FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)
and
IN THE COUNTY COURT AT GLOUCESTER

Tribunal Case reference	:	CHI/00HB/LSC/2023/0013
County Court claim	:	295MC500
Properties	:	First Floor Flat, 15 Linden Road, Bristol, BS6 7RJ
Applicant	:	15 Linden Road (Management) Company Ltd
Representative	:	Jonathan Stanniland (director)
Respondent	:	Leon Coles
Representative	:	Sajid Suleman of Counsel Dean Coles
Type of application	:	Transferred Proceedings from County Court in relation to Service Charges
Tribunal member(s)	:	Judge J Dobson Mr J Reichel MRICS
County Court Judge	:	Judge J Dobson
Date of Hearing	:	21st June 2023
Date of Re- convene	:	28th July 2023
Date of Decision	:	28th September 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 of £3020 are payable.**

2. **The Respondent's argument that he is entitled to set off is rejected.**

3. **The Tribunal will determine any matters as to costs following receipt of written submissions.**

Summary of the Decision of the County Court

4. **The Applicant's claim succeeds in the sum of £3020.00.**

5. **The Applicant's claim for interest is dismissed.**

6. **The Respondent's Counterclaim succeeds in the sum of £7300.00.**

7. **The Applicant shall pay the net sum of £4280.00 in damages to the Respondent in respect of his counterclaim within 28 days.**

8. **As to costs, the Court will determine by whom costs shall be paid and in what sum following receipt of written submissions in respect of costs and a summary assessment of the amount of such costs.**

Background

9. The Applicant is the freeholder of 15 Linden Road, Westbury Park, Bristol, BS6 7RJ ("the Building") and the Respondent the lessee of First Floor Flat, 15 Linden Road, Bristol, BS6 7RJ ("the Property"). The Property is situated on the first floor of a 3- storey former house now converted into 3 self- contained flats.

10. The Respondent became the lessee on 10th July 2015. The Applicant became the freeholder some time after the grant of the leases of flats in the Building and so in or shortly after 1988 (insofar as the information available indicates).

11. The Applicant is a lessee owned company. The members are the lessees of the flats within 15 Linden Road. There are 3 shares in the Applicant company and one share is allocated to the lessee of each flat. There are also 3 directors of the Applicant company, being the 3 lessees/

company members. More particularly the Directors are Janey Barrett (Flat 1), the Respondent, Leon Coles (Flat 2) and Jonathan Stanniland (Flat 3).

12. The Respondent Leon Coles and his father Dean Coles are referred to below by their full names below where relevant for the avoidance of confusion (save where Leon Coles is referred to as "the Respondent").

Procedural History

13. In May 2022, the Applicant filed a claim in the County Court under Claim No. 295MC500 [11- 15] for sums said to be due from the Respondent. The claim related to unpaid service charge, interest and costs. The stated value of the claim on the Claim Form was £4520.00 plus interest of £255.28, excluding the court fee paid (£205.00) which reflected that value and excluding legal costs on issue.

14. The principal parts of the £4520.00 comprised £3020.00 of rent/ service charges and two sums totalling £1500.00 (£900.00 plus £600.00) in respect of Counsel's advice. Interest is claimed at £0.49 per day to the date of issue and ongoing (necessarily more by the date of this Decision).

15. The Respondent filed a Defence and Counterclaim dated 20th June 2022[16- 21], including set- off against the value of the Applicant's claim plus an additional counterclaim stated to be for up to £10,000.00. What was in effect a Reply to the Defence and a Defence to the Counterclaim (and is described as such below) was produced on the part of the Applicant [23- 31]. An Order was made by Deputy District Judge Davies providing for the Respondent to provide better particulars of the Counterclaim, for a reply to that and other matters which was dated 12th October 2022.

16. The Further and Better Particulars were provided [35- 41]. The value of the Counterclaim was increased to some £55,490.00, although it seems that no further fee was paid and that increase was not so much the provision of more particulars of the Counterclaim as provision of a substantial addition to it. It is not apparent that there was any permission for that, although it is of no direct impact on the matters the subject of this Decision (see below). A response was filed by the Applicant [41- 51].

17. 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 by Order of District Judge Singleton sitting at the County Court at Gloucester and Cheltenham by Order dated 22nd December 2022 [59]. The Court file was transferred a time after that.

18. The history since transfer has been more involved than might have been hoped for. That the bundle includes some 72 pages of application

and Directions [52- 123] rather makes that plain in itself. Tribunal Directions were first issued on 25th January 2023, listing a case management hearing on 20th February 2023. Directions were then given permitting the parties to rely on the expert evidence of a jointly instructed surveyor in respect of the disrepair alleged by the Respondent and providing for scaffolding to be erected in order to provide access to the surveyor of the roof and areas at that level. That expert was directed to be Mr Mark Easton FRICS C Build E. The report was provided on or about 1st June 2023, rather later than had been provided for and reflecting difficulties in respect of the scaffolding. There is nothing to be gained by dwelling on any of that. There were also case management applications about matters other than the expert but those do not require recounting here. The County Court claim was allocated to the Fast Track (without awareness of the attempted increase in the value of the claim).

19. One issue that arose was that the Respondent wished to pursue a claim for diminution in value of the Property, where it was difficult to identify how that arose from the breaches of covenant alleged of the Applicant which may relate to the service charges, perhaps at least partially because of lack of sight of the Further and Better Particulars. That advanced that case more fully than the original Defence and Counterclaim, the latter having referred to the re-building of an extension by the lessees of the ground floor flat (Flat 1) and losses to the Respondent but being known to have been clarified. It was subsequently understood that the diminution was alleged to arise from the new extension and the grant of a licence for that [160- 177].

20. Following the case management hearing at which the County Court element of the case had been allocated to the Fast Track, the Respondent had sought re-allocation to the Multi Track. The Respondent asserted that the diminution aspect of the Counterclaim was of a value which would require allocation to the Multi Track. That would, if correct, have precluded the case from proceeding, requiring as it would a Circuit Judge or Recorder (or other Judge to whom it was released) to hear the case and resolving how that would fit with the matters within the jurisdiction of the Tribunal. The need to address how to deal with any further evidence, the potential need for cost budgeting and various other issues were identified. It was considered a practical inevitability that the listed final hearing would need to be adjourned.

21. A solution, if an imperfect one, was found in Directions given at a case management hearing on 15th June 2023, such that the part of the Counterclaim as related to matters other than the Applicant's repairing obligations was stayed, with only the part specifically related to repairing obligations and so directly relevant to the service charges claimed being proceeded with on the final hearing date listed. The stay also includes any part of the counterclaim proceeded with in respect of the front garden, also referred to in the Defence and Counterclaim and

firmly disputed in the Reply and Defence and other small elements. That was provided for in County Court order of that date.

22. For the avoidance of doubt, that left only the counterclaims in respect of water leaks into the Property and related lack of maintenance and repair to be heard in conjunction with the claim. Those were items (4) and (5) in the prayer to the Counterclaim, namely damage to the ceiling, replacement of them and redecoration claimed as £10,000.00 on the one hand (4), and, on the other, discount to the rent paid by the tenant of the Property on the other £2400.00 as at 2022 and said to be ongoing.

23. The bundle comprises, including the index, of 636 pages. That was supplied on 19th June 2023, the date having put back because of other interim issues. It was suggested on behalf of the Respondent that the bundle lacked documents the Respondent would have wished to include, notwithstanding that a lot of the material included already related to matters beyond the scope of the hearing. The Respondent provided an additional bundle on 20th June 2023 of 244 pages, particularly containing photographs although without descriptions and, to a fair extent, dates but also in part duplicating documents in the main bundle. Whilst the Court and Tribunal do not wish to encourage multiple bundles, which indeed should be avoided wherever at all possible, on this occasion it was determined that the additional bundle would be admitted and considered to the extent necessary. However, in fact no reference was made to any documents in the additional bundle in the hearing at any point.

24. Whilst the Court and Tribunal make it clear that they have read the bundles in full, the Court and Tribunal do not refer to various of the documents in detail in this Decision, it being unnecessary to do so. Where reference is made to 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. The Tribunal had not been able to consider the additional bundle from receipt of that to the hearing more than swiftly and in general terms, More significantly, there was no reference at all to any of the documents within it by anyone at any time, such that the Court and Tribunal did not consider it further in detail and do not consider it necessary to make more than limited reference to it in this Decision. Insofar as documents with that additional bundle are referred to that is done by the numbers being preceded with an "A" [A].

25. The hearing (see below) included receipt of oral closing submissions received but it was determined that additional submissions were required on one point and those could not be provided on the hearing date. Consequently, Directions were required to be given for parties to provide written submissions and those were timetabled. The dates were 28th June 2023 in respect of those from the Applicant and 3rd July 2023 in respect of those from the Respondent.

26. Those submissions were provided, although that of the Respondent is expressed as being from Dean Coles, his father, and not from Mr Suleman. That is not problematic in respect of Tribunal matters because a party may be represented by whoever they wish to, subject to a suitable authority having provided to the representative. It is problematic in respect of Court matters where there are important restrictions on representation. Given that the particular points straddle both aspects, the Court has considered the representations in this particular instance, insofar as they address the points about which submissions were sought. To an extent Dean Coles sought to go beyond that and the Court and Tribunal took no account of such matters.

27. It was necessary to arrange for the Tribunal to reconvene to consider those written submissions, to the extent that they addressed the legal point. Regrettably, difficulties arose with scheduling a suitable date. That and absences then caused delays with the drafting and agreement of the Decision.

28. Nevertheless, the Tribunal sincerely apologises for the consequent delay in the provision of this Decision.

The Lease

29. A copy of the lease ("the Lease") for the Property was provided within the bundle. The Lease [123- 149] is dated 5th September 1988. The parties to this dispute were in neither instance the original contracting parties under the Lease, although the Applicant is identified in the Lease as being the entity to which the freehold of the Building will subsequently be transferred, defined in the definitions in the Lease as "the Management Company". The term of the Lease is 999 years from 24th June 1988.

30. Clause 1 grants the Lease together with and subject to:

> "the rights and advantages specified in the Fourth Schedule"

31. It goes on to say the following, which lay very much at the heart of this case:

> "PROVIDED THAT every right and advantage hereby granted to the Lessee shall be exercisable only on the Lessee paying as and when the same shall become due from time to time the rent and the proportion of the Service Charge hereinafter covenanted to be paid by the Lessee……."
>
> "AND SUBJECT (as far as the same relate to the Flat and are still subsisting and capable of taking effect) to the covenants exceptions reservations and rights affecting the Property and referred to in the 1905 Conveyance"

32. The rights and advantages are also subject to payment of the yearly rent and:

> "ALSO YIELDING AND PAYING THEREFOR by way of additional rent by half-yearly instalments in advance of the 1st of January and the 1st of July in each year the proportion of the Service Charge referred to in Clause 3.2. hereof"

33. It should be added that the 1905 Conveyance is defined in the Lease but it is not apparent that any provisions it includes which may be relevant to the current case, neither party having provided it. Given that the Lease and the leases of the other flats in the Building are much more recent, the Court and Tribunal perceive the provisions will relate to the relationship between the freehold land and buildings as a whole and adjoining or neighbouring buildings and not the relationship between flats in the Building created decades later.

34. It will be noted that the Lease refers to the whole plot of land, including buildings as "the Property" and the Property as "the Flat" (although the Building is defined the same way as it is in this Decision) but nothing turns on that save for the need not to confuse one thing and the other, given the different definitions used in this Decision, which follows the usual approach of describing the dwelling the subject of the dispute as the Property.

35. There is also a definition of "Service Charge" and where this Decision refers to service charges, plural, it means where relevant that "Service Charge" as defined. The Service Charge is defined simply as "the cost to the Lessor of items in the Sixth Schedule".

36. Clause 3.1 sets out the specific covenant by the Respondent to pay the rent and clause 3.2 the covenant:

> "To pay to the Lessor as further or additional rent a sum equal to one-third of the Service Charge".

37. The contribution to service charges in the Lease is therefore provided to be one third. The accounts are provided to be conclusive in the absence of arithmetical error. It is provided that the payment is not limited to the amount of the Applicant's expenditure in the given service charge year and may in part be attributable to a past year or to future expenditure.

38. There is a separate provision in respect of the insurance premium (clause 3.3), which requires payment of one- third of that premium, against as further or additional rent. That is not provided to be paid in advance but rather:

> "within seven days of the service on the Lessee of a written demand thereof".

and that demand relates to insurance effected, suggesting the policy shall already be in place and been paid for.

39. There is interest payable "on the rent hereby reserved" at 5% above the bank base rate from time to time (clause 3.4). Given the terms of clause 3.1, that includes the service charges.

40. Clause 4.1.2 requires the Applicant to keep accounts of all expenditure incurred.

41. The service charge mechanism and related provisions are less clear than ideally they could be. Save in respect of insurance, it is not entirely clear how the payments of Service Charge required of the Respondent are to be calculated. There is not, at least in terms, the usual requirement for the lessor to provide a budget for the coming service charge year and ability to demand 50% of that sum on the payment dates, being entitled to any balance by which the expenditure exceeds the contributions so earlier demanded. That said, the payments are not provided to only be for expenditure already incurred, given that they can include sums for future expenditure.

42. The Tribunal concludes that the Lease therefore intends to provide for estimated service charges against costs expected that year but also including an element of catching up any shortfall on the previous year (hence the reference to past years) and so is in effect a balancing charge and payment on account combined, somewhat unusual though that is.

43. The obligations placed on the Applicant in respect of repairs and maintenance and other relevant expenditure are found in the first instance in clause 4, in which the Applicant covenants:

> "4.1.1. To carry out the works of repair and maintenance and care of the Reserved Property and all other matters referred to in the Sixth Schedule hereto.

44. The Sixth Schedule provides the Applicant's obligations, including in paragraph as follows:

> "From time to time and at all times during the term granted well and substantially to repair cleanse and keep in good and substantial repair and condition and sufficiently cleaned and lighted all parts of the Reserved Property PROVIDED THAT this provision shall not include any repairs or cleaning for which the Lessee is liable under Clause 3.6. 3.7.1. and 3.7.2. hereof or for which the holder of any other Flat Lease is liable"

45. The "Reserved Property" is identified in the Second Schedule as follows:

> "FIRST the entrance access drive paths and dustbin store forming part of the Property and not allocated exclusively to any Flat in the Building of any Flat Lease and the entrance hall stairways landings and other

parts of the Building which are used in common by the Lessor and the owners or occupiers of either the first or second floor flats SECONDLY the main structural parts of the Building including the foundations main walls and roof and all external parts thereof (but not the glass and frames of the windows of the flats nor the interior faces of such of the external walls as bound the flats)and all cisterns tanks drains sewers pipes wires cables ducts and conduits not solely used for the purpose of the one flat THIRDLY the boundary walls of the Property in so far as these may belong or be party walls"

46. The Third Schedule defines the Property but contains nothing which might be unexpected or on which any matter in this case turns. The lower and upper limits of the Property are the floors and the surfaces of the ceilings.

47. The Fourth Schedule reads as follows (the highlighting appears in the Lease):

> **"Rights and advantages appurtenant to the Flat (equivalent rights and advantages affecting the Flat being excepted and reserved):-**
>
> 1. The right (as at present enjoyed) of support for the Flat from the land on which the Building stands and from other parts of the Property and of support shelter and protection for the Flat from all other parts of the Property capable of providing the same
> 2. The right on foot only over and along the driveways paths and any other common accesses on the Property leading from Linden Road to the Building and over the corridors passages and porches in the Building
> 3. The right of drainage from the Flat and of the passage and running of soil water gas and electricity and telephone service through the several ducts pipes and wires laid or to be laid in or under over or through the Building or other parts of the Property and so that the maintenance of the individual connections of the Flat shall be the responsibility of the Lessee
> 4. The right if necessary to enter on any other part of the Property to repair any drains or water or gas pipes or electricity or electrical energy supply wires or telephone cables or any party wall or for the purpose of repairing maintaining or renewing the flat or any part thereof on giving prior notice (except in the case of an emergency) to the Lessor or other the occupier thereof and making good any damage caused
> 5. The benefit of all existing and future covenants by the Lessees of other parts of the Property to observe restrictions similar to those contained in the Fifth Schedule hereto
> 6. The right to keep one dustbin of a size and colour to be approved by the Lessor in an area allocated by the Lessor as the dustbin store together with the right of access thereto on foot only
> 7. The right to connect to and use the Television Aerial situate at the property

48. There is an obligation (clause 4.6) on the Applicant to take reasonable steps to enforce obligations placed on other lessees but subject to security being given in respect of costs arising.

49. There are also repairing obligations on the Respondent in respect of the Property itself (clause 3.7), but none identified by the parties as significant to the determination of this case.

50. The Respondent is required (clause 3.11) to permit access to the Applicant, agents and contractors by prior notice for the carrying out of work required to be undertaken by the Applicant, which must sensibly include any related inspection in respect of the works required and/ or which have been undertaken.

51. In respect of legal costs, clause 3.13 of the Lease provides that the Respondent shall pay as follows:

> "all costs, charges and expenses (including legal costs and fees payable to a Surveyor's fees) which may be incurred by the Lessor in or in contemplation of any proceedings under section 146 or section 147 of the Law of Property Act 1925 notwithstanding that forfeiture is avoided otherwise than by relief granted by the Court".

52. The provision therefore has relevance in respect of costs insofar as the Applicant requires a determination that a breach of the terms of Lease occurred in order to serve the requisite a relevant notice and potentially pursue any proceedings. Clause 5 entitles the Applicant to re- enter in the event of breach of covenant by the Respondent.

53. There are also repairing and painting obligations on the Respondent in relation to the Property- excluding those matters for which the Applicant is responsible-, but nothing turns on those in this instance. The remaining terms of the Lease are not directly relevant, neither assisting with the construction of the above terms nor directly addressing any matters the subject of this dispute.

The Hearing

54. The hearing was conducted on 20th June 2023 at Bristol Magistrates Court and Tribunal Centre.

55. Mr Stanniland, director of the Applicant and a barrister by profession, represented the Applicant company. The Respondent was represented by Mr Suleman, a barrister and in his capacity as such. Mr Stanniland provided a Skeleton Argument of 7 pages length, referring to one case authority and of which he provided a copy, although in the event the point to which that related was not pursued. Mr Suleman provided a Skeleton Argument of 4 pages length.

56. The first matter dealt with a case management application submitted on behalf of the Applicant late afternoon on 19th June 2023 for the

claim to be permitted to be amended to add a further £1080, being the unpaid service charges, including contributions to insurance, said to be due from the Respondent in July 2022 and January 2023 (£540 each time), together with interest on the sums. That was made as a Tribunal application on the application form used by the Tribunal. However, it was not related to a Tribunal matter. The amendment sought was to the claim. Hence it was a court matter. Preferably, that ought to have been made on an N244 form, although there is nothing to preclude an oral application at a hearing.

57. Nevertheless, the application was refused. There was no amended Claim Form (or Particulars) served in advance or even provided with the application and there had been no opportunity for any response in the event that any matters might have been advanced further to the rest of the Respondent's case. The Respondent objected because of the lack of ability to respond. Whilst the Claimant sought to add additional sums of the same nature as its existing claim and the application might well have been granted if made at a suitable earlier time, an application so late in the day and not in the proper form with the proper documents and creating potential issues with proceeding and potential need for adjournment of the hearing was unlikely to succeed.

58. Oral evidence was thereafter received from Jonathan Stanniland and Janey Barrett, the Directors of the Applicant, and from Leon Coles, the Respondent. Written witness statements were provided by Jonathan Stanniland [215- 241 excluding enclosures and 476 including the many enclosures] and Janey Barrett [178- 215 including enclosures which included several photographs] and also from Leon Coles [477- 486 excluding enclosures and 613 including the many enclosures].

59. There were also short witness statements from Natalie Coles [614] and Philip Miller [615- 616] but they did not attend. Mr Stanniland said that he had informed the Respondent that the evidence was not agreed and he submitted that any weight to be given to the evidence should have regard to that and that the witnesses had been kept away. Both the Court and Tribunal were cautious about their evidence unless corroborated.

60. The Tribunal additionally received written evidence [617- 636] from the single joint expert, Mr Easton of Easton Bevin Chartered Building Surveyors. The report of Mr Easton is dated 1st June 2023. He inspected the Properties on 30th May 2023. The report also included several paragraphs in which Mr set out his opinion about the Building and the remedial works required.

61. It is worth mentioning whilst dealing with the expert report that because of the delays touched upon above, Mr Easton needed to prepare his report more swiftly than he would have preferred and he indicated that he had provided less detail than usual (although not that there was anything which may have changed his opinion). The advocates stated that no issue was taken by either side with anything

said by Mr Easton. Neither side had sought to ask questions, seeing no reason to do so. The Court and Tribunal therefore accepted the report as provided.

62. The hearing also touched on the fact that Mr Easton identified that some of the effects on the Property arose from leaks within the top floor flat, of which Mr Stanniland is the lessee. That is mentioned in the Defence and Counterclaim by there was no identified basis for a claim against the Applicant in relation to those matters and matters which relate to those effects in the Defence and Counterclaim have not required determination (nor indeed to they form part of the portion of the Counterclaim the subject of a stay). The Tribunal has not therefore considered such leaks and effects determining this case, save insofar as it may be relevant to effects within the Property of matters the responsibility of the Applicant, as explained below. It is to be hoped that the leaks can be resolved by Mr Stanniland where still unresolved and that any matters arising can be resolved without the need for further dispute.

63. Given that in the course of closing submissions and matters in respect of which the Court and Tribunal required clarification, an issue arose about the terms of the Lease including a condition precedent relevant to the set- off and/ or counterclaim, the directions for oral submissions referred to above were made.

64. The Judge and Tribunal are grateful to all of the above for their assistance with this case.

65. This Decision seeks to focus on the key issues and, not least where 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. Not all of the various matters mentioned in the bundle or at the hearing 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 and so references to the parties making out, or not making out, their case in respect of any given point for which the onus is on that party to do so are to them doing so or failing to do so to that standard.

66. The parties' cases demonstrated considerable and longstanding difficulties between participants in this case, which are set out at some length in the written cases and including matters falling outside the relevant issues in this dispute (whether for determination at the hearing or the parts which were stayed). That was not helpful and indeed hindered dealing with the issues actually relevant to the matters to be determined in the claim and counterclaim. Whilst there are some comments made about future management of 15 Linden Road below, those do not form part of the substantive decisions. Equally, the

Tribunal and Court do not attempt to address the rights and wrongs of matters which fall outside of the issues to be determined in this case and nothing in this decision should be regarded as making any finding in that regard which goes beyond the matters which it is specifically necessary to determine in order to decide the particular case. The Court and Tribunal are, in particular, careful not to venture into any matters which might impact on the stayed part of the Respondent's Counterclaim any more than absolutely necessary.

67. The bundle included a number of colour photographs, both external and internal. The Court and Tribunal found those of considerable assistance in understanding the nature of the Property and were content that, with the assistance of the evidence given and those photographs, it was not necessary to inspect the Property. Neither party had requested an inspection take place or argued that any issue arose from the lack of one.

The Tribunal matters

The jurisdiction of the Tribunal

68. 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.

69. Service charge is in section 18 of the Landlord and Tenant Act 1985 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."

70. 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.

71. The Tribunal takes 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 Code contains a number of provisions relating to variable service charges and their collection. It gives advice and directions to all landlords and their managing agents of residential leasehold property as to their duties. 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.”

72. There are innumerable case authorities in respect of several and varied aspects of service charge disputes, but most have obvious direct relevance to the key issue in this dispute. Certain ones have been cited by Counsel and specific well- known ones are also referred to by the Tribunal.

73. In a number of case authorities 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. The case of *Wigmore Homes (UK) Ltd V Spembly Works Residents Association Ltd* [2018] UKUT 252 (LC) is an example.

74. However, 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).

75. *Cos Services Ltd v Nicholson and another* [2017] UKUT 382 (LC) (and 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.

76. 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 Service Charges payable and reasonable?

77. As noted above, it is amply clear from the Lease that the Applicant is entitled to demand service charges from the Respondent. That is unsurprising. The Respondent accepts that the sums claimed by the Applicant have not been paid.

78. The claim in respect of the Residential Lease made is for service charges said to be due on dates from January 2019. The total is £3020. As to exactly what that comprises as between contributions to insurance and to other service charges was not clear. However, as no

sums were challenged, the Tribunal finds the amount of service charges unpaid was that total figure and does not go behind it.

79. The manner in which service charges have been required in practice to be paid, other than contributions to the cost of insurance, is by the Applicant seeking payment from the lessees at a monthly rate. That is referred to as having been £60 and then being voted (including by the Respondent) to be increased to £70. More recently, it is said to have been increased to £90.

80. The Tribunal makes the obvious point that the above does not reflect the provision in the Lease, which required 2 half- yearly payments in advance of 2 specified dates, albeit that otherwise the service charge mechanism is less than ideally clear, as discussed. Mrs Barrett has described that when she purchased in 2008 the terms of the lease "was treated lightly" [178]. There is no reason to doubt that and in all likelihood it did not matter too greatly in practice when no issues arose. The difficulty, as so often encountered in the Tribunal, is that when issues do arise, failure to follow the provisions of the lease can go to compound those. The Tribunal notes that from January 2022, the demands have been bi- annual rather than monthly.

81. It is not apparent whether any demands made by the Applicant complied with statutory provisions. Copies of demands have not been provided to the Tribunal. That was queried at the hearing. The response on behalf of the Applicant was that the point had not previously been taken.

82. In line with what have been described as "the honourable traditions" of the Tribunal to, as an expert tribunal, takes points of its own motion where it considers those to be significant to the decision to be made, the Tribunal has carefully considered whether any issue ought to be raised by it in respect of compliance, either with provisions of the Lease or with statutory provisions. However, in this instance, where the Respondent has raised various arguments, was represented by Counsel at the hearing and it was indicated has received other advice and has not raised any query, the Tribunal has determined that it is not appropriate to take any point. The Tribunal has borne in mind that it does not have full details of any agreement reached, it does not have copies of the demands and it has not received any submissions, having determined that the points would not be taken and so not having sought any submissions on them.

83. The Tribunal has noted the assertion by the Respondent that he has paid sums equivalent to the level of service charge demanded into a separate bank account. However, that is of no assistance in itself (other than to support there being no query about the charges) and the Applicant is correct to say is of no benefit to it. Any obligation is to pay the service charges to the Applicant. The sums being held in another account does not amount to making such payment.

84. The Respondent stated that the specific reason was that he was not prepared to pay into an account "where I have no control". However, the Respondent has no entitlement to unilaterally not pay the Applicant and put the money into another account. It was implicit that the Respondent was suggesting the money may be mis-used, although other allegations were discontinued.

85. If the Applicant was to expend money in an inappropriate manner, the Respondent would have any appropriate remedy in respect of that. The possibility that such a situation might in principle arise and action then potentially be required, is no proper basis for failing to make the payment and cannot prevent the service charges remaining unpaid and due, assuming always that there is an amount otherwise payable by the Respondent.

86. It is appropriate to identify that in the context of his explanation in the Defence and Counterclaim, the Respondent made allegations that Mr Stanniland "has acted fraudulently". However, save for an assertion that Mr Stanniland had taken money from the company account to pay for what were said to be private legal fees- the allegations of fraud were not properly particularised in writing. Whilst the Respondent is not a member of a legal profession, he is a professional. It is important to emphasise that there is very firm guidance on the advancing of allegations of fraud in statements of case, which the Respondent did not come remotely close to meeting. Notably, Mr Suleman made no reference to the point. Leon Coles was asked about the matter by Mr Stanniland but the matters he asserted to be dishonesty were not, the Tribunal finds.

87. The particular allegation was not accepted and there is no apparent supporting evidence, indeed the Further and Better Particulars by the Respondent accepted that the money was for fees payable by the Applicant company in respect of the licence in respect of the ground floor extension. The Tribunal and indeed the Court have made no findings of fraud, firstly not needing to in order to determine the matters for determination and secondly because there is nothing like the evidence on which it might possibly do so.

88. It is also right to say, as the Applicant does, that the Respondent is a member of the Applicant company and has a right to vote at general meetings. He is also a director and so can vote at board meetings. The Applicant is able to advance his views at any such meetings and in related communications, albeit that he may find himself in a minority on issues such that the vote goes against his position. That is inevitable if the other two members and directors are aligned on the given matter but is an unsurprising result of there being three of each.

89. That is not a matter preventing the service charges being payable.

90. For completeness, the Respondent also asserted in the Further and Better Particulars that other than insurance contributions, payment

should be made as and when needed. However, the Respondent had no basis for seeking that in light of the provisions of the Lease, which does not so state. Mr Suleman was also instructed to take an issue that the insurance was not valid because of the state of repair of the Building but there was no evidence that the insurer had raised any concern. The Tribunal rejected that point. It was said that Dean Coles had made comments to the insurer about the condition of the Building which the Applicant did not accept, prompting further correspondence but nothing turns on that.

91. Additionally, the Respondent contended for the first time at the hearing that in any event the service charges were only payable where the services which the Applicant was required by the Lease to attend to were being provided. The Tribunal indicated that it regarded that as a far too literal way of referring to service charges. Sensibly, Mr Suleman did not seek to pursue the point further in those terms. This was not a case where for example there was a managing agent whose fees might be reduced for the quality of service: there was no equivalent cost charged by the Applicant.

92. Finally, the Respondent also sought to raise for the first time at the hearing that if the Applicant was not doing all it ought, the service charges should at least be reduced. However, that had not been advanced previously and was a new point. There had been no indication that any such reduction might be argued and it was at best unclear why it may be appropriate. The Tribunal did not allow the argument to be pursued.

93. The Applicant asserted that the last payment actually made by the Respondent to the Applicant was December 2018, which was not disputed, save that it was said that the Respondent had paid £300 to the insurance company that was being held as an over-payment, although it was not apparent when that might be applied or otherwise what might be done with it and it was plainly not a payment to the Applicant.

94. It was also not in dispute that by email dated 1st March 2019 the Respondent claimed that the justification for not paying was that an independent management company should be appointed to appoint accountants for a full audit. There was, not that anything turns on it, a dispute as to whether that would be proportionate, although it was said that no quotes had ever been provided.

95. Accordingly, the Tribunal rejects the Respondent's advanced reasons for not paying the service charges. They do not prevent the service charges being properly payable. As will be seen below, the Tribunal does find in favour of the Respondent in respect of disrepair but that is a separate point.

96. The Tribunal adds for the avoidance of doubt, although rather implicit from the Respondent's position that he has paid the sums demanded by

the Applicant into a separate bank account, albeit not to the Applicant, that the Respondent raised no argument that the service charges were unreasonable. That is either in his written case or at the hearing.

97. Therefore, on the cases presented, the Tribunal finds the service charges to be demanded by the Applicant which form the basis for this claim to be reasonable.

98. As identified above, the other £1500.00 claimed by the Applicant related to Counsel's fees for advice [474- 475]. Mr Stanniland said those related to forfeiture and not matters regarding the licence, although that was initially somewhat unclear in the hearing. He explained that the Applicant had sought to obtain payment of the service charge arrears from the Respondent's mortgage company, which is not an uncommon approach, but the company required evidence of action being taken, so advice was obtained.

99. It was not identified that the fees have been the subject of a demand for payment as service charges (or administration charges) by the Applicant of the Respondent. There is no manner in which the Tribunal considered that the sum could be properly regarded as forming service charges (or administration charges) recoverable in these proceedings. Mr Suleman put to Mr Stanniland that the fee notes referred to Mr Stanniland and not the Applicant company, to which it was explained that it was Mr Stanniland who contacted chambers, an explanation which the Tribunal regarded as sufficient, not that it mattered in respect of the claim.

100. Consequently, the Tribunal determines that the fees incurred must, at least at this time, be costs of and incidental to the litigation and so must be considered in the context of any other costs claimed in the case and form part of the costs assessment to be undertaken. It may be that if the fees are awarded, they are in due course then demanded as service charges or administration charges and payable as such. However, that will, if required, be a question to answer on another occasion.

101. Consequently, the Tribunal determined the £1500.00 not to be payable as claimed. They will be dealt with as costs of the litigation together with any other costs and in the manner explained below.

Set- off

102. The Respondent's case that he would be entitled to set- off any sums otherwise due because of the asserted breaches by the Applicant is therefore required to be dealt with by the Tribunal, although only to the extent of the £3020.00 which would otherwise be payable in light of the findings above on the cases as advanced. That is less than ideal where the Counterclaim is for a somewhat greater sum and the overwhelming majority of the potential value of the case advanced by way of set- off and counterclaim falls within the jurisdiction of the County Court. Nevertheless, the Tribunal cannot simply leave the

question to the County Court because it is for it to determine whether there are service charges payable and that necessarily requires determination of the set- off.

103. A question which is required to be answered by the Tribunal, and separately by the Court, is whether the terms of the Lease preclude any claim for set- off because any repairing obligation of the Applicant only arises if the Respondent has paid to it all of the service charges. That turns on the correct construction of clause 1 of the Lease. There is no need to repeat that clause in full. It also turns on the application of the wider law.

104. However, the law is different where consideration is not of actual service charges but rather of estimated charges. Set off can be advanced against actual service charges demanded, so sums which have already been paid out. It cannot be advanced against estimated service charges, so sums which may not yet have been paid and for which the exact sums may not be known.

105. It also necessarily follows that the Tribunal must consider whether the charges demanded are estimated charges or actual charges. The Tribunal considers in the event that the answer to the question is that they are estimated charges.

106. The Applicant has demanded round monthly sums. Those are plainly not wholly actual sums which have been incurred. They are contributions towards sums anticipated to be expended, although perhaps including elements of balancing charges for past expenditure beyond previously demanded sums. Whilst they may include such past elements, the extent of which is unclear, overall they are not reflective of sums specifically expended and must be regarded as estimated service charges.

107. The Applicant argued that the effect of clause 5 is that the clause prevents the Respondent having a claim for breach of Lease by the Applicant where the Respondent has not paid the service charges, because the Applicant's obligation to the Respondent only arises if the Respondent has paid the service charges. The Respondent's case was that the clause did not prevent that claim. Those will be relevant and returned to in relation to the Counterclaim. However, they do impact on the answer in respect of what have been found to be estimated service charges.

108. It follows that the claimed set- off does not arise within the Tribunal part of the case. In the absence of other challenge, the net effect is that the Tribunal finds the £3020.00 service charges to be payable.

109. There has been no argument that the service charges were not reasonable. Therefore, the Tribunal finds that they were reasonable.

110. The Tribunal has made no determination of any other matters in respect of set- off or counterclaim.

111. As referred to above, the Tribunal has not taken any point in respect of the nature of the demands and the Lease provisions. However, the Tribunal observes that to the extent that the approach being taken is contrary to the terms of the Lease, it can only survive if and for as long as the Respondent does not insist on the provisions of the Lease being followed. The Tribunal does not wish to add to the lines of dispute between the parties but considers that in practice those may be reduced if the terms of the Lease are followed and any issues which could arise in respect of that are removed.

The County Court issues

Claim

112. The County Court issues have been considered by Judge Dobson alone, having regard where appropriate 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.

113. The Tribunal has determined on the evidence presented and the arguments chosen to be advanced that the estimated service charges of £3020.00 are payable. The Court need not and cannot go beyond that determination.

114. It necessarily follows that the claim for payment of sums said to be due and found by the Tribunal be payable succeeds. As to whether that requires any payment from the Respondent depends on the outcome of the counterclaim and, as explained below, in the event it does not.

115. The Court has considered the claim for interest in those circumstances. It is a matter for the Court as to whether to award interest and in what sum, including where relevant at what rate. The Court notes the counterclaim is found below to exceed the value of the claim, such that the net payment is by the Applicant. The Applicant's position is also not helped by the lack of clarity as to how much was unpaid from any given date, although in the event that did not alter the outcome.

116. The Court does not allow the claim for interest in any sum and hence does not venture into consideration of the rate which may have been applicable.

Counterclaim

117. The Respondent's claim totals £12,400 as advanced, potentially added to by further loss of rent but without that being identified.

118. The Applicant admitted the responsibility to maintain and repair the reserved parts of the Building, without thereby admitting the claim for the reasons advanced by it.

Condition Precedent?

119. As identified above, the first question which is required to be answered in respect of a claim by the Respondent is whether the terms of the Lease preclude any claim for set- off because any repairing obligation of the Applicant only arises if the Respondent has paid to it all of the service charges and so the correct construction of clause 1 of the Lease.

120. Both parties' representatives made written submissions as invited to. Unsurprisingly, those referred to the authorities of *Yorkbrook Investments Ltd v Batten* (1985) 2 EGLR 100 and *Bluestorm Ltd v Portvale Holdings Ltd* (2004) 2 EGLR 38 and the effects of them, although Mr Suleman had also referred to *Connaught Restaurants Ltd v Indoor Leisure Ltd* (1994) 1 W.L.R. 501 in his Skeleton Argument.

121. The Court has carefully considered the arguments. The answer in such situations is commonly relatively simple, most clauses and circumstances going some significant way short of amounting to a condition precedent and hence the determination being that there is no condition precedent. The judgment of the Court of Appeal in *Yorkbrook* has generally been regarded as setting quite a high bar for the wording used in a provision to amount to a condition precedent. It follows in such cases that whatever other view may be taken of any lack of payment by a lessee, there is no prevention of a claim by him or her.

122. In this instance, the contracting parties chose to use language which is less clear in terms of whether it amounts to a condition precedent or not than oft the case and which therefore requires somewhat more careful analysis.

123. Mr Stanniland argued that the Court should construe the Lease in light of the whole document, which he contended evinced an intention that the work of the Applicant would be funded by payment of the service charge by the lessees and it would be assisted by their co-operation, for example by giving access. He identified that the effect if differing interpretations should be considered. The principle of construction in light of the document as a whole is uncontroversial and is the approach taken by the Court.

124. 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."

125. 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."

126. Whilst neither party made specific reference to the above authority, the Court and Tribunal must apply the law. The authority is a well-established one. The effect of the application of it in the given case can be the cause of dispute, on the other hand.

127. Whilst *Yorkbrook* was a relatively recent decision at the time of the Lease and it might be expected that solicitors would be aware of it, there is no evidence of that even if it would be admissible and specifically finding that relevant to any of factors (iii), (iv) or (v) above ought to include it would, the Court determines, go too far.

128. Mr Stanniland sought to draw parallels between the particular clause considered in Bluestorm and the clause relevant here. He quoted a number of comments made by Buxton LJ in Bluestorm, including:

> "36. The lease in Yorkbrook, although similar to our lease did, not as clearly as does the present lease create a close linkage between the tenants and their payments on the one hand and the landlord and his responsibilities on the other, as I have set out above. In the context of a lease such as ours, and the scheme in which it forms part, it would be entirely understandable that the words in brackets were intended at least to carry some meaning. The landlord depends entirely for his

> ability to run the building on contributions from the tenants, and that is what the lease provides for.
>
> 37. I think that it may well be an acceptable approach to a provision such as that under consideration to say that it deprives the non-payer of the right to complain of the landlord's breach when there is a direct connection between the non-payment and the breach. Thus some, but not all, and probably not very many, defaults in payment would disqualify action by the tenant. Applying that view of it, the single tenant with a genuine grievance in *Yorkbrook* would not be disqualified. On the other hand a tenant such as *Portvale,* refusing to pay for the reasons that it did, would be. That, indeed, may be to state in more general terms a conclusion somewhat like that which I have already reached without reference to this disputed clause"

129. Mr Stanniland also referred specifically to part of the judgment of Nourse LJ, in which it was said:

> "48. ... the tenant had evinced a fixed intention not to be bound by his obligation and had thereby disentitled himself from claiming the benefit of the lessor's obligation
>
> 49. ... the express words of the lease import its own principle of benefit and burden and no court of equity could, on the facts, allow the tenant to recover"

130. The above identifies that default in payment by a lessee could preclude a claim by him or her, but as a relative rarity. It highlights the particularly unsatisfactory approach of the tenant in that case. The facts of *Bluestorm* were described as "extraordinary". Although the Court of Appeal in *Bluestorm* expressed some doubt about the approach taken in *Yorkbrook*, it confined itself to distinguishing the judgment on the facts and did not interfere with the wider principle.

131. Mr Stanniland argued that the Respondent was not in a position similar to that of Batten but rather one more akin to the position of the lessee Portvale. Hence that the Respondent could not claim the benefit of the Applicant's repairing obligations in this instance. Dean Coles predominantly addressed the question of why work had not been able to progress, contending it was not the fault of the Respondent, although it was accepted that the Respondent had not paid the service charges.

132. The Court does not find the Respondent to be in a position akin to that of Portvale and to have acted such that he cannot rely on the provisions of the Sixth Schedule. The key finding made is of failure to pay service charges, not other matters, which the Court does not find of itself and set against inadequate response by the Applicant to the need for repairs to preclude reliance.

133. It is also of some relevance that on the basis of the costings given by Mr Easton, even the patch repairs could not have been funded by anything like the amount unpaid by the Respondent. In practice, it would only

have been, and will only be, at such time as sufficient sums were/ are now demanded and paid that the required works can be carried out. Payment by the Respondent would have given the Applicant some further funds and may have enabled some works but it is far from clear those would have been nearly sufficient. Hence, the link between the failure to pay and the lack of the necessary maintenance works has not been sufficiently demonstrated. The point made on behalf of the Respondent about the sums sought by the Applicant as against the cost of the works required was a good one.

134. The Court finds that the Applicant did not take sufficient steps to appropriately investigate the condition of the roof and otherwise the exterior of the Building, which is also relevant to any link between non-payment and lack of works. To the extent that access to the Respondent's flat was sought, it is disappointing if that was not facilitated but it was not by a surveyor and there could not be access to the external areas from the flat. It is far from clear whether assistance would have been derived from attendance by a contractor unable to properly see the roof and chimney. The Court determines that it does not need to make findings about the particular details of any contacts between the parties about access in those circumstances.

135. Hence the Court determines that on the correct construction of the Lease, the defence of set- off and the Counterclaim can be pursued.

136. In any event, if there is a condition precedent and the Court is wrong about the above, the Court holds that the provision would in any event not prevent the Counterclaim, given the wording used as to what rights of the Respondent would be relevant.

137. As identified above, the wording of clause 1 refers to "every right and advantage hereby granted to the Lessee shall be exercisable……" Right and advantage is a quite particular phrase to use and such rights and advantages are indicated to be matters granted in the Lease.

138. The Court finds it significant in that regard that the Fourth Schedule to the Lease is headed "Rights and advantages appurtenant to the Flat (equivalent rights and advantages affecting the Flat being excepted and reserved):-". The same phrase (save for the plural, which would not be used to follow "every") is therefore used to describe the rights in the Fourth Schedule as is used in clause 1.

139. The Court determines that the reference to "every right and advantage" in clause 1 is to each and all of the rights and advantages listed in the Forth Schedule. It is not to any wider legal rights that the Respondent may have had or have come to have. If the contracting parties had sought to refer to wider matters, the Court finds that they would have done so. The phrase used being so particular was, the Court finds, chosen deliberately and to refer to the matters referred to using the same terminology in the Fourth Schedule.

140. A condition precedent would therefore prevent the Respondent exercising the particular rights and advantages identified but not others. Those rights and advantages include the right "of support shelter and protection", which must include the right to not having water leaking through other areas of the Building and similar matters. However, the phrase used does not encompass claims for breach of the Applicant's obligations to repair and maintain, whether pursuant to the Lease or the wider law. The phrase cannot be read so widely as preclude any such claims.

141. It follows that the Respondent's entitlement to have works undertaken to attend to the disrepair to the roof and related were not limited.

142. The Court notes in passing that the Applicant does not obviously appear to have considered that its obligation were limited in the absence of payments by the Respondent when it arranged for work to be undertaken in 2020, although it must be emphasised that the suggested perception of the Applicant in 2020, which may not have considered the point at all at that stage, has not been in any way relevant to the construction given by the Court.

143. Whilst the Court has reached the above conclusion in respect of the correct construction of the Fourth Schedule to the Lease, with the consequence that the Respondent's counterclaim can be argued, that is not an endorsement by the Court of the factual matrix, being that the Respondent has not paid service charges to the Applicant since 2018.

144. It scarcely needs saying- but it may do no harm for the Court to spell it out to the parties- that a failure by one of only three lessees to make payments of service charges which are intended to meet the cost of insurance, maintenance and the various other expenses which the Applicant must incur in managing the Building, is bound to leave the Applicant short of funds and ever more so as time goes on. It is bound to impact on that which can be paid for, with some elements such as insurance for the Building having to take priority, such that it is only such balance as remains which can then be used for other elements of management, including repairs and maintenance. It is bound to be a source of frustration to the other lessees and a source of potential disagreement. As the Court returns to the point to an extent below, it is unnecessary to say more at this stage than to recommend that the Respondent reflects on these observations.

Works required and effects

145. The next question in the circumstances is what elements of the Residential Property require repair and/ or decoration, from when did any given one of them impact on the enjoyment by the Respondent of the Property- whether the same time or a later one when did they become pursuable and also whether there is any defence open to the Applicant where they have not been dealt with to date. The related

matter, if relevant, is the value in damages payable to the Respondent which should be attributed to any breach by the Applicant.

146. The relevant elements of the Property referred to in the Defence and Counterclaim are areas of water penetration into the Property and effect said to arise from that, although those include the leak from the flat above not the responsibility of the Applicant, as explained.

147. It is only in response to Directions given in these proceedings that a surveyor has been instructed and that scaffolding has been erected which enabled the surveyor to gain appropriate access and hence be able to prepare an opinion about the disrepair.

148. The Court has carefully considered and is content to adopt the expert opinion expressed in the report of Mr Easton as to the elements of disrepair requiring work which form part of that pleaded Counterclaim. Those comprise areas of damp penetration to the ceilings of the Respondent's flat in the kitchen, the bedroom and the lounge.

149. In respect of the lounge, there was an area of ceiling recorded as having been removed and no part of the ceiling with staining or similar effects was identified- the size of that is unclear (there is a photograph in the additional bundle which may show the area but which is difficult to scale, amongst other photographs whose subject matter and/ or date is unclear). However, Mr Easton was plainly content that the evidence he found within the roof void supported there having been water penetration and the Court accepts that. He described the lounge as being the "area of largest damage".

150. In respect of the bedroom, a small section of ceiling had been cut out and there was staining above, which staining the Court understands to be consistent with leaking from the roof and water penetration into the bedroom affecting the ceiling, and there was a photograph of damp staining and blistered plaster in another area. Mr Easton identified defective leadwork to a dormer window above.

151. Mr Easton also identified that he had been informed by the Respondent that there had been water appearing around the extractor fan in the kitchen, constructed in the chimney flue. Although there was no sign of that at the inspection, Mr Easton had "no doubt" that element was correct and the consequence of a number of external defects to the chimneystack with which the internal effects described were consistent. In addition, he saw bubbling of the ceiling paper in the middle of the kitchen, recording that the Respondent said that there had been damp penetration there previously. Mr Easton's opinion was that was likely to be due to one or more of four external defects identified.

152. Mr Easton identified no physical signs of damp penetration to the hallway but noted the assertions of the Respondent with regard to the effect on the fire alarm and a smoke detector and identified the leak from the flat above with the assistance of access to that flat. As

identified above, that is not the responsibility of the Applicant and so there was no impact on that room which is relevant to this case.

153. The opinion of Mr Easton is that the roof of the Building is in need of maintenance and repair. There are issues with tiles, defective flashing and similar. He identifies missing pointing and open joints to the ridge. He also notes ineffective bitumen repairs to the chimney stacks and party walls. Mr Easton's report support at least some previous work having been of inadequate quality. His very clear conclusion is that it is "perfectly obvious" that the water penetration results, aside from the hallway, from defects and disrepair to the roof of the Building.

154. Patch repairs to the roof are said to be possible, although Mr Easton's opinion is that will not "provide longevity" and would be a "false economy" That may support the Respondent's dissatisfaction with suggestions of patch repairs to an extent and desire for complete replacement.

155. However, and it is very important for the Respondent to understand this, it is ultimately for the Applicant to determine the works appropriate and whether patch repairs, provided those are possible as it seems they are in this instance but with the limits Mr Easton identifies, or replacement of the roof should be undertaken. Lessees cannot insist that the lessor adopts any specific course, the Respondent any more than any other.

156. The Applicant argued that in respect of ceiling repairs, the report of Mr Easton fails to distinguish between damage caused by the condition of the roof and external matters, the responsibility of the Applicant, and that caused by the leaking shower, the responsibility of Mr Stanniland as lessee of the relevant flat. Hence it was said there is a gap in the available evidence. However, the Court disagrees. The Court considers there to be sufficient evidence that works to the ceilings are a consequence of the leaks due to external issues, save in relation to the hallway.

157. It is of note that Mr Easton in respect of the lounge refers to evidence of water penetration is not clear about an ongoing problem. The loss adjuster instructed by the insurer of the Building appears to have considered the ceilings to the front of the Property to be dry as at October 2020, which the Applicant relies on as demonstrating that the works in March 2020 had been effective.

158. The Respondent's case is that in the addition to the matters apparent to Mr Easton at his inspection, there had water penetration to the extent of needing to use buckets to catch the water and to the extent that the Respondent and his partner considered themselves unable to remain living in the Property. However, it is not wholly clear whether any of the requirement for buckets is said to pre-date the works to the front part of the roof in March 2020 and to what extent those works

alleviated such a problem or where they continued to be required, if anywhere.

159. It is common ground that the Respondent no longer lives at the Property. The Court accepts on balance that a reason for that is the extent of the effects of disrepair, although not that it was necessarily the only reason.

160. The Respondent's case is that the Property been rented out since Summer 2021. As repeated below in respect of damages, it would logically follow that the Property in a condition capable of attracting a tenant to live there and that it was in a condition such that the Respondent was content to rent it out. Water penetration to the extent that buckets were needed to catch it is at first blush difficult to reconcile with that.

161. However, it appears that the Respondent tried to take some steps of his own and there is evidence from the tenant, Mr Miller, both by way of his short written witness statement and from contemporaneous text messages and photographs sent [609-613 (duplicated in the additional bundle)] of subsequent problems. Despite the lack of oral evidence, the contemporaneous evidence is compelling with regard to the issues at least in October 2021. The evidence demonstrates water penetration into the bedroom, hence below the rear part of the roof. Mr Miller's written statement suggests water penetration in the lounge at around or about the same time and states that as at 5th September 2022, the leak was "getting worse" in the lounge. There is an email and photograph [A19] which may show the lounge with water or water staining to the floor. Other parts of the statement deal with matters beyond the disrepair the responsibility of the Applicant. He does not state the rent paid by him.

162. The evidence of Natalie Coles is that she rented the flat from January 2023 for £1000.00 per month, a reduced rent because of knowledge of the leaks, although there is no indication of what the rent might otherwise have been and to what extent it was reduced to reach that monthly figure and it is not clear what, if any, relationship there is, other than as landlord and tenant, between Ms Coles and the Respondent and particularly whether or not the shared surname is or is not coincidence, something neither side referred to. She describes leaking water into the bedroom on 14th January 2023 and mentions later concern with the kitchen ceiling (as well as referring to matters not the subject of this Decision), although does not refer specifically to the lounge.

163. Overall, the Court finds that evidence from the tenants and the work which Mr Easton considers to be required is consistent with ongoing problems and the work in March 2020 only having temporary effect. In light of that evidence, the Court finds that is correct.

Time for undertaking works

164. A party required to undertake repair and/ or maintenance work being given a reasonable time to do so from the date when the problem first arose or was first reported (principally dependent on whether within an area occupied by the party bound to repair- see for example *British Telecommunications PLC v Sun Life Assurance Society PLC* [1996] CH 69- or by the party requiring a repair (at least subject to any unusual contract clause bringing forward the timing of the obligation)) is long-settled law. 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 a repair can be effected prior to the repairer being liable for breach of its covenant.

165. Whilst no specific submissions were made by, or sought from, Counsel in respect of the time for the undertaking of any relevant works, it is difficult to identify what submission could have been made by either Counsel which might have altered the Court's view as to the relevant legal position. Thereafter, the question becomes what findings of fact the Court considers appropriate on the evidence produced.

166. It is common ground between the parties that on 27th August 2019, the Respondent complained of water leaking into the Property. It is apparent that those problems existed at that time and the Court infers from the available evidence that the Residential Property suffered internal problems from the roof disrepair by way of the damaged decoration to which the Respondent referred in his Counterclaim. The problems identified related to the front part of the roof, which it was said enabled water to travel into the ceiling. In addition, report of water penetration to the hall was made (although the cause of that water has subsequently been identified not to be the responsibility of the Applicant) because of asserted problems with the chimney.

167. The email making those complaints also states that the Respondent told the Applicant the previous year that work to the roof was required. It is not said that any effects were experienced and so the Court takes matters from the email onwards. Leon Coles in oral evidence also asserted that his father had reported the chimney requiring work and that his wife written in 2014 but Dean Coles was not a witness at all and Leon Coles' wife did not give evidence (assuming that she is not Natalie Coles, although if she is she also made no mention of any report in her written statement). There was in the Respondent's additional bundle a document from Dean Coles through his building company dated 24th November 2016 [A6- 7]which did identify problems with the "front party chimney" as described. That therefore provides support for there being problems in themselves. However, there was inadequate evidence as to whom that was sent and when and in any event, it focussed on external building works and did not assist in demonstrating earlier effects on the Property itself, which the Tribunal found had not been proved.

168. In addition, it is common ground that on 29th August 2019, that Mr Stanniland asked the Respondent to obtain quotes for work to the roof of the Building. It is said that the Respondent did not do so other than for full re- roofing [A28- 29 and A35- 36], which it is implicit the Applicant did not regard as necessary, although see Mr Easton's opinion). However, there was no need for the Respondent to obtain such quotes. It was for him to inform the Applicant of disrepair and/ or effects: it was for the Applicant to then attend to the works required, including undertaking any relevant investigation, instructing any relevant expert and obtaining any relevant quotes or estimates. An argument that the Respondent was at fault for failure to take steps which were the responsibility of the Applicant was doomed to failure and does fail.

169. The Applicant's position was that it was hard to see how the roof could be leaking as badly as claimed where no damage was being suffered by the third floor flat. However, matters are not as simple of that. It is well- established that the place of water ingress and the place of where it is seen within a property may be quite different, given the way in which water tracks, an issue encountered frequently in cases before the Tribunal and so by the Judge when sitting in that jurisdiction. In any event, the report of Mr Easton reaches very clear conclusions, demonstrating that the Applicant's doubts were not well founded. Mr Suleman argued that a proper inspection then, in the manner of that of Mr Easton's would have revealed the defects and the Court accepts that as likely.

170. The Applicant also asserts stalemate followed because the Respondent would not engage in meetings or pay service charges (and because of placing the burden of considering how to proceed on the Applicant with the Respondent not obtaining quotes for the works but there is no need for the Court to repeat the parties' obligations as to that). Given the obligation on the Applicant to address the required works, the Respondent not engaging in meetings is not an answer: given the determination about the lack of condition precedent, neither is the lack of payment of service charges a complete answer.

171. It is said that roofers attended in or about late 2019 and described the roof as being in good repair with no obvious signs of water ingress. However, only in 2023 has there been surveyor opinion and the advantage of access via scaffolding. The opinion said to have been expressed by the roofers cannot be reconciled with that evidence of the surveyor, which the Court prefers and accepts. Given that and the assertions of leaks since 2019 which the Court finds consistent with the opinion of Mr Easton, the Court finds that the problems did arise in 2019 and, save in respect of some effects (which are not clear) from the front portion of the roof, continued.

172. The Respondent's case was that the Applicant had promised previously to instructed a surveyor and that the Respondent had been asking for

that since the leaks arose and further that diagnosis by surveyors from the ground was not possible due to the height of the Building. It is unnecessary to make any finding other than that there was no such instruction, at least until the direction for the appointment of a surveyor made by the Tribunal.

173. In terms of actual work since 2019, the Applicant's case was that works to the front of the roof were successfully undertaken at the attendance in March 2020, although that rested on the loss adjuster in October 2020 identifying the ceilings to the front part of the Property to be dry and it will be appreciated that the Court accepts success only temporarily.

174. It was also said that the workmen returned to carry out works to the rear part of the roof the following day but that those workmen were sent away by the Respondent or his father. It was also said that Dean Coles had also complained that if the work to the roof proceeded, it may impede their surveyor and "look as if you were trying to cover things up".

175. That assertion is of potential relevance to the Respondent's claim for damages and to mitigation of loss. If problems had been capable of resolution in 2020 but for prevention of the works by or on behalf of the Respondent, necessarily issues arising from 2020 to the present may not have arisen. However, the Court finds it to be unlikely from the report of Mr Easton and the other evidence that the work which might otherwise have been undertaken in March 2020 to the rear roof would on balance have had no more than a temporary effect, if any. The Court has noted the work which was described to be planned in March 2020 [353- 354].

176. It follows in terms of the length of time of repairs being outstanding that the period is the end of August 2019 onwards in respect of work to the front of the roof and the chimney stack. In respect of the latter, whilst the Respondent was wrong about water to the hall emanating from the chimney, investigation of the chimney would have prevent the water penetration which subsequently occurred to the kitchen.

177. The relevant times for the Court to consider in terms of when the items became pursuable and whether the Applicant has any defence for not having dealt with them earlier are those. Necessarily any work could not have been undertaken instantly and as such the Court is required to determine the reasonable time for the undertaking of the required repair works after report of them having determined what such repair works are.

178. The Court considers in that regard that where defects have been known about since August 2019 and remain outstanding a reasonable time has long since passed and the Respondent has proved his case that the Applicant has not undertaken the work in a reasonable time such that he succeeds with his Counterclaim in that regard.

179. It appears clear that there were ongoing effects but not sufficient evidence of the position in late 2019 to require the period to be shortened. Taking a necessarily broad-brush approach, the Court considers that the reasonable commencement date for the works would have been a few months after problems requiring attention were reported by the Respondent. The Court has had regard to the fact that the Applicant, unless it could point to sufficient urgency or other reason to dispense with consultation, should have been required to follow the statutory consultation process. That, including obtaining tenders and finding dates for the works, could have reasonably taken 7-8 months. The Court considers it would have been appropriate to allow a further 2 months for that work to be completed. Whilst Mr Suleman argued for 6 months overall, the Court considers longer to be reasonable.

180. Work may have been undertaken in or about April 2020 following that process. Whilst not determinative, the Court notes that would be about the ideal time of year for such works. It may be the time at which others also sought to have non-urgent similar works undertaken and so there may have been some flexibility required and the Court has allowed an extra month to provide for that. Applying that to the date of notice above, it follows that the repair works to the roof of the Property and the internal effects ought to have been completed by no later than around or about June 2020.

181. In the event, the works to the front part of the roof in March 2020 is therefore if anything slightly earlier than might have been expected, although it is not apparent to what extent any statutory consultation took place, if any. As no point has been taken with regard to that by the Respondent and as the Court is unclear as to any consultation and whether that was or was not compliant, the Court leaves the matter to one side.

182. No redecoration of the lounge of the Property was undertaken by or on behalf of the Applicant. Redecoration forms part of the repair work (see below). That redecoration consequently remained outstanding and in need of attending to, although effects moved on.

183. To any extent that new problems arose after March 2020, the same principles as set out above apply in terms of there being a reasonable time for the undertaking of works prior to a breach arising**.** The Court notes that the email in August 2019 did not identify effects in the bedroom. The first specific evidence is from October 2021, although the Court infers that there must have been effects in October 2020 because the loss adjuster is accepted as having identified that to the rear of the Building there was still leaking. The Court additionally finds on balance that the issues since March 2020 are in the main part and parcel of problems prior to that date and would have been resolvable had the situation existing in late 2019 been sufficiently addressed.

184. It merits mention in respect of timing of works that Mr Easton advises that the work which should be undertaken to the roof of the Building, whether patch repairs or replacement of the roof, should be undertaken before the winter. As to whether that is still possible if not progressed yet since the report may be another matter, both in terms of available time and, of obvious significance, funds being available to the Applicant.

185. The timing of work to the internal ceilings of the Property is a slightly different matter and it will be a matter for the Respondent to decide whether to have the works to other rooms attended to separate from the hallway affected by leaks from Mr Stanniland's flat.

Damages and mitigation of loss

Assessment of damages-

186. The period for which the Respondent is therefore entitled to damages for failure by the Applicant to undertake the works within a reasonable time is from June 2020 to the hearing in respect of the front part of the roof, the chimney stack and related, so in round terms 3 years. The period will of course have increased to date if the works have not yet been undertaken and will increase further until the works are undertaken but the Respondent will need to bring a claim in respect of those periods at a later date if relevant.

187. There are numerous case authorities in relation to the appropriate level of award for a tenanted house in disrepair. In broad terms, those held that a court should consider the appropriate sum for the discomfort and inconvenience and there was no single way of doing so but that once the Court had considered the value at first blush appropriate, the Court should step back and consider how that compared with the rent payable, considering the rent for the property in appropriate condition with the rent likely to be achievable for the property in the actual condition from time to time in consequence of the disrepair.

188. 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.

189. *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. Whilst the starting point was the resulting reduction in rental value arising from the disrepair it was not necessarily the end point.

190. The ground rent payable in respect of the Residential Property is not an appropriate yardstick as explained above, nor is the level of service charge albeit they were payable as rent. Neither bear any relation to market rent. The question is not those sort of sums paid by the Respondent to the Applicant but rather the rent which would have been achievable by the Respondent from a tenant.

191. The Residential Property is rented out by the Respondent and not, for the last 2 years before the hearing, been occupied by the Respondent. The Applicant understandably points to the fact of the Property having been rented out since Summer 2021, which the Respondent did not dispute and the fact that the Property was not uninhabitable. The Court makes the obvious and inevitable finding that Property has not been demonstrated to have been incapable of renting out because of the effects of lack of repair and maintenance, (certainly beyond effects of the leaks from the shower of Flat 3 which must be discounted). Indeed, it must follow that the Property in a condition capable of attracting a tenant. The witness statements of both Mr Miller and Ms Coles say that they knew there were leaks requiring attention from time to time but the Respondent must have content to rent the Property out, notwithstanding the obligations placed on landlords in such circumstances.

192. The Court accepts a potential impact on the rental value achievable. There is no firm indication of the market rent achievable for the Property in the event of a lack of disrepair: there is similarly none for the Property with any given level of disrepair. It is said that Ms Coles paid £1000 per month from January 2023, which gives some indication that was an appropriate figure for a flat in the condition it was at that time but given that it is unclear whether Ms Coles has any relationship with the Respondent other than as landlord and tenant, it is not identifiable whether the rate is a market one. An advantage of sitting as a Tribunal Judge might be said to be holding some knowledge as to market rents but that does not assist in this particular instance and so the Court has not formed any view on that basis and so been required to inform the parties of anything considered which falls outside of the submissions or evidence received from them in this case.

193. The Respondent contended that the reduced rent achieved was £2400 as at the time of the Counterclaim- and so in June 2022, which suggests claiming a reduction of £200 per month for the preceding twelve months, although that was not explained fully and how the figure was arrived at was not explained. Any claim beyond that date is unclear. The claim is very specific as to loss of rent and not to interference with enjoyment of property

194. The Court must necessarily be very cautious about the appropriate figure in respect of any reduced rental value where there is another source of water leaks and effects which must be set to one side and where the evidence of impact on market rental value is wholly lacking.

Equally, as identified above, that would be a starting point and not an end point.

Mitigation-

195. The Applicant argued that the Respondent failed to mitigate his loss by way of failing to accept a payment from the insurers of the Building. The Applicant said- and this was not in itself in dispute- that the insurer had agreement to make a payment of £2800 in respect of damage to the Property in 2021.

196. The Applicant particularly points to the fact that when Mr Easton reported, he expressed the opinion that the cost of repairs to the ceilings of the Property would be £4000 plus VAT including "protection, plastering and redecoration". It was asserted that with that in mind, the offer of £2800 had been a reasonable one, whereas the £10,000 claimed by the Respondent was not reasonable. Save for noting that the Respondent had obtained a single quote above that sum [A31] the Court only at this stage addresses the former.

197. The Respondent's written case read as if the insurer had only been agreeable to making payment to the Applicant, although in oral evidence the Respondent said that the insurer had said payment would alternatively be made to the contractor. Either way, he said that the roof would not have been fixed and so the cause of the problem would continue. The Court accepted the Respondent's position, finding that if the payment had been accepted, the Respondent would be in little, if any, better position. In addition, even if the payment had been made to the contractor to undertake internal works, it may have made little sense to undertake the works where leaks were ongoing and the newly undertaken work would have been very likely to be damaged. Indeed the Court notes that the loss adjuster does appear to have said [442] that payment had to be made to the Applicant. The Court also accepted that the Applicant had stated to the insurer that it did not support the claim [441] which is relevant.

198. Taking all of those points and without being wholly satisfied with the approach taken by and on behalf of the Respondent in respect of the claim, the Court determined that the Respondent had not, in that manner, failed to mitigate his loss.

199. However, the Court determines that by failing to make any payments of service charges from December 2018 and onwards and so depriving the Applicant of funds sought and particularly rendering there no discernible prospect of payment being made of any other sums, the Respondent did fail to mitigate his loss. The Court considers that must sound in the damages awarded to the Respondent.

200. Whilst the Applicant's assertion that it would undertake the works once arrears of service charges were paid was premised on it being entitled to adopt that approach, which it was not, has provided no defence to

the counterclaim, the fact that the Respondent was informed of that and could, as he should, have made the payments is relevant to his claim for damages which ought to be awarded, but tempered to reflect the fact that even if he had paid, the Applicant would not have held the funds for the works Mr Easton identified.

201. The Court does not regard the failure of Respondent to obtain quotes which were not his responsibility to obtain can be said to amount to a failure to mitigate loss. A failure to provide access- which is also mentioned into the Defence to Counterclaim- may amount to such but the evidence s insufficient for such a determination to be made.

202. In respect of the assertion that the roofer who undertook work to the front part of the roof of the Building in March 2020 refused to return due to the behaviour of the Respondent and Dean Coles, if that were correct, it may be that the works would have avoided or reduced the leaks and the effects on the Respondent. It is said that one reason was that the Respondent and his father required the roof replaced, rather than repaired. At first blush both that and the other matters said on behalf of the Applicant about the matter appear quite plausible. However, there is no evidence from the roofer himself of what is said to have transpired and why he did not return. The only direct evidence is from the Respondent, whose case (and oral evidence) was that he queried working off a ladder over 6 metres high and queried whether the work proposed would resolve problems. He said in oral evidence that the exchange with the roofer was amiable, although he indicated that there were also conversations between the roofer and a surveyor and his father, the details of which he could not provide. Whilst the Respondent's case about the point is not strong, neither is that of the Applicant and the Court finds that the Applicant has failed to prove its case on that point.

203. It is more generally unclear that the work then intended would in fact have resolved the problems in light of the opinion of Mr Easton. The Court does not find that the roof necessarily required replacement in March 2020 and particularly does not find that the Coles were entitled to insist on that. That said, the Court notes that to the extent that patch repairs would have been sufficient, there would have been several required. The Court does not find that failure to mitigate loss has for this particular reason been demonstrated.

204. Hence, failure to mitigate demonstrated is the failure to pay service charges to the extent that would have enabled work.

Appropriate level of damages-

205. Considering all of the circumstances, the Court determines that the appropriate sum in damages to reflect the disrepair to the Residential Property month by month is £100.00 per month for the period June 2020 to June 2023, taking months in the round rather than counting specific days. That amounts to £3700.00.

206. The Court accepts that on the basis that the Residential Property continued to deteriorate, there is argument for a greater sum for later months and a consequent lower one for earlier months but in the absence of any clarity as to the different effects during any given period, the Court is content that applying the same figure for each month is the best practically achievable and evens out.

207. For the avoidance of doubt, the Court has applied a discount to the amount of damages which it would have been minded to award if the Respondent had paid the service charges when requested and the Applicant had not thereafter undertaken the required work.

208. The Court has not made an award for any specific actual loss of rent as part of that or separately, determining that the Respondent has failed to prove any such specific loss on the evidence provided and so any interplay with the appropriate figure for interference with enjoyment was not required to be determined.

209. In addition, the Court accepts that the Respondent has suffered specific loss in respect of the internal remedial works, including redecoration cost, subject again to discount to allow for effects from the unrelated shower leaks and taking some account of the failure to mitigate loss on the part of the Respondent but with considerable caution, given that it is far from clear that all of the matters identified by Mr Easton would have been attended to and that the repair cost would have been lower (inflation aside).

210. The Court notes that in principle the Applicant could undertake all of that work- but see below about specific performance. In the absence of that remedy being sought, the Court accepts the Respondent is entitled to damages to pay for the cost of the works demonstrated to arise from breach by the Applicant.

211. That means the cost in the lounge, kitchen and bedroom, not the hallway which arose from leaks from the second floor. The Court notes the lounge and bedroom to be the main rooms but only portion of ceiling replacement being required to each. The Court also notes that it is not clear that the ceilings required removal- the evidence supports them having suffered staining not collapse- other than to enable any temporary works by the Respondent of applying temporary sheeting, and where it is less then clear how appropriate and useful that was. The Court considers some reduction appropriate with that in mind.

212. Taking those matters in the round, the Court awards a further £3000 plus VAT in damages in respect of remedial works to the Property, including redecoration. The fact that this figure is only modestly more than the offer made by the insurers is not lost on the Court, but neither is that directly relevant, not least where that would not have been paid to the Respondent.

213. The Court rejects the Respondent's claim for his tenant having to move out for a week and any related cost. Mr Suleman argued for that in closing but as was pointed out to him, there is no evidence for it. Likewise, it was argued that the Respondent ought to be awarded £1000 for miscellaneous works but there was no evidence of what they were or why any may have been required, hence that was also rejected.

214. For completeness, redecoration arising from 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. The Respondent would in principle have been entitled to require the Applicant to redecorate in the course of undertaking remedial works but is entitled to damages in the alternative.

215. The overall award on the set- off and counterclaim is therefore £7300.00, from which should be deducted the £3020 of service charges.

216. The Court is mindful that the award of the above damages sum and the remainder of the sum found due to the Respondent will impact on the lessees- the Applicant will need to raise the funds. That or use funds which were to be utilised for some of the works. There are also significant works to be undertaken which will need to be paid for. However, in the event the sum involved by way of net damages payable to the Respondent is quite modest and, in any event, none of that is relevant to the Applicant's obligations.

217. The Court notes that if the Applicant had been able to amend its claim, a portion of the net sum payable as damages may not have been so payable. The Court also notes that further service charges may have fallen due prior to receipt of this Decision. Those fall outside of this claim. However, given the very clear finding that the Respondent is not entitled to withhold payment of service charges by instead paying into a separate account, the Respondent will appreciate that if the service charges unpaid are not agreed by him to be offset against the damages payable, the unpaid service charges will remain payable and that may prompt further proceedings, in which the Respondent might not, without wishing to pre-judge- have too great expectations. The Court has given a judgment on the claims which proceeded before it. Wider common sense ought not to be forgotten.

Specific performance

218. The Court has considered whether the Respondent is entitled to an order that the Applicant carry out the works to the roof and otherwise the structure and exterior of the Building which Mr Easton considers to be required. The Court does not consider it necessary to address matters internal to the Property which the Respondent can attend to and which have been dealt with by way of the award of damages.

Hence, this portion of the Decision concerns itself only with works outside of the Property itself.

219. The Respondent did not state a claim for specific performance of the Applicant's repairing obligation in his Defence and Counterclaim, or even the Further and Better Particulars. Counsel also did not address that and identify on what basis the Court potentially make such an order, still less on what basis such might or might not be appropriate. The Court determines that a remedy of an order for specific performance had to be specifically pleaded to be pursuable in this case. Also, the fact that the Respondent did not pay the required fee to advance a claim for an additional remedy is of some relevance, but in the event has not altered the outcome in any manner.

220. The Court adds that if the Respondent had advanced a claim for an order for specific performance, the Court would have needed to consider the appropriateness of such an order and does not seek to prejudge the outcome. If the Respondent wishes to pursue such a remedy, a case will need to be properly advanced such that it can be responded to. The Court perceives that the need for that may depend upon the manner in which the Applicant now responds to the report of Mr Easton and how the Respondent responds to his obligations to make payments. The appropriate approach to take would be a matter for a County Court Judge at any relevant time if an application is made. 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.

221. Finally and for the avoidance of doubt, no award of interest is made.

Costs and fees

222. There are different but over-lapping jurisdictions which fall to be exercised by the Tribunal and by the Court.

223. Both the Tribunal and the Court may disallow the recovery of cost of proceedings as both service charges and administration charges, the former pursuant to section 20C of the Landlord and Tenant Act and the latter pursuant to paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002. The wording used in each instance is not exactly the same but for practical purposes the net effect usually is. Whilst Mr Suleman referred to that in his Skeleton Argument, no paper applications had been made.

224. The Tribunal also has limited powers to award costs of Tribunal proceedings in accordance with rule 13 of The Tribunal Procedure (First Tier Tribunal) (Property Chamber) Rules 2013. The Court has a much wider jurisdiction to award costs between the parties.

225. Directions are given for written submissions as to both the principle of whether any costs should be awarded to either party and in what sum.

The allocation to track and the length of hearing are such that there ought to be summary assessment of any County Court costs awarded.

General Comment

226. The construction placed on the provision argued by the Applicant to create a condition precedent and the consequence of determining that the provision did not should not be taken in any way as an endorsement of the approach taken by the Respondent to payment of the service charges since the end of 2018.

227. This Decision contains criticism of both sides. It is plain that the relationships between the directors/ members/ lessees has affected perceptions and has been unhelpful. In addition, it scarcely ought to require stating, not least where there are only 3 flats and 3 lessees or sets of lessees, that the parties and the lessees need to find a way of working together in a sensible, practical and constructive manner. That is to say between themselves. Anything or anyone hindering that is unhelpful at best. In that way, the management of the Building, including its maintenance, may be capable of being dealt with in an effective and timely fashion. It may not be possible to please all 3 lessees at any given time but that is in the nature of things. Mr Stanniland suggested it to be central to the Respondent's position that Leon Coles wanted there to be an independent management company appointed- that was certainly the first reason given in writing for non-payment of service charges by the Respondent. It is not appropriate for the Tribunal to comment on the merits of that as against any other approach, falling outside of the determinations required in this case.

228. Nevertheless, failure by any of the lessees to pay service charges demanded and due pursuant to the Lease and statute, will stimy matters being attended to, with potential difficulties to one or more lessees, with avoidable conflict caused and perhaps with time and money expended on legal proceedings far better used in other ways. It will be appreciated that the Applicant owns a freehold of modest value and relies for funds to undertake the tasks required of it on the lessees as lessees and on the same persons as directors of, and perhaps most significantly, members of the Applicant company- the rights as between companies and members being separate to those between lessor and lessee. In that regard, the Respondent will appreciate that he is member of the Applicant company and can be called on to contribute a proportionate share of funds required- including, whilst it should be expected he will find this unsatisfactory- the damages payable to him.

229. The Tribunal and Court are mindful that there remains an element of the Counterclaim which requires to be determined and that will inevitably impact. The parties will remain in conflict until it is concluded. It is not appropriate to say anything specific about that element. The parties can apply to the Court to lift the stay if and when they wish to. The wider principles identified in the preceding paragraphs nevertheless hold good.

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.