the Lease. So, in respect of the first part, the on- account demand for 1st October 2016, the Tribunal determines the on- account service charges to be payable in such sum as is reasonable.

61. In respect of the other £4951.01, the Applicant has not provided whichever demands for payment were made of sums which totalled that figure. The Tribunal does not know what those sums were from time to time, only the total said to be owed as at 28th November 2016. In respect of those sums, the request for payment is not the service charge demand, it is simply a statement of a balance said to be owed as at a given date. The Tribunal has no information as to whether any such demands were also accompanied by a suitable budget or other estimate and/ or by a Summary of Tenant's Rights and Obligations. There is no evidence that the Applicant has complied with requirements in respect of any such demands. The Applicant has produced the service charge accounts for the service charge years ending September 2015, 2016 and 2017 but those do not assist the Applicant in respect of the demands,

they simply demonstrate that appropriate overall accounts were produced for each of the years. The same comment applies in relation to the audit report produced.

62. The Tribunal determines that the Applicant has failed to demonstrate that any sums which comprised the balance on the account prior to the further demand for service charges on account for 1st October 2016 were payable. The Tribunal determines that the £4951.01 is not, on the evidence presented, payable.

63. The Tribunal considers it appropriate to explain why it has considered the question of validity of the demands in the absence of the Respondent specifically raising it in his pleaded case. There are, the Tribunal accepts, some limits to the extent to which the Tribunal should take points which have not been raised by a party in its case, although not the same limits as might be adopted by a Court. The Tribunal is particularly mindful of the Respondent having been a director of the Applicant at the time of the at least some of the apparently relevant service charges and so, irrespective of steps being taken by the Applicant's managing agents, the Respondent bears some responsibility for any failing at the time. That said, the Tribunal does not know whether there was a failing at the time. The Tribunal only knows what evidence it has been provided with on behalf of the Applicant and has identified that to be inadequate. The Tribunal proceeds on the evidence presented by the parties. Speculation as to whether there were failings at the time or whether there has simply been a failure to prove the case now is not considered to be meritorious exercise.

64. In terms of statutory requirements, meeting those requirements is so fundamental that the Tribunal is entitled as an expert Tribunal to consider matters irrespective of the points being raised by a lessee where it considers it appropriate to do so. Indeed, quite commonly such matters are not raised by lessees, who are unaware of those statutory requirements. The fundamental validity of a demand, as opposed to the unchallenged reasonableness of costs to which the amounts demanded contribute, is a matter in respect of which the Tribunal often takes points. It ought to be simple to demonstrate compliance where that has happened.

65. In respect of meeting requirements of the lease, arguably that is even more fundamental. Certainly, a party relying on a right to demand service charges and recover unpaid service charges pursuant to the terms of a lease must demonstrate that the given lease permits the recovery of such service charges, irrespective of what the specific sum may be. The Tribunal is entitled given service charges are demanded based on an entitlement in the Lease to so demand them, to consider whether the requirements of the Lease have been shown to be met.

66. Where the Applicant has failed to demonstrate valid demands, the reasonableness of any service charges included in such demands and

the applicable test does not arise. However, the Tribunal would not have considered it appropriate to explore reasonableness given that had not been raised in the Respondent's case, drawing a specific distinction between that and payability.

67. In a similar vein, in respect of the £1204.47, reasonableness has not been specifically raised in the Respondent's case. The Respondent in oral evidence accepted that all of the service charges were "necessary". In his witness statement he asserted that he had not received a proper service because issues with the Property had not been resolved, which is open to be interpreted as asserting some cost to be unreasonable. However, the Tribunal considers that was not adequate to amount to producing evidence of unreasonableness of any specific charge and to any sufficient extent and so if such a case were intended, it was inadequate.

68. In relation to the Respondent's case that he would be entitled to set- off any sums otherwise due because of the asserted breaches by the Applicant, the Tribunal considers that the terms of the Residential Lease do not preclude any such case by the Respondent. However, there is a distinction between service charges for actual expenditure which has been incurred and on account service charges for estimated expenditure. There cannot be set off against estimated on account service charges.

69. Hence, in respect of the first part of the on account estimated charges for the 2016 to 2017 service charge year payable 1st October 2016, that sum remains payable for the Tribunal's purposes. The County Court counterclaim is another matter.

70. The Tribunal therefore determines that the service charge of £1204.47 for estimated service charges on account 1st October 2016 is both payable and reasonable.

The County Court issues

Claim in relation to service charges under the Lease

71. The County Court issues have been considered by Judge Dobson alone, having regard to the findings and determinations of the Tribunal in respect of the Residential Lease service charges. The answer in respect of this aspect of the claim is simple. The Tribunal has determined on the evidence presented that £1204.47 of service charges was payable and reasonable and hence that sum is owing and due, subject to the counterclaim.

72. The Court notes that the claim made for interest related to the period from 1st October 2016, with no claim for any interest which may have been claimable for any earlier period. Further that the claim was made at the rate of 8% per year rather than the rate provided for in the Lease of 5% above base rate, the base rate from time to time not being

provided. The Applicant did not identify any basis for entitlement to recover interest at 8% where a contractual rate was provided for.

73. The Court determines that the Applicant is entitled to interest on £1204.47 as from 29th November 2016 at the rate of 5.5%. In the absence of the Applicant having provided any evidence of the base rate from time to time, the Court has adopted the lowest base rate the Court understands to have applied during the period. That produces interest of £62.25 per year and so for a period of approximately 6.3 years amounts to a total of £417.35.

74. Therefore, the Applicant is entitled to £1621.82, subject to the Respondent's argument for a counterclaim (referred to below as the "Counterclaim").

75. It merits brief mention, having been raised in the hearing, that the Claim Form was signed "54&55MPRA(B)Ltd" and so not by any director or other person. However, no point had been taken in respect of that at any stage and so save that the statement of truth on the Claim Form was meaningless because no-one had stated the contents to be true, the Court ignores the defect on this occasion.

Counterclaim in relation to the Residential Lease

76. The Respondent's claim totals £90,000.00- in his Comments he refers to losses of in excess of £330,000.00 but states that he will "settle" for £90,000.00. Whilst "settle" is not obviously a suitable word to use, nevertheless the Counterclaim is limited to £90,000.00 and that is the basis on which the Court approaches the matter. The Respondent asserts that the Applicant had failed to and continued to fail to comply with its maintenance obligations in the Lease. It is said firstly that the Respondent has incurred various elements of expenditure and secondly that there has been water penetration into the Residential Property.

77. The Court agrees with the Tribunal that there is no condition precedent such that the Applicant had no obligations because of a lack of payment by the Respondent at the given time. The Applicant has not relied on (and in any event the Court cannot identify) a clause which even attempts to have that effect. The Respondent is therefore able to bring the counterclaim.

78. A number of issues arose as to the extent of that. Mr. Groome contended at the Case Management Hearing on 4th April 2022 that the Respondent's case referred to matters from 15 years previously and that such matters could not be pursued due to limitation. The Court considers that if limitation applies, the relevant point at which it would apply is twelve years prior to the Defence and Counterclaim dated 29th October 2021 and so 29th October 2009. However, limitation is a defence and is required to be advanced as one. Whilst the Applicant referred to limitation in correspondence with the Respondent's then solicitors in 2021, in the 10-page Reply the Applicant does not plead

limitation. So, the entire period of the Counterclaim falls to be the subject of determinations (although in practice the additional period of claim which that allows the Respondent is of limited import).

79. A further and potentially significant point made on behalf of the Applicant, correctly in itself, is that the Respondent is limited to such matters as he advanced in his Counterclaim and not able to go beyond it. That was no doubt a point of which the Respondent was aware given not just that it was explained to him but also his attempt to amend, although that attempt to "extend the claim to the whole of my flat" was because "Apparently the current claim covers water ingress from the area under the terraces only". Similarly, a second attempt to amend stated "Apparently unintensionaly [sic]" he had limited his claim. It should be explained that both applications were Tribunal ones whereas it was explained that any application would require a Court application notice, which was never filed.

80. The Applicant's assertion is that the Respondent only refers in the Amended Defence and Counterclaim to water ingress in the Front Extension. The Court does not accept that assertion to be correct and sets out the basis for that, given the appreciable impact on the case.

81. Whilst it can be said that the Respondent did not set out all that he was asked to when permitted to amend his Defence and Counterclaim, that is not relevant to construing that which he did plead. There is a reference to 2009 report, which only dealt with the Front Extension given the apparent lack of water penetration into the lounge at that time but that is not in itself definitive. Under the heading regarding history of disrepair, the Respondent sets out in very general terms problems encountered and certainly makes further references to the front extension.

82. However, at bullet point 6 he asserts that "Rainwater was able to drip into my flat" and does not refer solely to the Front Extension part of the Property. The Counterclaim by that wording encompasses any water penetration into any part of the Property. A statement that water was able to drip into the Front Extension or any more limited part of the Property but did not encompass the Property as a whole would most likely have produced a different outcome.

83. Consequently, the Court determines that insofar as there were defects to areas above the Front Extension but those enabled water penetration into the Property generally, such water penetration does form part of the pleaded Amended Defence and Counterclaim. The losses asserted by the Respondent- see further below- are not limited to matters affecting the Front Extension alone.

84. The Court adds that it considers that the Respondent had never intended to limit his claim to the Front Extension only and that the use of the word "Apparently" and the subsequent statement that any limit was unintentional is significant- the Respondent had been given to

understand that the way he had expressed the Counterclaim did not include water ingress other than in the Front Extension, rather than having aimed to so limit it. The Directions, for example those of 3rd November 2022, record that at the Case Management Hearing, the Respondent had considered he had omitted issues with the sub-basement, which he said were not relevant to loss of rent and the Counterclaim. He had not in fact limited his claim save that it excluded any claim there might have been about that sub- basement.

85. Whilst the Applicant also made reference to some two letters of claim sent by solicitors for the Respondent in swift succession, those were not a statement of case and any limits to the matters referred to in that letter do not confine the Respondent's case in the manner that a statement of case does. Neither was the Particulars of Claim drafted for the Respondent by Counsel in respect of his intended claim to which reference was made. The contents were not irrelevant but did not weigh much as compared to the actual drafting of the Amended Defence and Counterclaim. The Court had started from the premise that the Respondent probably had limited his claim by the wording used in his Counterclaim, although based on the various steps he had sought to take and comments of the parties and not a full reading of the document. The Directions had been careful to explain that the cases were limited the matters advanced in the statements of case, without stating what those matters were. The subsequent full reading made clear the wording actually used and the lack of any such limit.

86. For the avoidance of doubt, the Court considers that if the Applicant read the Amended Defence and Counterclaim in another manner, that does not alter the actual case advanced. The Court is also mindful that the Applicant has been able to set out its case in considerable detail.

87. The Court is mindful of the fact that the Respondent was a director of the Applicant during some of the relevant time. (The Applicant has asserted that he was a "specialist director", which description appears to be based on the fact that the Respondent was involved in property development. The Respondent contended in oral evidence that his suggestions and recommendations were ignored by the company secretary, one Mr. Steven Read**,** who in effect ran the Applicant company. He was unaware Mr. Read was not a director- it was said the other director at the time was one Mr. Lilley. Mr. Groome made a more particular point about specifications of works, which included works to the Property but the Respondent said he was not involved because he was told he had a conflict of interest and essentially pushed out of involvement with the Applicant company. There was no contrary evidence. There was also an odd assertion- although by odd the Court does not seek to indicate disbelief about it- that Mr. Read received a percentage of the cost of work undertaken – and indeed the audit report document refers to that. Any matters which may arise from that fall outside of the scope of this Decision.

88. The Court is neither persuaded that any property experience of the Respondent should in some manner alter the approach taken nor that the Respondent was wholly without any influence, but the Court does accept that the Respondent did not decide specifications of works to the Building and finds the suggestion of a conflict between the Respondent's desire as a lessee to have works undertaken relevant to his flat and the expenditure of money by the Applicant where he was s director to be cogent. More generally, the net effect is to treat the Respondent's directorship as lending no general weight to either party.

89. The Court finds it helpful to divide the Counterclaim into a number of time periods, dealt with chronologically, and to set out its findings of fact and any other required determinations about each. Such findings of fact are made in respect of the alleged disrepair and effects of that and in respect of other work to the Property during each period. The impact on any value of the Counterclaim, including the time from which any element of that will run is addressed following setting out the findings made for each of the various periods.

- **2007 to September 2009**

90. The Respondent's case, as set out in his Amended Defence and Counterclaim was that water penetration was reported to the landlord on or around August 2007 following the collapse of the Balcony. The Applicant contends that in fact the collapse was only of a relatively small area of the Balcony, approximately 1 square metre, and only of surface tiles and the layer underneath which fell from the Balcony onto the Flat Roof, not penetrating into the Property. In the opinion of the Court the Respondent somewhat over-stated matters by referring to the Balcony of Flat 8 collapsing, something which he may have recognised given that he drew back somewhat in his Comments, although he maintained that there was penetration through the roof covering and onto what he described as the ceiling structure. From the Respondent's oral evidence, that was the ceiling immediately underneath the Flat Roof (as opposed to the ceilings of the partitioned rooms within the Front Extension) and he said that water had always leaked in since then and had not previously, causing black mould and damage to the floor.

91. The Court finds the event was of the much more modest nature the Applicant contended. The Court has noted the photographic evidence produced by the Applicant of the collapsed area and finds that the Respondent has not demonstrated there to be penetration through the roof structure to the ceiling and thereby causing water penetration discussed further below. The Respondent accepted in cross-examination that he had no photographs or other supporting evidence. The slippage of a small area of the Balcony may in some fashion, the Court finds, itself have caused a degree of water penetration to the Property and the Court has noted a short comment in oral evidence by the Respondent that the ceiling was wet and needed replastering but finds insufficient to identify that as caused by the collapse as opposed to the other issues discussed below.

92. The parties spent considerable time on matters identified in late 2008. However, because of other developments from October 2009 through to 2016 and ongoing, those matters are far less relevant to the overall case to be determined than they plainly are to the parties themselves. The Court has concluded that is neither necessary or appropriate to discuss them at too great a length given the much more modest significance to the outcome of the case and so what follows is very much a summary, if a rather less short one than might be ideal, with the findings made insofar as relevant.

93. The Respondent commenced work to refurbish the interior of the Property in or about December 2008, involving the removal of the internal walls so that the accommodation within the Front Extension could be remodelled. The Court refers to the work commenced as refurbishment work to distinguish it from later work discussed further below. The Court finds that the fact of there having been water-penetration for some time and the condition of the timbers on which the Flat Roof rested became apparent when the Respondent undertook that refurbishment work. The parties differed substantially and at some length in their cases more generally as to the cause of the water penetration. The Applicant alleged that any difficulty arose from works undertaken by the Respondent inside the Property and specifically to the removal of internal walls, said to have allowed the flat roof to "flex".

94. The Court accepts the cogent and uncontested evidence of the Respondent that rooms within the Front Extension had been formed by partition walls inside the boundary structural walls built at the time of building the Front Extension. The Court accepts that the original configuration was an open plan shop- so with no internal walls- and that a conversion in or about the 1950s introduced the partition walls. The Court finds that the internal walls did not reach to the level of Flat Roof and that ceilings had been placed on top of the internal rooms, which ceilings were at a lower height than the underside of the Flat Roof. The Court accepts the Respondent's case that there was a void between the internal ceilings and the timber joists supporting the Flat Roof and that was approximately 5 feet in height, at least in some areas. The Court further accepts that the original ceiling level immediately beneath the Flat Roof was found to be wet. The Court finds as a fact that the internal walls had offered no support to the timbers and likewise the removal of the internal walls had no effect on the level of support. The Court accepts the Respondents case that the partition walls were removed with appropriate advice. The joists were supported by the same brick walls that they had always been from the building of the Front Extension onwards,

95. The Court does not agree that any partition walls were removed which provided support. The Court did not accept Mr. Groome's assertion, for which there was no supporting evidence, that walls shown black on the plan in the Lease provided support to the joists whereas those shown white did not. The Court considers that the most likely explanation for

the distinction between walls coloured black in the plan and walls coloured white in the plan is that, and for reasons unknown, the front part of the Front Extension where a dividing wall and a small wall by the bedroom doorways are shown white was, as the plan itself states "Not surveyed".

96. For the avoidance of doubt, the Court determines that the non-structural walls were not ones which the Applicant was required to maintain- falling outside of the "Maintained Property" as defined- and in a similar vein the removal of those non- structural walls did not amount to damage on the part of the Respondent to such of the Building as fell outside of the demise and remained with the Applicant.

97. The Court finds the width of the span and the deterioration of the joists over a period of time including was the cause of the deflection of the Flat Roof. The time was almost certainly quite a lengthy- it did not only start with the collapse of the area of the Balcony. The Court finds that the level of support for the Flat Roof provided by the joists had reduced over period of time with the deterioration worsening until the timbers were insufficiently strong to avoid the deflection of the Flat Roof. The Court finds that the condition of the timbers had deteriorated with the impact of dry rot, wet rot and other water penetration and the deflection added to the water penetration. The Applicant's contention that the Flat Roof began to "noticeably bounce" according to the occupiers of Flat 8, who of course included Mr. Groome, in 2008 does not require any finding to be made as to its correctness. It may be that the effect of the deterioration of the timber joists became apparent to a greater extent then but, whether it did or not that does not alter the actual cause of the reduced support for the roof.

98. The Court had particular regard to the, clear, photographic evidence provided by the Respondent, which the Court considers makes the above plain, including as the Respondent pointed out, the arches above the original windows of the original front of the Building prior to the building of the Front Extension extending beyond the height of the partition walls, demonstrating the height of the underside of the Flat Roof to be some distance above the height of the ceilings to the top of the partitioned rooms. The photographs also reveal the condition of the timber joists.

99. The Court also had regard to the report of Mr. Dalton, the letter from Mr. Ford and other documents. Whilst the Applicant contends in its Reply that the report of Mr. Dalton addressed strain on the Flat Roof because of the removal of supporting internal walls, the Court finds that it did not. It is right to say that Mr. Dalton expressed the opinion, based on his calculations, that the Flat Roof was not sufficiently supported but not for the reason the Applicant asserts. The Respondent accurately quotes in his Comments a few matters stated by Mr. Dalton. He does so selectively but the matters selected are pertinent, namely "the roof is not watertight", "this has been ongoing for some time" (which he followed by explaining that "the top bricks in the parapet are saturated. The

rafters to this flat roof along with the plywood deck have fungal growth infestation"), "Fungal infestation both wet and dry rot and dark staining of the timber suggests that it has been there for some time". It was also identified that the main support iron posts of the railings allowed water to get past the asphalt roof which should have been watertight.

100. Although the report of Mr. Dalton was not expert evidence in these proceedings, it is, as identified above, a detailed contemporaneous document prepared by a surveyor, which the Court consequently finds of assistance. The Court gives weight to the facts recorded and opinions expressed, which the Court considers are consistent with and give added support to the other evidence. The report is also 58 pages long including the photographs and calculations and so the Court refers only to small elements, which are nevertheless consistent with the remainder.

101. In a similar vein, the Respondent quotes communication from Mr. Priddell FRICS, another chartered surveyor on behalf of Mr McKinnon Musson, that "Four of the roof joists at their end are rotten and these sections need to be cut out and replaced", which reflects one of several remedial steps stated by Mr. Dalton to be required. Mr McKinnon Musson is described elsewhere as a director of Rowbell Limited, the lessee of four other flats including Flat 8, so the flat currently occupied by Mr. Groome, and which the Court understands to be the company by which Mr Groome is employed. The letter of Mr. Ford of 5th February 2009 records that the Respondent had removed the walls and ceilings and stated, "In my opinion a steel beam is needed to support the joist and to stop the roof from sagging. There is a wide span from each side of the room which is causing the roof to sag and maybe collapse" but does not state- and if he had the Court would have preferred the other evidence indicating the contrary- that the walls and ceilings removal by the Respondent had caused the deflection. Mr. Ford's letter is just that and very short, only 8 lines, so on its own would not take matters far, by which the Court intends no criticism of Mr. Ford who no doubt provided that which he was asked to. Mr. Dalton had explained that the timbers "would possibly take the load if [the roof] was watertight and the joist ends adequately supported ….". He followed that by the words quoted above that the Flat Roof was not watertight.

102. There was something of a side issue as to whether the condition of the roof timbers may have been contributed to by the use of the Flat Roof above the historic forward extension of the Property as a terrace. Mr. Groome asserted that the areas had been in use as a terrace for at least a very considerable time and was entitled to be used as such and he described old photographs showing use as a terrace and with railings shown. The Court has noted all of the above but finds no need to determine the particular question of entitlement to use the top of the Flat Roof as a terrace, which is not directly relevant. Nevertheless, the Court finds that the timbers were not designed to support a terrace but merely a Flat Roof and accepts the opinion expressed in Mr. Dalton's report that "the flat roof rafters are undersized for this roof to be used as a

large roof terrace, they are over stressed and subject to large deflections". Indeed he said "The timber flat roof and its asphalt covering should not be used as a roof terrace". Notwithstanding the Applicant's assertions, the Court considers that the weight of the paving and other items placed on the Flat Roof exceeded the capacity of the timbers and contributed to them deteriorating and the roof deflecting. The comments of the parties as to weight the timbers should in principle have been able to bear had they not suffered from deterioration and the dispute about that do not assist.

103. The relevant point in respect of the liability is that the fault did not lie with the Respondent and that the water penetration prior to 2008 and ongoing at that time was because of matters which were the responsibility of the Applicant.

104. The Court notes it to be agreed by the parties that works were undertaken by the Applicant in or around the summer of 2008 to strengthen the Flat Roof. Mr. Priddell refers to the work as "Three RSJs installed to pick up the roof joists to provide additional rigidity to the roof structure". Given the terminology used by the Applicant, it is not clear to the Court as to whether other work was also undertaken to strengthen the balcony, but the Court finds nothing to turn on that whichever way. As to whether the Flat Roof has since been and is now able to be used as a terrace without scope for further difficulties falls outside of this case. Of more relevance, the Respondent contends that did not end the water ingress, relying on the opinion of Mr. Dalton as expressed in his report, the ongoing problems being discussed further below.

105. Turning to other matters, the Applicant also contended in its Defence of the Counterclaim that in the course of the refurbishment the Respondent removed, and without authority, the damp-proof membrane to the wall of the Front Extension. The Court understands that the reference to authority reflects the walls forming part of the structure (which plainly they did) and the membrane forming part of those structural walls. It is less than clear as to the date and whether this element does fall within the timeframe considered in this part of the Decision or in the next one but the Court deals with it here.

106. The Respondent denied that there was any dampproof membrane. He stated that the external walls were to their inner face lined with lathe and plaster. The Court finds that is in effect the damp-proofing, although the Respondent was correct to say that it was not a membrane and the Court considers that "dry-lining" would be a more apt description. The Court accepts the evidence that the purpose of the lathes was to ensure that the plaster was not applied directly to the external walls. The Respondent explained in oral evidence that when the area was replastered, that plaster was directly onto the external walls, with no membrane in between. To that extent, the Court finds that the Respondent may cause damp to the external walls of the Front Extension to the Property. However, the point was not developed

clearly on either side and actual damp since re-plastering is not apparent, so this has no significance to the wider case.

107. The Court also records that the parties have referred to a timber floor and the approval by the planning department of the council to the raising of the floor from its previous level. The Court understands that work was undertaken as part of the refurbishment works. There is no assertion that the raising of the floor had significance to any other aspect of this case.

108. The Court finds that the tenants who were in situ in 2007 left at some point in 2008, probably in or about June although precisely when is not clear. Whilst the written cases suggested that the tenants left because the Respondent wished to undertake refurbishment works, in oral evidence, the Respondent stated that they had stopped paying rent, which he implied was because of the condition of the Property. The Court is unable to find that- the Court does not accept that the Respondent has proved it on the balance of the evidence- or infer that. Much of the problems with the Flat Roof and water penetration were only revealed when the internal partition walls and the ceilings to the Front Extension were removed, which was not undertaken with tenants in situ. The Respondent suggested in oral evidence that it was, quite significant, mould growth that led the tenants to stop paying but the Court is unable to identify sufficient evidence of that or to satisfactorily reconcile that with identification of problems on undertaking later refurbishment work. The Court also has no information as to whether such mould grew or clear evidence as to its cause. In any event, the cessation of paying rent is accepted by the Court.

109. The Court accepts- and this is how the point arose in the hearing- that the tenants paid a sum of rent in 2010 but did so because they were ordered by the Court to pay rent unpaid prior to them vacating. The Respondent therefore had pursued that payment of rent. The overall situation is not obviously consistent with the tenants having suffered from poor conditions and damp arising from disrepair to the Property.

110. More particularly, the Applicant had asserted that the payment showed the Property to be tenanted in 2010. In this instance on balance the Court prefers the Respondent's explanation, which it finds consistent with more of the other available evidence. The Property being tenanted in 2010 was far from implausible, including because correspondence from solicitors for the Respondent argued loss since 2010. However, on balance the Court found that the Property had not been tenanted until then. Whilst returned to below, it merits recording that given the payment by the tenants, the Respondent ultimately suffered no loss of rent up to the date of the tenants vacating.

111. The Court understands that the refurbishment works commenced by the Respondent in 2008 continued into 2009. The Respondent asserted that but for the water penetration and related problems discovered, the refurbishment work would have taken four months. The

Court is mindful that the Respondent has experience in development and so some ability to predict timescales but notes that timescales for building work very commonly slip for a variety of reasons and so finds six months to be a more likely period in principle for the sort of work involved.

112. For completeness, there were some small references to issues before August 2007, principally in the Respondent's oral evidence, said to be water penetration and a need for a floor to be replaced, as well as to report in 2006 which was not in the bundle, although the Respondent sent to the Tribunal after the hearing. The Court finds water penetration into the Front Extension generally prior to 2007 plausible, given the rot to the timbers from water penetration, and notes references in the bundle to the Flat Roof having been re- asphalted and some works being carried out to the timber roof structure in 2006 or thereabouts. However, the Court does not consider that period prior to August 2007 to form part of the Respondent's case as presented and so it does not require any determination. The 2006 report has not been considered in light of that and leaving aside any other considerations as to whether that would have been appropriate. The Applicant asserted that there had been no previous report of water penetration into the Property prior to 2008 in support of the assertion that problems with the roof arose from the removal of internal partition walls but the Court has found ample evidence of that being incorrect and need say no more.

2009 onwards

113. As mentioned above, the refurbishment works ought in the normal course have been completed some time into 2009 and the Court finds broadly in or about the middle of the year. The Respondent's case in his witness statement suggests problems were encountered in the course of the refurbishment. The statement does not expand in that other than to refer to the report of Mr. Dalton, the relevance of which to this point is not clear.

114. It is said by the Respondent that he went into occupation of the Property in September 2009 and that was not challenged as a fact. Mr. Groome put to him that there had been no loss of rent during that period because the Respondent lived there i.e. it could not be rented out. The Respondent stated that he had not intended to occupy the Property and only did so as it was not lettable. Documents in the bundle indicate that the Respondent sold the house he had lived in and moved into the Property because it could not be let and so did not produce the expected income. The Respondent's case was consistent. The Respondent's explanation for staying was that he had moved possessions to the Property and it was convenient because he had other work in the area. However, as that particular point about any impact on the level of loss was not taken, the Court does not dwell on the matter. The Court sets out its determination about losses below.

115. The Respondent's position was that he occupied just that part of the Property which was not within the Front Extension, that being in the middle of the intended refurbishment works, effectively turning the Property from a large two- bedroom flat with a large kitchen/ dining area (at least as intended following the refurbishment work) into a one-bedroom flat with a very limited kitchen and the only toilet in the en-suite to the bedroom. The Applicant did not dispute that. The suggestion of the Respondent of using one-third of the overall space is not supported by the plans. The loss of one-third would be closer and has been mentioned in documents in the bundle, although apparently under-stating matters to a degree.

116. It was accepted that further disrepair was then identified and reported to the Applicant by solicitors acting for him by correspondence in October 2009, which is not that far beyond the likely completion date of refurbishment. The Court understands that whereas in 2008 the water penetration (save for any which may or may not have occurred prior to the balcony collapse) had only been identified by removing the internal divisions and revealing the roof and timbers, from a point in 2009 (such point not being precisely clear but before October) onwards the problems experienced were greater.

117. The Court infers that the correspondence prompted the inspection and letter/ report of Mr Grumitt. That identified high damp readings to each of the three areas tested, indicating water penetration, and dampness to where the joists were supported on the walls could also be seen. Mr Grumitt also accepted problems from the rusting railings around the Flat Roof. He identified the work that the Applicant needed to undertake. There is also tender documentation prepared by Mr Grumitt for the required works.

118. It was separately accepted on behalf of the Applicant that, albeit perhaps somewhat late, the Respondent was given a licence to undertake the works dated 8th July 2010, coinciding with the grant of the Basements Lease.

119. However, it was not until spring of 2012 that the Applicant undertook further work to the Flat Roof. The Respondent said, and it was not challenged, that the Applicant wished to deal with various issues with the Building together, which may have been sensible on certain levels but delayed work and so allowed ongoing effects to the Property of water penetration, affecting the use of the Front Extension, refurbishment work to that part of the Property and affecting the prospect of renting out the Property.

120. In addition, the work undertaken by the Applicant was not satisfactory or effective in the mid- term and, in consequence, the Respondent asserted, in or about October 2013 further water penetration occurred through the new ceiling which had been fitted to all of the front extension part of the property. That is the timing of the report of Mr Sztyber, discussed below.

121. On the other hand, there is no evidence of problems between Spring of 2012 and October 2013. The Respondent said in his statement that he had to stop refurbishment because of the problems reported in October 2013, implying that some refurbishment work had been undertaken between Spring 2012 and October 2013. There was no information as to what that was and why it was not completed if the sort of timescale for the work indicated by the Respondent was correct. There was far more than the balance of six months during that period.

122. More specifically, the Respondent asserted in his Counterclaim that rainwater was able to drip in from nail penetrations through the new plywood deck installed by the Applicants' contractors. He asserted that some of the water penetration was attended to and ceased but that other parts were not attended to and continued. He also asserted in his Comments that recommendations by Mr. Dalton in 2009 had not been fully implemented, including the wrapping of joist ends to prevent them getting wet and consequently rotting/ otherwise deteriorating further.

123. The Applicant accepted in its Reply that there continued to be reports of water penetration by the Respondent in October 2013 and into 2014- and implicitly that those reports were made because there was indeed such water penetration. The Applicant said that the water ingress was caused by the gaps around the edges of the Terrace which had been produced by the above deflection of the Flat Roof and actions of the Respondent, but it will be appreciated the Court has found that not to be correct. The failure of that assertion has inevitably effect on the wider case.

124. The Court accepts that the Property continued to be occupied by the Respondent as it had been from 2009 and to the trial/ final hearing date, which avoided his need to use other accommodation but did require him to live with the difficulties experienced by the Property. The Court accepts the Respondent's evidence that he continued not to use the significant portion of the Property which lay within the historic front extension, occupying the drawing room and the main bedroom and with a small temporary kitchen fitted to the hallway of the Property.

125. The report of Mr Sztyber in 2013 was obtained by the Applicant and related to the Building generally but made comments about the Property across five paragraphs. It identified both water penetration to the lounge to the original external wall and rainwater dripping from two locations in the Front Extension. Both parties therefore made reference to and apparently accepted the report of Mr Sztyber. It was plain that the Property was suffering the effects of water penetration and that remedial work was required.

126. Given that it is clear and indeed apparently common ground that there was water penetration, the Court finds that there was and to both the

Front Extension and to the lounge. The Court further determines the responsibility for the ongoing water penetration into the Property to lie with the Applicant, who bore the obligation to attend to the roof and prevent water penetration- the condition of the Flat Roof and any other external areas and any consequences of defects were matters for the Applicant to attend to.

127. The Respondent contended in his Comments that there was no longer a need for buckets to catch water following major works- see below- but that damp continued. It necessarily follows that the Respondent asserts a need to use buckets until 2015 or so. which the Court therefore accepts. The Court has had regard to the series of photographs produced by the Respondent from 2013 and 2014, which at the very least include pictures of some apparent effects of water leaks and also include pictures of buckets. The Court does not have the ability to determine how many buckets, for how long they were needed in any given timeframe and in what circumstances and how much water was caught.

128. Nevertheless, the photographs show that a number of areas of the Front Extension were being affected, including the intended WC, the kitchen, the hallway and what seems to be the bedroom, although the photographs lack descriptions, and some locations are more easily apparent than others. Whilst there is not perfectly clear evidence as to how significant the water penetration was and to what extent any part of the Front Extension was usable albeit not lettable, the Court accepts on balance that it was not realistic to undertake refurbishment work during the period from October 2013 until completion of the major works and so the Front Extension part of the Property was not usable in practical terms.

129. The Court also finds that the Property could not practically be rented out between October 2013 and the major works, as the Respondent contended in writing in light of the ongoing water penetration and damp. In oral evidence about this period, the Respondent said that for the right price it could be rented out- implicitly a very much lower one than if in good condition. However, he added that he was not comfortable with doing that and envisaged calls from the tenants when it rained. Whilst it is undoubtedly right to say that anything may be lettable for the right price, in this instance the Court finds on balance that the Property could not have been let.

130. The Applicant contended that correspondence in January 2021 by the Respondent stated that water penetration into the area below the Flat Roof was remedied in Spring 2015, by which the Court understands the Applicant refers to the letter of claim dated 18th January 2021 which plainly does state that disrepair was remedied at that time. The Respondent denied that the disrepair being remedied was correct and contended damp problems continued, as discussed further below. It is notable that the second attempt at a letter of claim, in effect replacing the first, put the allegations differently and that previous

correspondence from other solicitors in May 2018 was clear that whilst water ingress into the Front Extension ended in 2015, that was not the end of water penetration into the Property more generally. The Court finds on the basis of other evidence that water penetration to the Front Extension did cease for the time being in 2015 when the major works were undertaken.

131. It was common ground that in 2015 there was a major works programme pursuant to a schedule prepared by Grumitt Wade Surveyors which included the re-laying of all of the water- proofing on the Flat Roof. The Court finds that was intended to address accepted ongoing problems with the Flat Roof and water penetration into the Property amongst various other matters.

132. As the Applicant contended and the Court accepts, it has not been demonstrated that following the major works there were ongoing effects on use of the Front Extension area. The Applicant was right to say that the report of Mr. Redmond- and indeed others- did not refer to effects within the Front Extension. The Court finds those to have ended on completing of the major works. In response to questions, the Respondent said that some of the refurbishment work was undertaken in or after 2015, such as plastering walls and fitting a toilet.

133. There were some questions about dates of planning applications and planning permission in relation to works, but the Court does not consider it necessary to address those as not relevant to the key issues for determination.

134. The Respondent also described in his witness statement problems with the porch and water penetration. It was said in one document that those were resolved in 2015, although the Court infers that in fact partial work had been undertaken but the defects had not been resolved in light of the contents of surveyors' reports discussed below. The effect was not clear, nor whether the dates involved put the Applicant in breach. But for the witness statement, the Court had understood the problem to arise later. The Court does not find the defect of significance during this period and in the absence of clarity as to a breach, does not seek to address the matter further.

- **2016 onward**

135. Despite the extent to which the parties addressed the area of balcony collapsing and damp identified in 2008, this period from (late) 2016 onwards is the one of greatest significance in this case.

136. 2016 is firstly significant as being the year in which the Respondent obtained the Basements Lease and commenced a development of those areas and as following the major works referred to above. That development work was aimed at incorporating the basement areas into the Property and the Respondent contended making use of previously unusable floor void. The Court uses the term development work to

distinguish the work from the refurbishment work undertaken in earlier years.

137. In respect of the Front Extension, the Respondent's case is that he continued with some of that refurbishment work following the major works but did not complete it. Objectively, the Court determines that the Respondent could have made headway and completed the works to the Front Extension. On the evidence, the Court finds that from the point of the major works in 2015, the Front Extension was capable of being put back in the position it ought to have been back in late 2008 within the remainder of the overall six- month period found appropriate for those refurbishment works above, so by the start of 2016 broadly speaking. Hence any lack of use of the Front Extension part of the Property thereafter was not the liability of the Applicant.

138. There was a good deal said about the development works. However, as the development work was the Respondent's choice and the Court does not find the water penetration into the lounge (see below) prevented it, the nature of the development work and the timescale for it is only relevant to the extent that from the point at which it could have been completed, the Property should have been capable of being rented out in its expanded form including the Basements but for the impact of the water penetration into the lounge. The Court does not consider it necessary to comment on the development works at any length.

139. The Applicant makes the fair and obvious point that the Property could not, at least without considerable complications, have been rented out during the period of such works (and implicitly neither could the Front Extension or at least much of it have otherwise been occupied). The Court notes that the Respondent rejects the notion of the work being extensive, referring to making a hole in the raised timber floor and constructing a staircase, which he said took one week. However, the Court considers that not address all of the work required. The Court notes the raised timber floor has been explained to be one fitted above that which was said to have been damaged in or about 2006 and that the damaged one was removed, which enabled greater height to the basement, enabling its use as intended, namely as a games room (whereas it is currently a storage area). The Court notes from photographs there to be windows at basement level below the windows to the lounge of the Property.

140. The Court finds that the various elements of the works to incorporate the Basements, including related works to the ground floor, could not have happened overnight and rather would inevitably have taken a period of time, although here is a lack of clear evidence of that period of time. Doing the best that it can on the basis of the various pieces of evidence which assist in generally terms with identifying the relevant period, the Court finds that the development work could have taken up to six months, so any delay in renting out for that reason was for that up to six- month period, irrespective of the issues described below.

141. Notably, the Respondent asserted that the major works in 2015-2016 did not entirely resolve the problems experienced by the Property, which continued 2016 and onward. He accepted that most leaks were resolved but not water penetration later identified as affecting the lounge wall. That wall is situated on the interior side of the original front external wall of the Building and so the other side of the wall forms the internal edge of the Front Extension.

142. The Applicant sought to exclude effects to the lounge by asserting- see above- that the Respondent was limited to effects in the Front Extension, but the Court has rejected that. The effects to the lounge are consequently part of the case for the Court to consider, irrespective of the lounge not forming part of the Front Extension.

143. The Applicant also strongly put in cross- examination that problems had ended in 2015 in any event and denied there to be contrary evidence. Mr. Groome suggested that the video relied on as one piece of evidence by the Respondent- and one of relatively modest significance to the Court amongst the other pieces- could have been made at another time and simply said to have been taken in 2017.

144. That was tantamount to asserting the manufacturing of evidence by the Respondent and fraud, for which there was not a shred of support. Mr. Groome will be aware of his professional responsibilities in that regard. As Mr. Groome did not press the point, the Court lets the matter rest there on this particular occasion.

145. Rather more appropriately, Mr. Groome put that solicitors' letters said problems ended in 2015 but the Respondent replied that water penetration from the Terrace ceased but not water penetration as a whole. He distinguished the Terrace and the Balcony as the Court does. Whilst Mr. Groome stated that he regarded both as being the terrace, and so it is understandable may read references to the terrace accordingly. However, where the perspective is not shared and correspondence is written from a different one, Mr Groome's perception is not relevant.

146. The Respondent relied on several further photographs of the condition of the Property in 2016 and in 2017, which show areas of damp staining, including apparently to the lounge although without descriptions. The Court is therefore cautious about the weight given but finds ample other evidence irrespective of those photographs. The Court is unclear whether that was from a new leak, as Mr Groome asserted, or whether there was a recurrence of the leak identified by Mr Sztyber but there is only minor impact on the case either way.

147. The Court accepts from those and the surveyor evidence discussed below that water penetration continued. The Court finds that there were effects to the lounge and the effects to the lounge were caused by water penetration in the area at which the Front Extension adjoins the remainder of the Building. That is consistent with the reports referred

to below. The Respondent has not demonstrated exactly when any issues and any reports commenced. In the absence of sufficient evidence to the contrary, the Court finds the effects are not demonstrated to have commenced before Autumn 2016 but that they had commenced then.

148. The Court finds that the Respondent occupied the Property for only limited time from 2015 until 2017, a reason why any water penetration to the lounge did not affect him- and explaining why it was not earlier identified before late 2016 even if it existed earlier. The Respondent's witness statement describes him as living mainly in France until 2017. The Court also finds that the key reason for any other lack of progress with works from 2015 to 2017. There is no suggestion that the Respondent contemplated renting out the Property.

149. Mr. Groome in closing made the point that the Lease requires the Applicant to be notified in writing. The Court discusses the enforceability of that requirement below but for now considers whether there was any written notification of water penetration affecting the lounge and, if so, when and the condition of the Property in and after Autumn 2016.

150. The Court has noted the opinion expressed by Mr. Horsfield in late 2016 that:

> "There are still leaks and dampness in the flats due to the external condition of the building. The leaks are due to leaks on the flashings around the roof and water getting in through the paint finish. I believe that if the flashings had been upgraded and the decorations undertaken to a higher standard then the amount of water ingress would have been significantly less. This is due (in my opinion) to a mixture of poor workmanship on site by the contractor and the works not being properly overseen by the contract administrator."

151. It will be appreciated that Mr. Horsfield talks about "flats" and that is because he refers to Flat 17 as well as the Property, and also in the report discusses Flats 14 and 16. However, Mr. Horsfield additionally comments in respect of the Property specifically stating:

> "There is also extensive water ingress into Flat 5 where water is getting in at the junction between the main front wall and the flat roof on the front section of the property. The weathering at this junction between the flat roof and front of the building was not updated and is in need of attention. This work was not in the schedule of work and not undertaken by the contractor."

and separately:

> "Extensive water ingress has occurred at the junction between the main flat roof on the front of the property and the main front wall above Flat 5, and this has led to extensive water ingress coming in on the wall between the lounge and bedroom of Flat 5. There is also water ingress coming in around the single storey entrance structure [the porch] to Flat 5."

later adding:

> "Also, extensive water ingress has occurred into Flat 5 which has damaged the plasterwork and paintwork and prevented the ceiling from being lined in the bedroom of this flat, and remedial works are required."

152. It is Mr Horsfield's identification of the leaks in November 2016 which led the Court to conclude that the problem must have arisen sufficiently before then for a decision to be made to commission a report including the Property and obtain one. The Court has noted the water ingress to be "extensive" not minor, relying on the words used and observing that the copies of the photographs from the report which are contained in the bundle are somewhat blurred.

153. The report of Mr. Horsfield is some 47 pages long and so necessarily the Court only touches on the contents in this Decision. It is described as an expert witness report for the Court, although not in this case. The Respondent said that the was commissioned for the purpose of potential proceedings against the contractor who had undertaken the major works, which explains why it is described as it is The Court finds Mr Horsfield's opinions to be accurate. The same point apply as with the report of Mr. Dalton to this report being a contemporaneous document to which weigh should be given. The opinions were not challenged by the Applicant, which had originally commissioned the report. The Court further notes Mr Horsfield to identify the same sort of problem with water penetration into the lounge that Mr Sztyber had described earlier.

154. The Respondent said in oral evidence, having specifically referred to it in his statements of case, that work which could have fixed the problem with water penetration by the balcony had been removed from the 2015/2016 major works, adding that the overall works were said to be too expensive and so items were removed. It is certainly clear from Mr. Horsfield's comments that the work had not been dealt with.

155. The conclusions of Mr. Horsfield in respect of water penetration and the effects on the Property are abundantly clear. There is no need to labour them. The work required to remedy the water ingress was also set out in clear terms and not obviously unduly difficult and so it is difficult to understand why it was not attended to, no clear explanation being given by either party. Mr. Horsfield explained as follows:

> "There is extensive water ingress getting in at the junction between this roof and the main front wall of the building. The flashing detail on this should be completely upgraded and re-weathered into the front wall to prevent further water ingress occurring, as this is leading to extensive water ingress in the flat below.

156. In terms of notification, the report of Mr. Horsfield was commissioned by the Applicant and sent to the Applicant. Most immediately, even in the absence of other written notification by or on behalf of the

Respondent prompting the instruction, that was written notification of the ongoing problems described. The Lease does not seek to require notification by the lessee specifically. However, it is also obvious that Mr. Horsfield would not have inspected the water ingress to Flat 5 if the Applicant was unaware of it, whether in writing or otherwise, such that the provision of Mr. Horsfield's report to the Applicant was the latest time at which written notification was received.

157. In the event that the Court is wrong in respect of the above, the report of Mr Horsfield was also provided to the Applicant with correspondence from the solicitors then instructed by the Respondent dated 22nd May 2018, so that there was notification then. That would necessarily have an impact on the date of notice and any consequent damages, although would not alter the outcome of this case and the impact on the damages figure would be relatively modest.

158. The Court notes the opinion of Mr. Horsfield that even the water penetration and damp to a more limited area caused the Respondent ongoing loss of rent. He expressed the opinion that:

> "Flat 5A?? and Flat .... are not currently in a rentable condition, in my opinion, due to issues with dampness in these flats. I believe this is due to a mixture of workmanship on site undertaken by the contractor and, potentially, supervision of the works has contributed towards this and, if the works were undertaken to a higher standard, or the supervision had picked up the issues with poor workmanship, this could have been avoided."

159. That is a very clear opinion about the ability to let based on contemporaneous inspection given by a surveyor instructed by the Applicant, whose opinion was not challenged by the Applicant and is consistent with the other evidence and other opinions expressed by other surveyors from time to time, including the expert opinion of Mr. Redmond in 2022. The Court accepts it as correct and finds that the Property was not lettable from late 2016.

160. The Court pauses to observe that plainly- and as the noted above- the Property may have been capable of having been let in any condition at a suitable rent, although the Respondent would not have been able to exclude liability to the tenant for disrepair. The Court accepts on a fine balance that practically the Property was still not lettable at all, although effects became limited to the lounge wall the margin narrowed considerably. Loss to the Respondent because of loss or rent therefore continued.

161. That said, use of the Front Extension in itself was possible, save for the period in which the Property would not have been rentable because the Development work would have been proceeding. In terms of loss of use and enjoyment, impact remained much more modest than in 2010 to 2012 and 2013 to 2015 and the Court notes in passing that the ongoing problem occurred in an area the Respondent actually used- the lounge- at least when in the Property, rather than in France or elsewhere

especially until 2017. The Court can identify no reason why the Respondent could not have progressed with and indeed completed work to the Front Extension.

162. The Court understands that there was no change during the twelve months from November 2016, save that the Court infers that ongoing water penetration will have had an effect and caused further damp and deterioration. Further, the Court finds, as explained below, that there has essentially been no change to the relevant external condition of the Building since. Considering the extent of the claim produced by the six year period of ongoing water penetration from late 2016, it is extremely difficult to understand why a fairly modest repair to flashing and related was not attended to. The financial impact of failure to undertake that work, as discussed below, massively outweighs the cost of the work.

163. A further report in respect of damp was commissioned by Graves Jenkins on behalf of the Applicant from Mr. Smith in November 2017, which is 11 pages long excluding photographs. It is not clear why another report was obtained a year after the report from Mr. Horsfield. That report again was not solely in respect of the Property and covered the Building as a whole, mentioning all seventeen flats to one extent or another. Only fourteen lines were devoted to or related to the Property but the report records that "Water ingress on south wall of lounge reported to have been occurring for several years, causing deterioration to coving and plaster finishes. The lessee advised that the situation had improved in recent times", albeit it is not immediately apparent to the Court how far Mr. Smith considered that improvement went or whether he believed any comment by Mr. Testa related to the particular wall or water penetration into the Property more generally. In that last regard, the Court finds it much more likely that the Respondent referred to the Property generally.

164. Mr. Smith noted that the Property had experienced water penetration from the roof terrace above, without specifying the timeframe of that. Mr. Smith talked about dry lining to another flat in his observations but otherwise primarily discussed the condition of windows. Within that, he made a number of comments about window sills to Flat 10 as the current or historic source of water penetration to Flat 8 and to the Property and stated that repairs to the windows were needed. Mr. Smith described potential issues with lead flashing causing water ingress, which "remains a possibility" because whilst there was relatively new lead added, that could not be fitted properly with the windows in place, which is what had been attempted.

165. That report is also not expert evidence, but it is again a contemporaneous opinion of a chartered surveyor instructed by the Applicant as to the condition of the Property in 2017 and merits being given weight. However, the report is much less detailed than that of Mr. Horsfield, only identifies certain causes of damp and not others, says relatively little about the Property, does not particularly explain the

basis for the limited conclusions about it and was apparently prepared without sight of the report of Mr. Horsfield or earlier reports. The Court accepts there to have been issues with window to Flat 10 as identified but to any extent that the reports of Mr. Horsfield and Mr. Smith differ as to matters related to the Property, the Court firmly prefers the opinion of Mr. Horsfield.

166. It should be added that Mr. Groome suggested that Mr. Smith's report did not support water penetration, with which the Court disagrees, and Mr Groome also referred to there having been horrific storms around that time, which may be correct although it is not immediately clear as to the relevance of that given the limit of Mr. Smith's comments which were made in conditions described as fine and dry. The Court is content that the report does not demonstrate water penetration to have ceased.

167. In 2018, the lounge wall was re-plastered by the Applicant's contractor and Vandex applied to the wall. That was not in dispute and rather suggests that the Applicant accepted an ongoing problem at least at that point. The Court understands Vandex to be a cement- based waterproofing slurry such as might be used for tanking. The Respondent in his statement identified that the problem was hidden and not resolved and that paint to the wall bubbles up and peels, which the Court finds in itself indicates an ongoing problem with water penetration. The Court understands this is the matter to which the Respondent referred in his original Defence when talking of the Applicant trying to "cover some of the issues" and his reference to illegality being to the assertion that a product such as Vandex was not permissible in a listed building, although that latter point but any such issue falls beyond this case. However, the Court notes that the Respondent must have permitted the work. He has also not sought to have the Vandex removed. The Court considers the Respondent's comments to be borne from the report of Mr Redmond- see below- rather than because the Respondent had any issue with the work at the time.

168. The Court finds that there was no other progress made and that the position remained in the subsequent years. Hence, water penetration continued and whilst water did not pass through the Vandex, the Court accepts the Respondent's case that it did pass above and behind the Vandex to floor level. The Court finds the Respondent's case that the flooring to the lounge was damage as a consequence, not directly challenged, is correct.

169. The Respondent suggested in oral evidence that the water penetration was caused essentially by the wind blowing rain in a certain way and facilitating penetration by it, an opinion which had also been expressed by the managing agents in 2013. Given the position of the Property and experience of water penetration in other properties in and round Brighton, the Court finds that very likely, although it is the effects which are of primary interest.

170. There is no evidence to suggest any change in the situation at any time between 2018 and the trial.

171. The expert opinion of Mr. Redmond of February 2022 was obtained by the Respondent and comprised eleven pages plus appendices of which those not comprising other reports and documents and amounting to approximately twenty further pages are included in the bundle, including a significant number of photographs (which amongst other matters show progress in the basement works from earlier photographs). Mr. Redmond inspected in November 2021. The "Summary of My Conclusions" part of the report includes the following:

> "It is evident that there is an ongoing issue with water penetration occurring internally within Flat 5 at both ground floor level and basement level.
> 5.2 The damp ingress has caused damage to plaster and decorations to the ceilings / walls in the entrance porch and living room.
> 5.3 The damp ingress has caused wet rot in timber skirtings, window cills / frames to the living room and entrance porch."

172. Mr Redmond also addressed water penetration to the lounge wall further in more detail as follows:

> "We obtained high damp readings in the internal wall of the living room directly below the roof terrace using the surface reading, this measures the moisture in the wall behind the plaster. This indicates that the wall behind the Vandex water-proofing membrane is damp."

and was concerned about the application of Vandex:

> "The use of Vandex and other such cementitious tanking / water-proofing systems is not recommended in historic buildings. These impermeable materials do not allow the permeable traditional building fabric to breath or moisture to pass through thus, moisture is displaced or trapped and frequently this can lead to problems elsewhere. In addition, these materials have a short life span and are known to fail over the passage of time, but can result in irreversible damage to historic building fabric when removed."

173. Consequently Mr. Redmond's opinion is that, as at February 2022:

> "The ongoing damp issues are preventing Mr. Jesmond Testa from completing the refurbishment works and therefore preventing Mr. Testa from letting the property or occupying fully".

174. The opinion of Mr. Redmond is therefore on very similar lines to those of Mr. Horsfield in respect of internal effects. The obvious lacuna in the opinion of Mr Redmond is that the closest he gets to explaining the cause of the effects to the lounge wall is general statement that the ongoing issues are caused by "lack of adequate maintenance and poor quality repairs to the external fabric of the building". Mr Redmond does not explain in any more detail, at least with regard to the particular lounge wall at the heart of this case. The impression created is that he

accepts what was said in previous reports but having to form such an impression from limited comment is less than satisfactory.

175. The Court has also carefully considered the report of Mr. Rogo dated 5th September 2022, which is also eleven pages long excluding appendices and also includes nine further pages of photographs. The Report is described to be "on: "Internal Dampness within Front Extension"" and its purpose to be to "assess the dampness (if any) present within the area of Flat 5 54&55 Marine Parade which lies immediately below the terrace to Flat 8, 54&55 Marine Parade, ('the Front Extension') and to express an opinion as to whether the property is livable in and / or lettable.". The report proceeds to do just that. Mr Rogo is explicit in stating "In preparing this Report I am only being requested to comment on the extent of any current dampness within the area below the Flat 8 roof terrace. It is not part of my remit to address issues of the history to any of the work carried out above or elsewhere within the 54-55 Marine Parade building."

176. Mr Rogo found no damp of note below the Front Extension. He states:

> "… I did detect the presence of moisture to exposed and accessible parts of the wall separating the primary building and the Extension to 54-55 Marine Parade, Brighton from within the ceiling void to the Front Extension, this moisture is not visibly extending to the rooms below."

He later says:

> "I found no evidence at all of any matters such as mold [sic] growth, internal deterioration etc. within the bedroom, WC cloakroom and kitchen to the Front Extension."

177. The moisture found to head of the arch to the original windows to the former front of the Building, so where the Front Extension joins are within the range identified by Mr Rogo as high and, troublingly given the previous issues with the timbers and notwithstanding the strengthening, beyond what:

> "is normally the threshold of timber becoming sufficiently saturated to allow wood fungus' to grow and colonise"

although there were no visible signs. In addition, whilst no mould growth was found and there was no impact on interior finishes, some high moisture readings were identified and it is suggested that part has:

> "emanated from….. the junction of the Front Extension and the original parts of the building."

178. The lack of mould growth and identifiable damage to plaster and similar in the Front Extension is no surprise. As Mr Rogo noted, Mr Redmond did not identify any either and indeed the Respondent's case does not refer to any. It is similarly no surprise that Mr Rogo identified

nothing in the Front Extension rendering the Property uninhabitable or unlettable. Indeed, it would have been a surprise if he had done so.

179. The rather obvious central problem with the instructions to Mr Rogo are that they reflect an apparent misunderstanding as to the extent of the Respondent's case, namely that it is limited to effects within the Front Extension. Mr Rogo makes no comment at all about the lounge wall (nor the lounge window or the porch mentioned below) and so makes no comment about the disrepair which forms the basis of the claim from late 2016 onward and there is no way of knowing what he would have said if he had expressed an opinion. There is a photograph of part of the lounge wall and it is right to say that there is nothing of obvious note shown but one partial photograph can only weigh lightly against the other evidence.

180. That leaves Mr Redmond the only one of the two experts who does address the lounge and so despite the flaw referred to above, his is the report which addresses the relevant part of the Property.

181. The Court also notes that Mr. Rogo's attendance took place in mid-August, the height of summer, 2022 and so the fact that any moisture of mention is found then is suggestive of a much greater problem at other times of the year. The Court is mindful that Mr Rogo identifies "substantial rainfall" forty-eight hours before his first inspection, although forty-eight hours is, the Court considers, enough time for drying out, not least at that time of year. Mr Rogo notes the weather to have been generally dry and clear in preceding weeks. The Court finds the report of Mr Rogo consistent with the earlier reports by identifying moisture to the wall between the Front Extension and the remainder of the Building, which is where previous reports consider water penetrated and caused the damp to the lounge wall.

182. Set against all that and without in any way criticising the report of Mr. Rogo in respect of those incomplete matters which he was asked in his instructions to consider, the Court accepts the evidence of Mr Redmond that there were ongoing effects as he described. The Court finds the cause of those to be disrepair to the exterior of the Building allowing water penetration around the join of the Front Extension of the Building (which Mr Rogo's report lends support to as mentioned above) and most likely failings in the lead flashings facilitating water penetration as identified in Mr Horsfield's detailed report.

183. The Court also accepts from the photographic evidence of the current condition of the Property as at the date of trial/final hearing, that there remains water penetration and effects of water penetration to the lounge and indeed also in the internal hallway and WC within the Front Extension to the other side of the particular wall to the lounge. Mr. Groome conceded in cross- examination that, assuming the accuracy of other evidence which he could not gainsay, there was water penetration.

184. The Court additionally notes there to be no assertion on the part of the Applicant of work having been undertaken between the reports of Mr. Horsfield and Mr. Smith and the trial date. The Court finds that there were continued problems of the same nature during that period.

185. The rather more difficult question is whether in the circumstances the Property continued not to be rentable until the trial date. It is not difficult to identify that it could not be rented out with the lounge in the condition it ought and at the rent it ought. Hence on the evidence there was an ongoing loss of rent from the application of Vandex to the trial/ final hearing broadly four years later. However, having noted the margin in respect of ability to rent out to have been much reduced when problems related to the lounge (and porch) and no longer the Front Extension, that margin reduces with the Vandex and the more limited identifiable effect of the water penetration.

186. The Court is mindful that no questions were put to Mr Redmond but equally that he was instructed solely by the Respondent and that the Court struggles to understand his reasoning that the Property remained not lettable at all. The Court does not find there be sufficient that the Property remained entirely unlettable and so is not persuaded that it was. The Court finds the Property was lettable but at a lower rent.

187. The Court also finds ongoing reduction in other use and enjoyment, although such loss of use and enjoyment to be to the limited extent described above, that is to say that there could have been the undertaking of works to the Front Extension and the effect was on use of the lounge, which remained in use, arising from the sources of water penetration. Whilst Mr. Groome put to the Respondent that the Property was not uninhabitable and he accepted that, a dwelling need not be uninhabitable for there to be loss.

188. The Court should be clear that the above findings do not relate solely to water penetration affecting the particular wall of the lounge and that they include the fact that water penetration occurred through or around the lounge windows. The Court has not addressed that in any detail as apparently a very minor matter in the eyes of the parties when compared to other issues.

189. However, Mr. Horsfield describes in relation to the window there being hollow and loose render underneath a window. Mr. Redmond stated that high damp readings were obtained from beneath the window and visible damp staining was also evident. He described cracked and loose render to the soffit and external wall of the lounge bay allowing water to penetrate behind and cause damp in the wall internally.

190. Further, the damp to entrance porch is described as continuing, with water ingress into the structure and blistering of rendering, although Mr. Horsfield identified some work had been undertaken prior to his inspection replacing part of the rendering. Mr. Redmond identified

high damp readings, rot to the porch window and deterioration of paint and putty.

191. The Court finds the surveys to support that addition effect in 2017 and in 2022, with some additional impact on use and enjoyment, although the further matters do not add a great deal to the Respondent's case in the event.

192. There was cross- examination of the Respondent about a request for access by the Applicant in 2021 following a letter from the Respondent's solicitors making reference to new water ingress. The Respondent suggested that lack of access was related to not continuing with solicitors and not reading an email, which he said was because of being depressed and unable to deal with matters. This was an instance in which the Respondent's evidence lacked other obvious support, ideally medical evidence, and was inadequate. The Court considers that access should have been afforded.

193. Mr. Groome also made the point that the report of Mr. Redmond was prepared in February 2022 and not supplied to the Applicant until a year later. The Respondent's also inadequate response was that the report had not been asked for. That is inadequate because even if correct, plainly the Respondent ought to have supplied the report when received. There was no good explanation given for the delay and it is very difficult to identify what good reason there could have been.

194. Given previous reports, both surveyors' report and more general notifications of problems, it is not clear that the Applicant would have responded to the report of Mr. Redmond by undertaking works. It had not done so for example between the date of service of the report and the trial/ final hearing date, much as there was ample time for work to have been undertaken. Equally, it had not resolved the water penetration in response to other reports. It follows that if access had been provided, it has not been demonstrated that work would have followed it. However, the Court finds that the Respondent contributed to the ongoing lack of repair work by not providing access and not disclosing the most up to date survey report as soon as available.

Time at which the Applicant was in breach

195. Necessarily any work to remedy defects identified and effects which arose from them could not have been undertaken by the Applicant instantly and as such the Court is required to determine the reasonable time for the undertaking of the required repair works.

196. The Court notes that whilst the wider law identifies the time for the undertaking of repair works and refers to a reasonable time and that whether the time runs from the problem first arising or from the date of report of the defect is dependent upon which party occupied the relevant area, the Eighth Schedule provides specifically that the Applicant is not liable unless and until written notice of any defect or

lack of repair has been given and the Applicant has failed to remedy that within a reasonable time of receipt of the notice.

197. The Court received no submissions from either party as to whether any part of the wider law survived the specific contractual provision. It was held as long ago as 1973 in *O'Brien v Robinson* [1973] AC 912 HL that where a repair is required of the appropriate repairer of a property occupied by the person requiring the repair, the repairer has a reasonable time from the effects of the defect first being reported within which an repair can be effected prior to the repairer being liable for breach of its covenant (at least subject to any unusual contract clause bringing forward the timing of the obligation). Paragraph 4 .1 of the Eighth Schedule reflects that.

198. In contrast, if the repair is required to a part of a building occupied by the person responsible for repairing, that person's reasonable time ordinarily runs from when the problem first arose, as held in *British Telecommunications PLC v Sun Life Assurance Society PLC [1996] CH 69*). That, and indeed *O'Brien*, are not cases about which the Court sought submissions. However, given the length of time since the above cases were decided, it is difficult to identify what submission could have been which might have altered the Court's view as to the relevant wider legal position.

199. More particularly, a question arises as to whether defects to areas occupied by the Applicant did require reporting as provided for in the Eighth Schedule or instead the position set out in *British Telecommunications* applies. The Court considers that the answer to the question is that the provisions of the Lease apply. There is, the Court determines, no need to imply any approach where the Lease itself makes specific provision. The Court is particularly mindful that the Lease was entered into in 2000, whereas the above case authority was decided in 1996. As such, the Court infers that the lawyers drafting the Lease and those advising the lessee would have been aware of the caselaw and would have provided any relevant advice about it such that the contracting parties intentionally required notice from the lessee and intended that the Applicant would not be liable unless and until a report had been made, irrespective of whether the defect arose to an area occupied by the lessee or arose to one occupied by the Applicant. The Court bore in mind *Arnold v Britton* (see above).

200. The Court considered particularly whether submissions should be sought from the parties on that point. However, the Court also considered that submissions were very unlikely to alter the decision made on the point. The Court was also particularly mindful that the Respondent had on his case- and indeed there was no dispute on this point- made reports when problems had been identified and so it is difficult to discern at what earlier point any given problem may have started. In addition, and for the same reason, the impact on the value of the effects of any defects if the correct answer were that the Applicant

was liable not just from the time of the report but from some earlier date was likely to be modest if any.

201. The Court adopts the approach that overall the reasonable commencement date for specific and modest to moderate works would have been three months after problems requiring attention were reported. That period would increase to six months for major works. The Court considers it appropriate to allow a further one to two months to be completed in very broad terms. The Court is mindful in respect of the above that more significant works require more planning and are likely to take longer to obtain appropriate contractors and certainly to formally consult where required. On the other hand, the fact of a property suffering from water penetration and consequent damage ought to cause progress to be as swift as practicable and may enable dispensation from consultation requirements.

202. Applying that, it follows that the various repair works to the Property and internal effects caused ought in each instance to have been undertaken by five to eight months after the various dates identified. Eight months is appropriate in respect of major works, as undertaken in 2015. The other repairs, including the lead flashing which was the problem for the lounge wall, should have been undertaken in four months or so.

203. The period for which the Applicant was in breach and the Respondent was therefore entitled to damages excludes five months from the report in October 2009 but includes April 2010 until Spring 2012, so approximately two years.

204. There is no identified problem from Spring 2012 to October 2013 approximately eighteen months more, so no identified breach during that time, nor for eight months from October 2013, the longer period reflecting the major works. There was a breach from April 2014 to the major works in 2015.

205. There is the period from the end of the major works in 2015 to towards the end of 2016 before there has been demonstrated to be water penetration to the lounge and written notification of it. There would reasonably have been a period of four months from November 2016 to tackle the water penetration into the lounge and related. There is a breach from March 2017 to November 2022.

206. The period will of course have increased to date if the works have still not yet been undertaken and will increase further until the works are undertaken but the Respondent will need to pursue those periods at a later date if relevant.

207. Problems were not addressed over significant periods of time, notwithstanding that the Respondent could have done more to enable progress in more recent times. Aside from potential damage to the fabric of the Building and additional cost of remedial work, to the likely

detriment of all residents, it was always likely to be extremely difficult to justify an approach of not undertaking the works and always likely to result in an increase in the value of the Respondent's counterclaim, which has been known about for a significant time.

208. The Court has found the Respondent to have failed to mitigate his loss by failing to do all that he ought to have facilitated works in recent times. That does not detract from the Applicant's liability but the Court does take it into account in respect of the level of damages claim.

Value and remedies

209. The value of the Counterclaim as claimed is for the substantial sum of £90,000.00 and the Respondent has paid a Court fee accordingly. The Respondent has not suggested that he may seek any greater sum and so the Court treats that £90,000.00 as the maximum potential value and so it need not consider any arguments which may have been advanced as to whether the Respondent would otherwise have been strictly limited to that figure.

210. In relation to long leases such as that held by the Respondent, the principal authorities in respect of the value of a disrepair or similar claim include *Calabar Properties v Stitcher* [1984] 1WLR 287 and *Earle v Charalambous* [2007] HLR 8. In the first of those, it was held that an award of damages should restore the lessee, as far a money could, to the position he or she would have been in if there had been no breach and was not limited to diminution of the rent paid, very low as that was, but rather was the appropriate sum for the unpleasantness of living in the flat. *Earle* held that a long lessee was not limited in a damages claim to discomfort and inconvenience, which was only a symptom of the wider interference with enjoyment of the asset suffered, that asset being a distinction between properties held on long leases and those held under tenancies. The starting point, but not necessarily the end point, was the resulting reduction in rental value arising from the disrepair.

211. An old authority to which reference is still often made but which relates to a tenancy and not a long lease is that of *Wallace v Manchester City Council* [1998] 30 HLR 1111, it which is said an unofficial tariff proposed by Counsel of between £1000 and £2750 per year dependent upon the seriousness of the disrepair was accepted by the Court of Appeal. It is worth remembering that related to social housing at relatively low rent even at that time- £45.26 per week rising to £47.40 per week during the relevant time- and a fraction even of social rents now, so that the "tariff" figures ranged from a substantial percentage to all of the rent. It is at best questionable that there was any acceptance of such a tariff but worthy of note that even where the tenant held no title to an asset, there was at least potential for a significant percentage of the rental value to be awarded.

212. The Residential Property was not rented out by the Respondent other than 2007 and into 2008. There was something of an issue as to how much the rent received was at that time, although nothing turns on it. The Court accepts as correct on balance that the figure of £1295.00 per month subsequently given by the Respondent less agents fees of £121,73 per month, leaving a net figure of £1173.27.

213. The Respondent asserted in his statement of case that the rental value would have been £2000 per month if the Property had been in lettable condition. The Respondent subsequently obtained evidence of rental value as at 27th June 2022 from The Property Shop, where the opinion was expressed that the rental value would be £2400 to £2500. It is worth pausing to make two observations about the above. The first is that the opinion as to rental value is expressed in a letter. That letter is not an expert opinion for the purpose of these proceedings and the background to it is not completely clear. Although the opinion expressed is a simple one and there may be little in the background of relevance, some caution is appropriate in applying the figure stated.

214. The second is that the opinion is given as to the rental value in 2022, following the grant of the Basements Lease and where the Property has some extra potential accommodation in consequence of that and is not the same as the Property was prior to that lease. It is reasonable to infer that the extra space has an element of impact on the rental value, albeit that the Respondent said that value is only as storage because that is all the additional area can be used as incurrent condition. There is no specific evidence before the Court as to the extent of that impact, so it does not entirely help with the rental value prior to 2016 but the Court consider it likely that the storage space would make only a marginal difference.

215. The Respondent has failed to persuade the Court of any specific figure as to rent on a given date. The Respondent has argued that based on a 5% per year increase in the average rent over the period, the average would have been £1718 per calendar month but without evidence as to whether a 5% increase would have been achieved. The Court is also mindful that the periods for which the Court has accepted that the Property was not practically capable of being rented out were between 2009 and 2018 and so not the most recent part of the very approximately fourteen- year span contended for by the Respondent. With that in mind and taking a somewhat broad- brush approach, the Court consequently considers that a more cautious figure of £1600 is the best that can be identified, less than wholly perfect though it is.

216. The Court also notes that the Respondent had used agents who had charged a fee and finds, doing the best possible on sparse evidence, that he would have continued to, at cost of approximately £150 per month on average assuming a rate approximately the same percentage of rent as in 2007 to 2008, producing net rent of £1450.

217. There are approximately eight and three- quarter years of breach for the reasons explained above. Mr. Groome was right to say that the Property cannot be rented out until the works are completed but the time which should be offset for the completion of the refurbishment and development works from the period of renting out if all had been well is amply counter- balanced by the time allowed for the Applicant to undertake works following being notified and before becoming in breach, so that to count the period for the Respondent's works as well would be to double- count.

218. A period of approximately four and a half years at a monthly rent of £1450 would produce a figure of some £78,300.00. However, that is not the end point on calculation of loss even in respect of that period. There are various other considerations addressed when determining the value below.

219. In respect of the other approximately four and a quarter years, the Court has not accepted the inability to rent out at all during the period from the Vandex work to trial. That is the most recent period and the average rent across the whole period is not accurate for the rent which would have been received during that period. Inevitably the rent would have been higher. The Property Shop figure is more relevant for that period. On the available evidence, the Court finds that the likely rent was £2000 per month net of agent's fees. The actual rent which would have been achievable in light of the ongoing water penetration to the lounge is not precisely identified. The Respondent's case has been that the Property could not be rented at all. The Court must therefore do its best to identify the likely reduction in rent achievable in light of that ongoing problem based on the evidence of the nature of the problem and the likely reaction to that of potential tenants.

220. Accepting that it does so without precision and taking a somewhat broad approach, the Court considers that the likely level of reduction would be in the region of 25%. The Court considers that where the bedrooms and other main living room of the Property were unaffected, that provides a sufficient reduction on the market rent- £500 in money terms- that it is likely that a tenant could be found within around and about the same timescale as a tenant could be if the Property was in the condition it ought to be and for full market rent. The further loss of rent was accordingly £25,500.

221. It is of relevance that the Respondent himself had use of, at least some of, the Property. There is no way of knowing how much of the time he may have lived at the Property but for the difficulties, although the Respondent has not demonstrated that he would necessarily never have lived in it at any time during the fourteen years. Any occupation of the Property by the Respondent would have rendered it unable to be rented out during such period. The Respondent had referred to occupation of the Property in response to challenge as to how he had mitigated his loss.

222. Equally, there is no way of knowing for how long the Property might have been empty between lettings and how often or the costs and fees which may have been incurred in letting the Property each time a new tent was required. It is further unclear whether there may have been other repair or refurbishment required to the Property from time to time over the years, at cost to the Respondent and so being offset against the rent income received- and hence now reducing his loss. It is unclear to what extent any of that might have been able to be recouped from any deposits paid. The Court considers not all of it would.

223. The layout of the Amended Defence and Counterclaim is such as to make it difficult to identify whether the Respondent only sought to pursue a claim for loss of rent or for losses and damage generally. The Respondent refers to considerable losses and mentions inconvenience and stress, loss of use and enjoyment and damage to personal possessions. However, there is a specific bullet point in respect of loss of rent. The Court finds that the claim is not limited solely to loss of rent by use of the bullet point and other wording and does encompass other elements, albeit that loss of rent is the principal part.

224. The Respondent would have a claim in the absence of sufficiently demonstrating loss of rent for more general loss of use and enjoyment of the Property bearing an appropriate relation to the rent level. The amount of the Property which was unoccupied due to water penetration continuing from the end of 2008 until around or the latter part of 2015, when the major works were complete, was approximately 40% in practical terms- one of two (originally three but before the relevant periods) bedrooms and ensuites and one of two living rooms, the kitchen/ dining room. That 40% subsequently was usable (save for in consequence of work the Respondent chose to undertake) and the effect on use and enjoyment was limited to the lounge wall, although without preventing that room being used. A claim which had not been put on the basis of rent would have been lower, albeit that the measure of damages would have started from the impact on rental value if the Property had been rented. Even such a claim would have been considerable.

225. The Respondent in evidence and closing that he had become depressed (although not medically evidenced in this case) and in closing that the problems had ruined his life. The Court applies some considerable caution to that absent expert medical evidence. The Court did have regard to the letter from the Respondent's GP dated 26th October 2021, which describes reports by the Respondent of stress from 2016 because of matters related to the Property, records some medication given and expresses the conclusion:

> "In my opinion, stress relating to his flat has had an adverse effect on Mr Testa's physical and mental health."

However, that opinions was not explained, was very briefly stated and in any event as not contained in an expert report in these proceedings.

The Respondent has not sufficiently demonstrated stress and depression for the Court to so find and to add anything to the loss of rent identified above.

226. The Court also notes that the Respondent did not do all that he could to have mitigated his loss from 2021 onward. That merits some reduction in the loss of rent figure for the last eighteen months in broad terms, much as it is unclear whether the Applicant would have undertaken work. The Court allows 20% for that in respect of that period taking matters in the round.

227. Doing the best that it can and apply a degree of caution to reflect the the various uncertainties as to the extent, the Court determines that the Respondent has suffered losses of and is entitled to damages in the sum of £70,000.00.

228. It is not apparent to the Court that the Applicant intends to attend to the redecoration which is required inside the Residential Property, although attending to the effects of disrepair forms part of the repair work. That principle of making good consequential damage is another not referred to by Counsel for either party but is another long-established one – see *McGreal v Wake* [1984] 13 HLR. However, the Respondent has not specifically claimed for cost of redecoration at any given time and there is no evidence of cost. It may well be that the Front Extension, and perhaps the lounge, would have required decoration in any event such that no loss accrues. Taking those points together, the Court considers that no award can be made for any loss in respect of redecoration.

229. The Respondent has, it will be noted above, stated a claim for damage to personal possessions but has also not identified any specific possessions damaged or the losses incurred. This element necessarily also fails for lack of evidence.

230. The Court observes that commonly a party asserting breach of a repairing obligation by another party will claim damages and also seek an order for what is termed specific performance, that is to say that the party performs the obligations which it is said to have breached. There would usually need to be a clear specification of required works and a suitable timescale given for their completion. However, the Respondent did not state a claim for specific performance of the Applicant's repairing obligation in his Amended Defence and Counterclaim, or indeed in the original version, or seek any remedy which might indicate that such a remedy is desired. Neither has the Respondent sought to claim any ongoing damages for any ongoing failure on the part of the Applicant to comply with any repairing obligations.

231. If the Respondent wishes to pursue any such remedies, a separate case will need to be properly advanced in the County Court. It is not appropriate to make any comment here as to what the outcome may be at such a time and in circumstances not known. It is reasonable to

express the hope that the Applicant will attend to repairs within as short a time as practicable such that any further litigation may be avoidable.

Conclusion

232. It should be apparent from the above but is summarised for the avoidance of doubt, that £1204.47 service charges plus interest of £417.35 have been found demonstrated to be due on the evidence presented. The Respondent has been determined to be due £70,000.00. That sum therefore falls to be reduced by the £1621.82 which would otherwise have been owed to the Applicant, producing a net total payable to the Respondent of £68,378.18.

233. The Court is very much mindful of the substantial amount of that sum and that the only apparent way in which it can be paid is to raise the funds from the members of the Applicant company at not insignificant cost to each of them. However, the amount to which the parties are entitled is not determined by who is liable to pay that amount.

234. It scarcely needs stating that to the extent that any other repairs are required to the Building both now and in the future, it will be vital to address those effectively and without unreasonable delay, which will necessarily involve levying service charges on the lessees. It can only be hoped that any disquiet at the level of expense on service charges is outweighed by their realisation of the potential cost of failing to address repairs and the risks of disputes rather than co-operation and action. It is not for the Court to manage the Building and it is perhaps unnecessary to labour the points immediately above.

Costs and fees- Court and Tribunal

235. There are different but over-lapping jurisdictions which fall to be exercised by the Tribunal and by the Court. Costs were scarcely touched on in the hearing and has not been mentioned in the Written Submissions. It was identified in the hearing that practically dealing with costs would have to follow the issue of this substantive Decision.

236. That raises the question of how best to deal with such costs. In principle, the allocation to track and the length of hearing are such that there ought to be summary assessment of any County Court costs awarded, although it must first be determined to which party, if either, any costs should be awarded. Submissions will be required as to both the nature and amount of the costs order. Consideration will also need to be given by the Tribunal to any powers in respect of costs and how to exercise those, prior to decisions being taken by the Court.

237. On balance and with a little reluctance the Court and Tribunal have concluded that written submissions should be required as to costs. Directions will be given by the Tribunal in respect of both elements.

ANNEX - RIGHTS OF APPEAL

Appealing against the Tribunal's decision

1. 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 date this decision is sent to the parties.

2. 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.

3. The application for permission to appeal must state the grounds of appeal and state the result the party making the application is seeking. All applications for permission to appeal will be considered on the papers.

4. Any application to stay the effect of the decision must be made at the same time as the application for permission to appeal.

Appealing against a reserved judgment made by the Judge in his/her capacity as a Judge of the County Court

5. A written application for permission must be made to the court at the Regional Tribunal office which has been dealing with the case. The date that the judgment is sent to the parties is the hand-down date.

6. From the date when the judgment is sent to the parties (the hand-down date), the consideration of any application for permission to appeal is hereby adjourned for 28 days.

7. The application for permission to appeal must arrive at the Regional office within 28 days after the date this decision is sent to the parties:

    1. The application for permission to appeal must state the grounds of appeal and state the result the party making the application is seeking. All applications for permission to appeal will be considered on the papers

    2. If an application is made for permission to appeal and that application is refused, and a party wants to pursue an appeal, then the time to do so will be extended and that party must file an Appellant's Notice at the Regional Tribunal office within 21 days after the date the refusal of permission decision is sent to the parties.

    3. Any application to stay the effect of the order must be made at the same time as the application for permission to appeal.

Appealing against the decisions of the tribunal and the decisions of the Judge in his/her capacity as a Judge of the County Court

8. In this case, both the above routes should be followed.