FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case references	:	**LON/00AW/LSC/2021/0324** **LON/00AW/LDC/2022/0093** **LON/00AW/LDC/2023/0021**
Property	:	**Flats 3 & 4, 27 Lennox Gardens, London SW1X 0DE**
Applicants	:	**Tak Yi Stephanie Yeung (1)** **Destan Fuad Bezmen (2)** **Armada Overseas Limited (3)**
Representative	:	**Mr Daniel Dovar, counsel instructed by Child & Child**
Respondents	:	**27 Lennox Freehold Limited (1)** **Montalcino Property Investments Ltd (2)**
Representative	:	**Mr Sam Madge-Wyld counsel (12.05.2022 and 6.09.2022) and Mr Simon Allison, counsel instructed by Forsters LLP (10.05.2023) for the First Respondent; Mr David Peachey, counsel, (hearing 10.05.2023) and written submissions by Mr Stephen Jourdan KC and Mr Michael Ranson of counsel for the second respondent, instructed by Fieldfisher LLP**
Type of application	:	**Reasonableness and payability of service charges;** **Dispensations from Consultation Requirements.** **Costs orders.**
Tribunal	:	**Mr Charles Norman FRICS Valuer Chairman** **Ms Fiona Macleod MCIEH**
Dates and Venue of Hearings	:	**12 May and 6 September 2022 (remote); 10 May 2023 (face to face),**

		10 Alfred Place London WC1E 7LR
Date of Decision	**:**	**4 October 2023**

DECISION

Decision

The Tribunal finds:

(1) that all the Works and Additional Works fall within the scope of the repairing covenants in the Leases
(2) That dispensation under section 20ZA for the Additional Works should be granted unconditionally
(3) That the Works other than early strip out works were not started before the Artpol contract was entered into; therefore the second dispensation under s20ZA is not required.
(4) That the works were urgent works within the meaning of clause 4.7 of the leases
(5) That the contract cost from Artpol of £263,000 was reasonable as a contract sum.
(6) That reasonable and payable payments on account were
    i. For Flat 3 £33,182.66 and
    ii. For Flat 4 £34,176.39
(7) That applications under section 20C and Sch 11 Para 5A be refused.

Background

1. The application concerns the reasonableness and payability of service charges in respect of major works carried out to the lower ground floor of 27 Lennox Gardens SW1. This is an imposing mid-terraced converted house in Belgravia on basement, ground and four upper floors. It is Grade II listed. The service charges demanded for the first and second applicants was £37,955.77 and for the third applicant £36,852.15. The total expected contract cost was £263,038.45. Demands were served on 9 June 2021.

2. The demands are for payments on account. The sums in issue are payable in advance, based on an estimate of anticipated expenditure made before any of the remedial work has been done. They are therefore sums to which section 19(2), Landlord and Tenant Act 1985 applies; it provides as follows:

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

3. The case was heard over three days on 12 May, 6 September 2022 and 10 May 2023, following which further written submissions were invited and received. The long delays between hearing dates were caused in part by the unfortunate sudden illness of a witness, Mr Fifield, on 12 May 2022.

By the close of the case the Tribunal had to determine the section 27A application and two separate dispensation applications under section 20ZA. There were also applications under section 20C and Sch. 11 Para 5A in relation to costs.

The Applicants' Case

4. Mr Dovar for the applicants, set out his case which may be summarised as follows. The costs claimed are for the benefit of Flat 1, not the building. The lease does not permit recovery of such costs from the applicants. Further, the amounts have not been properly demanded under the terms of the lease. Flat 1 had suffered damp from at least 2007. In September 2020, Renlon [damp proof specialists] inspected. They identified damp and suggested an injection course and tanking. On 9 February 2021, the respondent served the leaseholders with section 20 notices for these works. In March 2021, the Respondent instructed IDCE [trading as Ian Drummond Consulting Engineers] to inspect. They reported rotten lintels and deteriorating brickwork. This amounted to additional work. On 19 April 2021, the respondent served the leaseholders with the second section 20 notice setting out two quotes. They also wrote separately and asserted that there was no other way of rectifying the ongoing damp without thoroughly damp proofing the walls to the flat with a specialist damp proofing company. In July 2021, the respondent entered into a JCT contract for the works, but not the additional works. The works were carried out. The Respondent has asserted that the additional works were also carried out, but the costs have not been demanded. The respondents have asserted that the cost of such additional works will come from the contingency, so there is no separate invoice for the additional works.

5. The works undertaken comprise the injection of a DPC course, installation of waterproof render to the walls and an epoxy resin damp proof membrane to the floor (tanking). There was also removal of items to Flat 1 to enable the works and making good and redecorating. The Respondent asserts that the additional works comprised repair of numerous areas of damaged and defective brickwork and dropped or broken brick arches and rotten timber lintels. It is not clear how the demands have been calculated.

6. The Respondent's obligation to repair does not extend to internal surfaces of Flat 1 as these are part of the demise. The existence of damp does not on its own give rise to an obligation to repair (*Quick v Taff Ely Borough Council* [1986] QB 809). The only items positively identified as being in disrepair were the lintels and brickwork. Whilst the applicants' expert [Mr Byers] speculated that there is likely to have been a damp proof course it is not clear as to its nature and extent. There are other competing causes of damp namely the neighbouring property.

7. A distinction must be drawn between part of the main structure in disrepair and those parts demised with Flat 1. The trigger for works was to make Flat 1 free from damp rather than to repair the brickwork and lintels. The internal plasterwork is within the demise of Flat 1. There is no evidence of any prior membrane resin or tanking of Flat 1. At best, all that is required is a DPC injection to prevent further brick or lintel deterioration. Repair of plaster saturation is not part of the landlord's repairing obligation. Tanking may also have a detrimental impact on the structure as it prevents water moisture escaping.

8. The only costs attributable to the works that could be passed through the service charge are those relating to the damp proof injection course which amounts to around £24,000 in total. The applicants are concerned that the respondent has left in situ rotten timbers and deteriorating brickwork which will require further works at a future stage. If the lintels are in disrepair those works should have been carried out now.

9. Further, the demands have not been made in accordance with the lease. They may be made as ad hoc demands under clause 4.7. However, in order to make such a demand the works must be urgent. The precondition is that the cost must not have been included in an interim demand. Accordingly on the true construction of clause 4.7, the landlord could not have anticipated including it in an interim demand. Clause 4.7 is not wide enough to encompass works now urgent because landlord has delayed undertaking them. The works are not urgent because the damp had been known about since 2007.

The Evidence of Mr Byers

10. Mr Dovar called Mr John Byers FRICS ACIArb who is a director of LBP chartered surveyors, 41-44 Temple Chambers London EC4. Mr Byers had submitted an experts' report dated 12 January 2022. That report contained the relevant experts' declarations and statement of truth. Mr Byers is a chartered building surveyor having qualified in 1987 and with experience of defect investigation and diagnosis, the specification of building works and building contract administration.

11. Mr Byers confirmed that he had inspected the subject property on 2 December 2021. He was instructed to opine as to whether the works undertaken to remediate the problem with damp to Flat 1 were necessary to maintain the fabric of the building, and if so to what extent. Mr Byers identified that by fabric he understood that to mean those parts of the building that are the landlord's obligation to maintain as set out in clause 5.2.1 of the lease [see below]. He further commented that the construction of lease clauses is a matter of legal interpretation.

12. Mr Byers summarised the history as follows. Another of the basement flats suffered damp penetration dating back to around 2007. He was told by the managing agent that similar damp proofing works have been carried out in around 2018 to Flat 6, another basement flat in the

building. From the letter of DRY architects [who acted for the first respondent] of 12 October 2021, adjoining properties had undergone basement works, including damp proof treatments and formation of a new deep basement. More recently widespread dampness was suffered by Flat 1. Remedial redecoration was carried out within the flat in 2013 and 2017, but no substantive damp proofing works. In 2019 specialist contractors were consulted. They provided an estimate in 2020. This led to a competitive tender and consultation. The works began in July 2021. Certain structural repairs were also considered necessary as described in letters and emails from a structural engineer Mr Ian Drummond of 21 July and 15 October 2021. The structural works were identified in March 2021 but do not appear to be included in the schedule of works save for a provisional sum of £1000 for making good brickwork. The leaseholder of Flat 1 has taken the opportunity to carry out certain other works of refurbishment and improvement within the flat which are noted separately in the schedule of works. Flat 1 is a basement flat situated at the rear of the building and there is a second basement flat situated towards the front of the building. The building was constructed as a single house about 140 years ago. It is of traditional construction of load bearing brick walls with various pitched and flat roofs. It is arranged on basement, ground and four upper floors and is Grade 2 listed.

13. Mr Byers opined that damp proofing works to Flat 1 comprise three elements: (i) an injected damp proof course into the walls, (ii) a waterproof render applied to the internal face walls and (iii) an epoxy resin damp proof membrane laid over the floor structure surface. This is linked and sealed to the render applied to the walls. These three elements together combine to provide a watertight seal intended to stop dampness penetrating the flat's wall finishes and affecting the interior of the flat. Without each of these constituent parts, the system would not be wholly effective. An injection DPC is commonly adopted but often not completely effective and usually insufficient on its own, particularly in basement situations which require additional measures, such as the render applied in this case. The waterproof rendering is to block dampness within the brick walls. Mr Byers' preference would be to use a flexible waterproof membrane rather than a cementitious render owing to likely future movement of the building. However, Mr Byers accepted that the landlord's approach to damp proofing the flat is a typical one commonly used by many surveyors in situations such as this.

14. Mr Byers referred to the additional works comprising structural repairs described in the letters of 21 July and 15 October 2021. These comprised replacement of rotten timber lintels, rebuilding of loose and crumbling brickwork, stitching, HeliBar[1] repairs to cracked brickwork, and reconstruction of dropped or broken brick arches. Mr Byers was unable to identify these works during his inspection because they had been concealed by subsequent damp proofing render and other plasterwork. However, from the description given he considered them likely to be works necessary to maintain the fabric of the building.

[1] A proprietary metal strengthening system for masonry

15. As to whether the walls have always been damp and whether that amounted to disrepair, Mr Byers evidence was as follows. As constructed, the original house would not have been built with damp resisting construction although a damp proof course was likely to have been built into the perimeter main walls, probably as a course of slates. The original basement would have been more damp and humid than acceptable for modern occupation. Mr Byers considered that when the flats were formed by conversion, they would have had to comply with building regulations in force at the time. Since 1965, building regulations require flats to protect occupiers from penetrating rising dampness by way of damp proof courses and damp proof membranes. Mr Byers would therefore have expected there to have been some form of additional damp proofing installed within the basement at the point of conversion. It was most likely that the additional damp proofing elements have deteriorated to some degree starting in around 2007 having worsened since then. Alternatively, or additionally, changes to the water table level have resulted in the damp proof systems in the basement no longer being effective.

16. In relation to the question as to whether any element of work was not necessary to maintain the fabric of the building, Mr Byers had analysed the spreadsheet of construction costs and attempted to try to separate those works that relate only to the DPC and structural works. The total contribution of Flat 1 from a letter dated 19 April from Fifield Glyn showed a total contribution of £46,643 being paid by Flat 1. My Byers opined that this seemed likely to be calculated by deducting the Flat 1 contribution of £46,643 from the total cost notified of £263,038 and then charging the set percentage of service charge proportion of 22% for Flat 4. Based on this approach Mr Byfield calculated that the cost of works likely to be incurred in connection with the DPC and structural works would be around £23,864 including a contingency.

17. As to whether the landlord should have been alerted to the damp issues earlier and whether their failure to act had increased the cost of repair, the landlord was aware of damp penetration problems in Flat 1 in around 2007. Mr Byers had not previously seen the flat which made it very difficult for him to comment on this. To be effective, damp proofing treatments need to be carried out in a continuous way creating seamless layers of waterproofing materials. Many surveyors would recommend re-treating the entire property including previous treated areas.

18. Mr Byers produced a supplemental report for his evidence at the hearing of 5 September 2022. My Byers was instructed to opine on whether the additional works were necessary, whether the cost of the additional works was reasonable and whether the need for the additional works resulted from the landlord's failure to maintain the property. From an email dated 21 July 2021 from Ian Drummond, [as referenced above], the additional works were said to comprise repair to rotten timber lintels, repair of loose and crumbling brickwork, stitching cracked brickwork requiring HeliBar repairs, reconstruction of dropped or

broken brick arches. Mr Byers stated that he had not inspected the building following completion of damp proofing works and his comments were given on the basis of documents and photographs provided to him. From those photographs he identified some defects consistent with repairs identified by Mr Drummond, but in the absence of fuller photographs he was unable to comment further. From the dispensation application, the cost of the additional works was £11,013.50. Based on available photographs, he had been unable to identify from the schedule every item said to be required in Mr Drummond's drawing, but he could identify £2,697.43 of work from the photographs. He valued other items of the additional works at £4,907.50 giving a total of £7600.57 as his valuation of the additional works.

19. The only description of structural works which he could identify in the main schedule of works were items 3.4 and 3.5 ["MG Brickwork" and "Preparation for Waterproofing – Bush Hammering"] both of which were provisional sums [£2,500, in aggregate]. The additional works contain repairs which he would expect to see set against those provisional sums and if necessary, against any contingency within the building contract. It would have been best to describe these works in some detail and obtain competitive tenders for that work.

20. The results of the tenders were included in the statement of estimates dated 19 April 2021. Mr Drummond's inspection was made in early March 2021 and his drawings dated 22 March 2021 revised on 8 and 13 April 2022. Consequently, these additional works were not subject to competitive tender. Mr Byers compared the cost of the HeliBar work against the Helibar cost of six recent building projects in which his firm had been involved. The average HeliBar tender costs for those was £82/m. Mr Byers' analysis was that the work would require 20 Heli bars and accordingly the cost charged was higher than had the cost been incurred following competitive tender. Mr Byers calculated the additional cost as £3,413 equivalent to 31% of the £11,014 charged. In cross examination, Mr Byers explained that his £82/m was based on 6 data points ranging from £49.20 to £118.75. He also agreed that the HeliBars used at the subject property could be shorter or fewer in number. He accepted that his HeliBar analysis might therefore not be fair.

21. Mr Byers was not able to clearly identify any additional works required as a result of the landlord's failure to maintain the property.

The First Respondents Case

22. Mr Madge-Wyld's skeleton argument may be summarised as follows. A damp proof course is part of the building structure; the existence of rising damp is prima facie proof that the damp proof course has failed and that the structure has not been kept in repair: *Uddin v Islington LBC* [2015] EWCA Civ 369. The DPC forms part of the main structure: *Luckhurst v Manyfield* [1992] LEXIS 1788. From Mr Byers' evidence, damp proofing elements deteriorated in around 2007 and accordingly

the respondent was under an obligation to remedy the existing damp proof course. Work to repair a defective part of the structure which also results in an improvement does not mean it ceases to be a repair; it is a question of fact and degree in each case: *Ravenseft Properties v Davstone Holdings Limited* [1980] QB 12. The use of better materials or carrying out additional work to conform with good practice does not preclude the works from being a repair: *Hounslow LBC the Waaller* [2017] EWCA Civ 45. The cost of other work such as strip out and restoration reasonably necessary to enable the repair to be undertaken are recoverable: *Tedworth North Management Ltd v Miller [2016]* UKUT 522 (LC). The new damp proof course is a repair. The purpose of the works was to repair part of the main structure, not protect it. The purpose of a functioning structure is to protect the building as a whole not just the structure. From Mr Fifield's evidence, additional structural works were undertaken.

23. The sums demanded were payments on account under clause 4.7. This clause did not require that the landlord be unaware that such works might be necessary; all that is required is that works are urgent and that no provision was made for them in the interim service charge. Mr Ian Drummond structural engineer discovered that the brickwork and lintels needed to be repaired as soon as possible preferably with the damp proofing works whilst access was available, and the building was fully exposed. This discovery and the need for the works to be combined with the damp proofing works made both sets of work urgent.

Mr Fifield's evidence

24. Mr Fifield is a director of Fifield Glyn, managing agents of 27 Lennox Gardens. He had not been involved with day-to-day management of the building since 2012. He had liaised with the directors of the first respondents in respect of all issues relating to the building including the preparation and service of demands for service charges and consultations pursuant to section 20 of the Landlord and Tenant Act 1985. Throughout his time working on the building, the lower ground floor has suffered damp issues both in common parts and within flats 1 and 6. He arranged for DRY architects and Renlon to inspect and take steps to remedy the damp in this area. In 2007 and 2013 damp was wrongly attributed to plasterwork within Flat 1 and the lessee remedied this at their own cost. In 2017 during refurbishment works to common parts, damp was identified in the storage cupboard in the lower ground floor, and this was sealed. In 2019 the damp recurred in the common parts. This was the subject of a section 20 consultation and costs recovered from leaseholders. No investigative works were undertaken in Flat 1 at the time, as it was let. In 2021 following delays as a result of the Covid pandemic, further works were undertaken within Flat 1, at which point the full extent of the damp became apparent.

25. In a report dated 21 September 2020, Renlon advised of the necessary works to remedy damp in the lower ground floor. The respondent

consulted Mr Drummond of IDCE, a structural engineer. The respondent has acted informally in relation to the building as the respondent is a resident-owned freehold company. Further, it has been working with Renlon, DRY and IDCE for many years. In 2021 the respondent was advised that the work should be completed urgently.

26. Mr Fifield was instructed to commence a section 20 consultation and served an initial notice on 9 February 2021. The initial notice described the works as "remedial works to the basement Flat 1 to address the damp in the walls and floors of the building". The statement of estimates was sent to the leaseholders on 19 April 2021. No leaseholder responded to any part of the consultation. The lowest estimate was from Artpol construction for £263,038 inclusive of VAT. Invoices were sent to all leaseholders.

27. Following the previous increase in size of Flat 5 a service charge reapportionment was carried out by Knight Frank. Consequently, Flat 3 is charged at 17.03% and Flat 4 at 17.54%. These figures are significantly below those stated in the respective leases. This has never been formally documented. The respondent entered into a JCT intermediate building contract with contractor's design 2016 on 21 July 2021. As of 31 March 2022, Mr Fifield's evidence was that structural works had been completed but as a result of non-payment by some leaseholders including the applicants the respondent had not been in a position to meet its obligations under the contract. Workers had been removed from the building which would delay completion of the 2021 works considerably. Consequently, Mr Rees a director of the first respondent had been forced to make a directors' loan to allow the 2021 works to complete. Artpol had threatened to invoke the interest provision within the contract. The leaseholder of Flat 2 was in breach of covenant on unrelated matters and for that reason had not been served with a demand.

28. Mr Fifield advised by letter to all leaseholders that Montalcino [the lessee of Flat 1] would be contributing £46,643 in respect of the 2021 costs in addition to its obligation to pay a proportion through the service charge. Flat 1 was not in need of any renovation and was in good condition prior to the 2021 works, save for the effects of damp. Montalcino agreed to make the Flat 1 contribution to account for any betterment as a result of the 2021 works. This was based on 10% of the costs of finishings where the same was replaced like-for-like to account for minimal wear and tear. Flat 1 agreed to contribute 20% of the preliminary costs and also waived its right to pursue the respondent for the loss of rent as a result of damp.

29. Mr Fifield together with DRY Architects prepared a 'contribution model' based on the condition of Flat 1. Where items were in perfect condition Montalcino would contribute 10%, where there was minor deterioration, the contribution was 20%, for older joinery the contribution would be 33%. For old vanity units the contribution will be 90%. Items solely of benefit to Flat 1 would be met at 100% of the cost. On 16 March 2022, DRY issued a certificate and Montalcino made a further payment in the

sum of £93,538 plus VAT to Artpol direct. This is in addition to the 2021 costs. Every attempt was made in 2021 to keep the costs to a minimum by reusing items capable of being reused.

30. Mr Fifield produced a second witness statement, given in support of the second s20ZA application. The specification was prepared between December 2020 and February 2021. During this period leaks were discovered in Flat 1 and Artpol was instructed by Montalcino to investigate. This required partial strip out of the ceilings of Flat 1. Simultaneously, Artpol was instructed by Montalcino to investigate noise issues which required a more extensive strip out of the ceilings of Flat 1. Whilst awaiting sound insulation materials, Artpol decided to remove the plaster on some walls in Flat 1. The above works cost £25,198.16. These were invoiced and paid for by Montalcino. An invoice from Artpol dated 2 March 2021 for £25,198.16, plus VAT (£30,327.80) was exhibited to Mr Fifield's witness statement together with a redacted bank statement from Artpol showing that this amount had been paid by Montalcino prior to the contract being signed [47]. The first respondent never instructed Artpol to carry out the strip out works and was never invoiced. Montalcino's payment for the strip out works was additional to the Flat 1 contribution.

31. Mr Fifield stated that it simply did not occur to him to explain the position regarding the strip out works when writing to the lessees and that the strip out costs would not be recovered by the service charge. The initial notice was served on 9 February 2021 and the specification was not amended to reflect the strip out works. This was because DRY prepared the specification and could not amend it as a result of homeworking caused by Covid. This would have also necessitated repricing by both contractors and risked increase in tender prices and further delay. The leaseholders have received the benefit of not having paid for the strip out works. The directors were regularly updated.

32. Mr Drummond attended on 25 February 2021 and took photographs which showed the strip out. On 19 April 2021 the second s.20 notice was issued to the leaseholders which included Artpol's estimate of £263,038.45 based on the specification. The cost of the strip out was deducted from the total price of the contract by DRY to avoid double payment.
    As there were no responses from the leaseholders to the notices the respondent selected Artpol and entered into the [JCT] contract. Extensive strip out took place in July 2021 and was charged to the leaseholders through the service charge. The cost of the extensive strip out was £7,522.50.

33. Mr Fifield accepted that the leaseholders should not have been billed for the strip out works referred to in the specification, but the final certificate will also take into account extension of time claims which are expected to exceed the value of the initial strip out. Therefore, the ultimate sums due will be in excess of the sums demanded in June 2021 and a balancing demand will be needed.

Mr Drummond's Evidence

34. Mr Drummond was instructed to opine on whether the additional works are urgent, whether or not they could have been identified prior to preparation of the works and/or the section 20 notices, whether the additional works could have been completed without the level of strip out undertaken, and the impact on the building had the landlord failed to undertake the additional works when it did.

35. Mr Drummond inspected the property on 25 February 2021 when extensive stripping out had taken place. This revealed numerous defects in the fabric of the building which detracted from its structural integrity. Mr Drummond exhibited photographs taken on that date. In his opinion, it was important for repairs be carried out as soon as possible to safeguard the inhabitants of the building. Much of the cost arose from removal and reinstatement of finishes. Had the structural work been carried out separately the overall cost would be significantly greater.

36. The full extent of defects can only be assessed following full strip out. That applied in this case when Mr Drummond attended on 25 February 2021 as Flat 1 had been stripped out and the brickwork and timbers exposed. Cracking and plasterwork cannot be taken as an indication of the severity of an underlying defect. Mr Drummond prepared structural drawings, sending drafts to the DRY architects, project manager in respect of the works and additional works. The draft drawings were sent on 8 March 2021 following which they were amended. As a result of this and the Covid pandemic there was some delay in the final drawings for the additional works which were issued on 29 June 2021. The additional works could not have been completed without a full strip out. Removal of the plaster disturbs the fabric of the building which if in poor condition may deteriorate at an increased rate. The poor condition of supporting brickwork will increase the loading on sound areas, leading to overstress of the structure. In a worst-case scenario collapse of part of the building is possible.

The Leases

37. Leases for flats 3 and 4 were provided and the Tribunal was informed that all leases are in similar form. The lease for Flat 4 is dated 3 May 2011 and granted a term of 999 years from 26 December 2010. The demised premises were referred to in paragraph 1 of the particulars and more fully described in schedule 1. Interim charge and service charge is defined in schedule 5.

38. Clause 4.6 requires the lessee:

> "to pay by way of further or additional rent the interim charge and the service charge at the times and in the manner provided in schedule 5".

By paragraph 4.7 the lessee covenanted:

"if in any year it shall prove necessary for the Landlord to carry out any urgent works to the Building and the Landlord shall not have included the cost of such works in the Interim Charge and the Service Charge then the Landlord shall have the power to require the Tenant to make a further payment on account of such reasonable sum as the Landlord may require for the carrying out of such works the said payment on account to be made within 14 days after the Landlord shall have sent the Tenant a demand for the same".

39. By clause 5.2 the landlord covenants under "Expenditure of Service Charge" as follows:

"5.2.1 the Building

(a) To maintain and keep in good and substantial repair and keep in good and substantial condition and (where necessary) to renew:

i. the main structure of the Building including the principal internal timbers and the exterior walls and the foundations and the roof and the main water tanks main drains gutters and rain water pipes (other than those forming part of the Demised Premises or the demise of any other flat in the Building)
ii (sic)[...]
ii. the Common Parts
iii. the boundary walls and fences of the Building
iv. [...]
v. all other parts of the Building forming neither part of the Demised Premises nor the demise of any other flat"

40. Clause 5.2.2 (f)(B) permits the landlord to employ managing agents surveyors builders architects engineers tradesmen accountants or other professional persons or contractors as may be necessary or desirable for the proper maintenance safety and administration of the building.

41. Clause 5.2.2(D) permits the Landlord "[to] do cause or to be done all such works installations act matters and things as in the absolute discretion of the Landlord may be considered necessary or advisable in the interests of good estate management for the proper maintenance safety amenity and administration of either or both of the Building and the Common Parts".

42. The demised premises are defined in Schedule 1 as:

"the self-contained dwelling known as Flat 4 27 Lennox Gardens comprising the suite of rooms on the second floor of the building or group of buildings and curtilage known as 27 Lennox Gardens London SW1 in the Royal Borough of Kensington and Chelsea in Greater London (the Building as specified in paragraph 2 of the Particulars) and shown coloured pink on the plan or plans annexed to this Lease including (but without prejudice to the generality of the foregoing):

(a) the internal plaster coverings and plasterwork of the walls bounding the said suite of rooms and the doors and door frames and window frames fitted in such walls and the glass fitted in such window frames; and
(b) the walls and partitions lying within the said suite of rooms and doors and door frames fitted in such walls and partitions; and
(c) the ceilings and the floors including the whole of the floorboards and the supporting joists and beams to which they are attached (if any); and
(d) all conduits which are laid in any part of the Building and serve exclusively the said suite of rooms; and
(e) all fixtures and fittings in or about the said suite of rooms and not hereunder expressly excluded from this demise

But not including:

I. any part or parts of the Building (other than any conduits expressly included in this demise) lying above the said surfaces of the ceilings or below the said floor surfaces
II. any of the main timbers and joists of the Building or any of the walls or partitions therein (whether internal or external) except such joists and beams as are expressly included in this demise and such of the plastered surfaces thereof and the doors and door frames fitted therein as are expressly included in this demise
III. […]

43. Clause 3 demises the Demised Premises together with the "Included Rights" set out in Schedule 2. These include at paragraph 1(b) the right to 'shelter and protection from the other parts of the Building as enjoyed at the date hereof'.

The Tender and Consultation Process

44. A notice of intention was sent on 9 February 2021. A specification was professionally prepared by DRY Architects. Quotes were sought and a statement of estimates sent to leaseholders on 19.04.2021. There were two tender responses. Artpol was the lower of the two at £263,038.45, including fees, contingency and VAT. Subsequently a JCT Intermediate 2016 was entered into with Artpol on 21 July 2021.

Legal Submissions by the Third Applicant

45. The Tribunal summarises a detailed submission as follows. The flat demise is an "eggshell" demise. The landlord's covenants at clause 5.2 [see above] is not only to keep in good and substantial repair but also to keep in good and substantial condition. These are distinct covenants. From *Credit Suisse v Beegas Nominees Ltd* [1994] 1 EGLR78, in these circumstances the covenantee need not prove disrepair but simply a deterioration in condition. In *Welsh v Greenwich LBC* [2001] L & CR 115, the Court of Appeal held that the lack of insulation causing

deterioration to decoration and chattels in a flat was a breach of covenant to maintain the dwelling in good condition.

46. The brick walls were outside the demise and were obviously part of the main structure of the building or alternatively were other parts of the building forming neither part of the demised premises nor demise of any other flat. The Renlon report of 21 September 2020 stated that the floor appeared to be formed from solid material overlaid with floor coverings. The solid floor falls outside the demise. Mr Byers' report referred to the installation of an additional damp proof course, the damp proof membrane having been installed when the basement flats were converted. His evidence was that these had deteriorated some degree starting in around 2007 and worsened since. In *Uddin v LB Islington* [2015] L&TR 35 the Court of Appeal held that a damp proof course was part of the structure. This was further supported by *Luckhurst v Manyfield* [1992] LEXIS 1788. In that case it was held that the DPC was wholly inadequate when installed and had further deteriorated. The landlord was held liable for breach of covenant to maintain and repair.

47. Prior to the damp proofing works the flat was plainly not in good condition. Further, the brick walls and solid floor could only give shelter and protection to Flat 1 if the property was damp proofed. From Mr Byers' evidence all three elements of damp proofing system were needed to ensure that water could not enter the building. The Works carried out by the landlord were a reasonable method of performing its obligations under clause 5.2.

48. The applicants were incorrect in asserting that the damp proofing works were improvements. In *Elmcroft developments Ltd v Tankersley-Sawyer* [1984] 1 EGLR 47 it was held that it was "a question of degree whether work carried out on a building was a repair or work that so changed the character of the building as to involve giving back to the landlord a wholly different building to that demised." On the facts of the present case the damp proofing works had not so changed the character of the building as to involve creating a wholly different building.

Further Submissions by the First Respondent at the hearing of 10 May 2023

49. The Tribunal notes the helpful submissions of Counsel. Of particular note was a concession by the First Respondent that that the costs of the soft strip out should have been excluded from the initial demands. Mr Allison submitted that the £25,198.16 referenced by Mr Fifield and paid direct by Montalcino included matters, other than the strip out.

Applicant's response to the legal submissions by the third respondent

50. Mr Fifield gave oral evidence that in 2013 Flat 1 had been taken "back to brick" although he was unable to say what had been installed at that time or what was there prior. There was no evidence of the work carried out

then. Accordingly, the assertion that there was already a damp proof course in the brick walls and a DPM laid on the solid floor is not the only conclusion to draw from Mr Byers statement as to the presence of damp proofing which was anyway only an assumption. There was no evidence as to what was actually done in 2013. There was no evidence of damp penetration via the floor and scant evidence of the need of any membrane to be added to the floor or the existence of any membrane prior to the works. There is no evidence of the floor construction. The letter from Renlon is of limited assistance as only the bathroom and kitchen floors were surveyed and only using a sonic rather than an electric damp metre. Further, the readings were only a little above the considered acceptable limit. Renlon were also contractors not independent surveyors. The injection of a damp proof course to the walls could have been done without the necessity of stripping out the entire flat. Accordingly, it was not reasonable to install a new DPM. Given the lack of evidence of any pre-existing DPM and water ingress through the floors that work was an improvement outside clause 5.2.

Findings

Witnesses

51. The tribunal found that Mr Fifield was an honest and straightforward witness who was doing his best to assist the tribunal. Unfortunately, his evidence was affected by his sudden illness whilst giving evidence on 12 May 2022 as a result of which proceedings had to be adjourned. The Tribunal generally found Mr Byers to be a clear and reliable witness and it accepts his evidence, with the exception of his HeliBar analysis (see below). The Tribunal found Mr Drummond be a clear and reliable witness.

The extent of the Demise and Nature of the Works and Damp Proof Course

52. The Tribunal accepts the first and second respondent's legal submissions. It finds that the lease of Flat 1 was an "eggshell" lease in that only the innermost portions of the flat were demised to the lessee. It finds from the Renlon letter that immediately below the floor covering was a solid floor structure, and no timber joists. It accepts the respondents' submissions that all the parts of the building subject to repair were within the landlord's demise.

53. On the clear evidence of Mr Drummond, Mr Fifield and Mr Byers it finds that the property was in disrepair and also not in good condition. There was clear damp penetration and structural defects to the walls. It finds that the works were clearly structural repairs within the lease and did not amount to improvements. It also accepts Mr Madge-Wyld's submission that recoverable costs extend to removing and reinstating structures and fittings owned by the affected lessee as a consequence of the repair works being carried out.

54. The Tribunal accepts Mr Byers' evidence that in his opinion a DPC had been installed at or prior to the conversion of the building into flats. This is because the Building Regulations in 1965 required that, and when the house was constructed, the basement would not have had a DPC to meet modern standards (although Mr Byers stated that there would have still been some damp proofing to walls). In his opinion, it is most likely that the DPC had deteriorated post 2007 or alternatively changes in the water table may have led to the DPC becoming ineffective.

55. The Tribunal accepts Mr Byers' evidence and the submission of the second respondent that all three elements of the DPC would need to be installed to ensure that the DPC would be effective in preventing damp penetration. It also finds that the method undertaken was a reasonable approach for the landlord to adopt. It does not accept the submissions of Mr Dovar that a DPC was not required to the floor or that relevant costs would be £24,000. From Mr Byers' evidence a full DPC of all three elements would have been required to comply with the building regulations 1965. The Tribunal considers it inconceivable that any form of DPC installed at conversion of the property would not have included treatment of the basement floor, because this would have been a clear breach of the building regulations. Even if that installation had been inadequate from the start, from *Luckhurst v Manyfield* (above) the landlord would still have been liable. Further, Mr Byers' evidence was that installation of a DPC should include re-treatment of areas previously treated. The Tribunal finds that Mr Fifield's evidence was unclear on the works carried out in 2013. However, it does not consider that the 2013 position impugns the respondents' case. There was clear evidence of current serious disrepair and premises being out of good condition when demands were served.

56. The Tribunal finds that the Artpol costs were reasonable having been the lowest quotation obtained following a competitive tender and subject to adjustment for (i) the Flat 1 contribution and (ii) the early strip out works (see below).

57. The lessee of Flat 1 received some betterment as a result of new for old replacements of fittings. This resulted in an enhanced contribution to the costs of the Artpol contract (excluding soft strip out) of £46,642.95 by Flat 1. The apportionment was carried out by Mr Fifield and DRY Architects and appears reasonable to the Tribunal although the apportionment was not disputed.

The First s20ZA Application for the Additional Works

58. It was conceded by the First Respondent at the hearing of 9 September 2022 that dispensation was required for the additional works. These are structural works to the walls. The Tribunal was enjoined in *Daejan Investments Limited v Benson and others* [2013] UKSC 14 to normally grant dispensation, which may be granted on terms, unless the lessee has proved prejudice. The Tribunal finds that this element of the work was

referred to in the estimates, but only as two provisional sums at 3.4 and 3.5 of the building contract. The costs of these works are less than the contract contingency and they therefore form only a small part of the contract price.

59. The Tribunal is unable to accept Mr Byers' HeliBar price analysis as sufficient evidence of prejudice suffered by the applicants. The sample size of the analysis was only 6, and it depended on assumptions as to the number and length of HeliBars used at the subject property. Mr Byers accepted that his analysis might not be fair. The Tribunal therefore finds that the applicants have suffered no prejudice in relation to this failure to consult. It therefore grants dispensation unconditionally.

The Second Section 20ZA application for Pre-Contract works.

60. The Tribunal finds that works were not carried out for the First Respondent prior to the JCT contract being entered into and that therefore this application (which was made on a protective basis) does not require a determination.

The Early Strip Out Works

61. At the hearing of 10 May 2023, the first respondent conceded that the applicants ought not to have been charged for this element in the clause 4.7 demands (see above). However, the quantification of this was disputed. Mr Allison for the first respondent submitted that the relevant value was £16,815.94 being the amount set out in the JCT contract. Mr Dovar for the applicants submitted that the relevant amount was £25,198.16 plus VAT, being the amount referenced in the Artpol letter of 10 November 2022 (see above). The Tribunal notes that the Artpol letter makes reference to ceiling works as well as the soft strip out. It therefore prefers to rely on the contract tender document. It finds that the adjustment required for early strip out works is the £16,323.65 referenced at OB 56 plus 10% contingency and VAT. This aggregates to £21,547.22.

Whether the Demands fell within clause 4.7 of the Lease

62. The Tribunal accepts the submissions of Mr Madge-Wyld as set out above that clause 4.7 did not require that the landlord be unaware that such works might be necessary. All that was required was that the works are urgent and that no provision was made for them in interim service charge. It accepts Mr Drummond's evidence that the discovery that the brickwork and lintels needed to be repaired quickly, preferably with the damp proofing works whilst access was available, made both sets of work urgent. Furthermore, work may remain urgent even if repairs are delayed.

Outcome

63. In light of the above findings the Tribunal finds that the following sums are payable by the applicants as payments on account:

Artpol Contract		£	263,038.45
Less Flat 1 contribution		£	46,642.95
Less Value of Early strip out works		£	21,547.22
Balance		**£**	**194,848.28**
Flat 3	17.03%	**£**	**33,182.66**
Flat 4	17.54%	**£**	**34,176.39**

Applications under section 20C and Para 5A Schedule 11

64. The applicants have been largely unsuccessful. In addition, the landlords in the Tribunal's judgment have attempted throughout to address a difficult and complex problem in a reasonable way. They have consulted professionals taken advice and acted on it. They prepared and tendered a professional specification and, subject to the additional works point, served the correct consultation notices and accepted the lowest quotation. The Tribunal is also concerned that a director of the first respondent Mr Lees has had to lend money to the first respondent to enable the works to continue. It also notes reference to extension of time claims which may be made by the contractors as a result of delay, adding to cost.

65. For these reasons there is no basis upon which the Tribunal could properly make the orders sought and both applications are refused.

Name: Mr Charles Norman FRICS Valuer Chairman **Date:** 4 October 2023

ANNEX - RIGHTS OF APPEAL

- The Tribunal is required to set out rights of appeal against its decisions by virtue of the rule 36 (2)(c) of the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013 and these are set out below.

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

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

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

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