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

Tribunal Case reference	**:**	CHI/45UB/LSC/2024/0006
County Court claim number	**:**	H7AY00G5
Property	**:**	17 Bonaventure, Sussex Wharf, Shoreham by Sea, West Sussex, BN43 5BH
Applicant	**:**	Sussex Wharf Estate Residents Association
Representative	**:**	Brady Solicitors
Respondent	**:**	Stephen Ward Dusauzay
Representative	**:**	---------
Type of application	**:**	Transferred Proceedings from County Court in relation to service charges and ancillary applications
Tribunal member(s)	**:**	Judge J Dobson Mr B Bourne MRICS Mr M Jenkinson
Date of hearing	**:**	27th February 2024
Date of Decision	**:**	26th April 2024

TRIBUNAL DECISION AND COUNTY COURT JUDGMENT

Summary of the Tribunal Decision

1. **The Tribunal determines that the service charges demanded by the Applicant from the Respondent are not payable.**

2. **No administration charges are payable.**

3. **In respect of costs for the Tribunal proceedings, the Applicant's costs may not be recovered against the Respondent as service charges or administration charges.**

Summary of the Court Judgment

4. **The Applicant's claim fails and is dismissed.**

5. **The Respondent's counterclaim succeeds in the sum of £3,800.00, that sum being payable by the Applicant within 28 days.**

6. **As to costs, the Applicant shall pay the Respondents costs and expenses in the total sum of £555.00, also payable within 28 days.**

   The relevant provisions are set out in the separate Order of the County Court.

Introduction

7. The parties are referred to by the terms on the frontsheet, adopting the usual descriptions given in Tribunal proceedings for the avoidance of confusion, whilst accepting the parties to have roles in both those proceedings and the Court proceedings and that different titles would ordinarily be used in the latter.

Background

8. The Applicant is the management company for Bonaventure, Sussex Wharf, Shoreham by Sea, West Sussex, BN43 5BH ("The Building"). The Respondent is the lessee of Flat 17 Bonaventure ("the Property"), having become so back in 2012. .

9. The Building is a purpose- built block of residential flats built in the early 2000s. The Property is a first floor flat.

10. Chamonix Estates, as they were originally called, were appointed as managing agents to manage the Building. The current name of that company is Firstport Property Services Limited. The freeholder of the

Building is Taylor Wimpey Developments Limited, the developer which built the Building and the Estate generally.

Procedural history

11. The original proceedings were issued in the County Court under Claim No. H7AY00G5 by way of a Claim Form, Particulars of Claim and attachments [6-56] as long ago as April 2021. The Respondent filed a Counterclaim. Following various Orders and a stay, the case was listed for trial in December 2022 [135], in April 2023 [140], September 2023 [141-142] and then was again for trial in the small claims track on 15th December 2023 [7]. The Court had insufficient time to hear the case. The proceedings were subsequently transferred to the Tribunal by Deputy District Judge Byfield by Order dated 15th December 2023 (not within the bundle).

12. Tribunal Directions were given and a County Court Order was made both on 16th January 2024 [5 to 10] and in the same document. The case was listed for final hearing. Observations were made as to potential need for expert evidence in respect of defects but the uncertainty as to the current position (with evidence and the Property). It was noted that a period of 3 years had elapsed since the issue of proceedings. The parties were given permission to apply to adduce expert evidence (or additional expert evidence) if appropriate.

13. Observations were also made about assertions made by the Respondent as to effects on his health and it was noted that the Respondent had been given permission to rely on evidence he had produced, although there was no formal expert evidence. The parties were also given permission to apply in relation to that. It was noted that the fact of a potential claim for personal injury and potential value of that had apparently not been considered matters requiring any allocation of the claim and counterclaim to a different track. It was further noted that careful consideration would be required at the final hearing as to whether any injury claim for deterioration of health conditions is suitable for determination, dependent on the assistance provided by the parties and the experience in such matters of the Judge before whom the case is listed.

14. On the footing that the parties had apparently been content to proceed to trial in the County Court in December 2023, no directions were given in relation to further preparation of the parties' cases, although a bundle was directed to be provided for use at the final hearing. A bundle was provided, containing 269 pages relevant to the substantive case, which it seemed added the Tribunal Directions to start of the previous bundle for the small claims track final hearing in the County Court (which is by no means to be read as implying any criticism of that approach). Where the Court or Tribunal refers to specific pages from the bundle, the Tribunal does so by numbers in square brackets [ ], with reference to PDF bundle page- numbering.

The Hearing

15. The hearing took place in person at Havant Justice Centre on 27th February 2024. The Applicant was not in attendance, and neither was any representative despite legal representatives acting. The Respondent was present.

Preliminary matter

16. At 15.49 on 26th February 2024, the Applicant's representative sent a short email to the Tribunal office, which substantively said the following:

> "We refer to the Small Claims Hearing which is due to take place tomorrow on 27 February 2024 at 10am.
> Unfortunately, our client's witness is unable to attend due to having to attend at a funeral. We enclose an email marked Annex 1 confirming this.
> The Applicant requests that the hearing is adjourned to the first available date to enable Steve Shambrock to attend as witness at the hearing as to be unable to present witness evidence at the hearing will prejudice the Applicant's case."

17. That was accompanied by a one-line email to the representative which read:

> "Unfortunately, I found out on Monday that I will be attending a funeral on the 27th in North Hertfordshire for a relative so I won't be able to attend this hearing."

18. Neither a Tribunal application form or a Court application Notice was completed and no fee for a Court application was paid at that point.

19. By further email at 16.27, a Tribunal application form was completed. However, that attached the same email and gave the same reason for seeking an adjournment. Save for the fact of a form being completed, it added nothing.

20. The Tribunal office explained to the Applicant's representative that the application could not be considered by the Tribunal at that point and that it would be dealt with at the start of the hearing on 27th February 2024.

21. The Applicant's representative emailed again later but not seen by the Tribunal office that day suggesting that an advocate could be arranged to attend to make the application at the hearing. Later and again not seen by the office that day, the Applicant's representative emailed another time, stating:

> "We have tried to instruct an advocate to attend at the hearing on behalf of the Applicant to explain the circumstances of the request to the Judge and to provide an apology in person to the court for the absence of the Applicant. No disprespect [SIC] is meant by our absence, but as you see from the attached email from Legal Practice Clerks there is unfortunately no advocate available at this juncture."

22. There was no application still in the Court proceedings. There was no-one present to advance an oral explanation.

23. The Tribunal considered whether it ought to adjourn pursuant to the over-riding objective and weighed the various considerations within that. The Tribunal does not propose to set out every element of its consideration but simply to identify some of the key factors which caused it to determine that the hearing should proceed, as follows:

    i) The application was made extremely late, the reason given was inadequate and it was inadequately evidenced.
    ii) The comment by the witness suggested that he had found out about the funeral a week earlier. The 26th was a Monday and the Tribunal concluded that if the witness had meant that Monday, i.e. today as it then was, the email would have said so. The natural construction of the email using the term "Monday" on a Monday was that reference was made to a previous Monday.
    iii) Whilst the Tribunal had sympathy for the witness for the loss of his relative, the closeness or otherwise of the relative is not indicated. If the relative was a particularly close one, the Tribunal considered that the nature of the family relationship would have been likely to be explained using a more specific term than "relative". Insofar as the funeral being one of a close relative would have carried more weight, more weight could not be given on the limited information provided.
    iv) There was also no witness statement confirming the truth of any statement made.
    v) These were longstanding proceedings, issued as far back as April 2021. The hearing was the final hearing.
    vi) The Respondent was in attendance. The Tribunal and Court were ready to proceed.

24. As indicated, the Tribunal determined that the hearing should not be adjourned and should proceed.

25. In terms of the Court, there was no application to determine and no reason to do anything other than to proceed. However, even if there had been anything to potentially merit an adjournment of the Court proceedings in spite of that, any such was removed by the decision of the Tribunal to proceed.

26. It would have been illogical the Court determined and the cause of additional cost and delay to adjourn the Court proceedings where the Tribunal proceedings were continuing. The Court refused to adjourn the hearing in the circumstances and for the reasons explained in the Tribunal Decision. The Court did not find the decision a difficult one-the weight overwhelming lay with proceeding.

27. It was therefore determined in both instances that the hearing would proceed.

28. The final email regarding lack of attendance of an advocate ought to be referred to. In relation to that, there was additionally nothing like an adequate reason for the lack of attendance by a legal representative.

29. No explanation was given for the searching around for an advocate late afternoon on the day before the final hearing. The hearing had been listed some weeks earlier and plainly was intended to proceed. Arrangements for representation, if sought, ought already to have been in place. There ought to have been no need to seek to arrange that so late in the day and it was quite likely by then that no suitable advocate would be available. That said, there was no indication that representation other than by LPC had been sought. Inconvenient though it may have been, there was nothing to suggest that no advocate from the representatives could attend.

30. None of the matters in respect of lack of attendance of an advocate were determinative of the outcome. They did not, however, offer the Applicant's application any support.

Substantive matters

31. The hearing therefore proceeded with the attendance of the Respondent and addressed the substantive issues in each of the proceedings.

32. The Tribunal and Court heard oral evidence from the Respondent in response to questions put by the Tribunal members and by the Judge. Whilst the Applicant was not present, relevant matters advanced by the Applicant were put to the Respondent to test his case and obtain a response. The Court and Tribunal were astute to identify their respective involvement in matters addressed in the hearing.

33. It was not possible to specifically hear only the matters in one set of proceedings in their entirety and then move on to the other. That was not practicable given that some of the matters raised by the Respondent provided both his case as to set- off and, subject to the Court determining them to have additional value beyond the level of service and other charges demanded by the Applicant, his case by way of counterclaim. There was no logic in some evidence being twice.

34. However, the Tribunal did conclude its proceedings including evidence also relevant to the Court proceedings and then address costs matters relevant to the Tribunal proceedings. At that point, the members other than the Judge stopped being involved in the hearing.

35. The Court did then address matters which were solely relevant to the Court proceedings. That principally occurred after a lunch break.

36. In light of the absence of the Applicant or a representative, the key matters stated in oral evidence by the Respondent are set out below.

DECISION OF THE TRIBUNAL

The jurisdiction of the Tribunal

37. 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. The power arises from the provisions of the Landlord and Tenant Act 1985 ("the 1985 Act").

38. Service charge is in section 18 defined as an amount:

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

39. 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. In particular in relation to on account service charges, no more than a reasonable amount is payable.

40. The Tribunal commonly sets out matters relating to the basic payability and reasonableness of service charges at greater length than above but there is no need to do so in this instance.

41. The matter which is significant and does merit identifying is that in the course of determining whether service charges are payable, the Tribunal is entitled to consider whether any sums are payable by the landlord or management company, the entity claiming the service charges, to the lessee. A lessee may have a counter- argument by way of set-off against service charges otherwise payable. The Respondent has advanced such an argument in this case.

The Lease

42. A copy of the lease of the Property ("the Lease") was provided within the bundle [19- 58]. The Lease is dated 17th December 2007. The term of the lease is 125 years from 1st June 2005.

43. The Lease is tri-partite. The Applicant management company is a party to the Lease. The over- whelming majority of the Lease in the usual sorts of terms.

44. The Service Charge payable by the Respondent is expressed to be 2.49% of what is described as the "Apartment Charge" and 0.323% of what is described as the "Estate Charge". The charge is payable by the

Respondent to the Applicant management company. The former charge is said to relate to "all those Maintenance Expenses relating to the Buildings" and the later "all those Maintenance Expenses relating to the Development save for Maintenance Expenses relating to the Buildings or the Commercial Units". The Estate includes houses and commercial units in addition to flats and includes a river wall.

45. The "Maintenance Expenses" are defined as the "moneys actually expended or reserved for periodical expenditure" by the Applicant.

46. The Respondent covenanted to observe and perform various covenants contained in the Lease (clause 3.1). The Applicant covenanted to "observe and perform the obligations on the part of the Management Company set out in Schedule Nine").

47. The "Maintained Property" is identified in Schedule One and includes "the whole of the Development so far as is not comprised in the Apartments of the Houses or the Commercial Units" and specifically includes:

> "1.1 The structural parts of the Building and the external parts of the Buildings including the roofs the foundations the load- bearing walls the walls which bound each of the Apartments (even if not load bearing) and the ceilings and floors above and below each of the Apartments.
>
> 1.3 The whole of the Common Parts.
>
> 1.4 All Service Installations used by the Buildings and the Social Housing Blocks which are not used solely for the purpose of one of the Apartments and located within the relevant Apartment and the gutters and downpipes."

48. The Maintenance Expenses are intended to be incurred in the Applicant complying with its obligations in respect of the Maintained Property, which includes pursuant to paragraph 1. of Schedule Five:

> "Repairing re-building re-pointing or otherwise treating as necessary and keeping those parts of the Building which are comprised in the maintained Property and every part of them in good and substantial repair order and condition and renewing and replacing all worn and damaged parts of them"

And also pursuant to paragraph 5.:

> "Providing operating maintaining and if necessary renewing and adding to
>
> The fixtures fittings and any furnishings provided in the Common Parts and the Storage Areas"

There are other specific provisions within the Schedule about other services and equipment in common parts and elsewhere.

49. The Applicant covenants to attend to such matters in paragraph 1. of Schedule Nine. It is said in paragraph 1.2 that:

"1.2 The Management Company [Applicant] shall in no way be held responsible for any damage caused by any want of repair to the Development or defects in it for which the Management Company is liable unless and until notice in writing of any such want of repair or defect has been given to the Management Company and the Management Company has failed to make good or remedy within a reasonable time of receipt of such notice."

50. The Property also has rights which are said to be granted for the benefit of the Respondent, including (paragraph 9 of Schedule Three, "The right of lateral and subjacent support and shelter for the Property……"

51. Schedule Six deals with service charges. The "Service Charge Year" is the annual accounting period 1st January to 31st December. The Respondent agrees to pay the service charges in paragraph 1. More specifically and pursuant to paragraph 4.1 of the Schedule, he agreed to pay the estimated service charge in equal instalments on 1st January and 1st July. He also agreed by paragraph 4.2 to pay the balance if the actual service charge exceeded the estimate. In the event of the actual service charge being lower than the estimate, the freeholder is to credit the excess against the next instalment.

52. The Applicant is entitled to employ "a suitable firm of managing agents" (Schedule 5, paragraph 18).

53. By paragraph 6 of Schedule Three, the Respondent has the right to use the Cycle Stores.

54. By clause 6.1, the lessor, that is to say the freeholder, or a person authorised by it has the authority to commence proceedings for forfeiture. The clause is quoted by the Applicant in the Particulars of Claim. It is less than wholly clear what the clause means in the sense that only the freeholder could forfeit but it may intend to refer to solicitors issuing proceedings. However, as these proceedings did not involve a claim for forfeiture, it is not necessary to explore the point or reach any determination about the clause.

55. The Applicant also asserted that the Lease provided an entitlement to claim contractual costs pursuant to paragraphs 5 and 7 of Schedule 7 to the Lease, also quoting those provisions in the Particulars of Claim. That was said to include all expenses, including legal fees and disbursements in the proceedings.

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

> "When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to

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

57. 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."

58. The Tribunal had careful regard to the above when construing provisions in the Lease.

Summary of the parties' cases

59. In this instance and in light of having set out the Respondent's oral evidence, the Tribunal considers it appropriate to summarise the parties' cases more generally, despite the fact that there will then be some repetition of those when addressing the issues to be determined.

60. The Particulars of Claim explains that the Applicant claims service charges and/ or ground rent arrears said to be £6,002.74 for the period 1st January 2014 to 31st December 2019 (although as explained below that is wrong). The sums are said to be those shown on a statement of account.

61. Whilst there is reference to those continuing to accrue, the Tribunal can identify no amendment of the claim to increase the amount or to extend the period and the transfer from the Court is to determine the service charges which had been claimed.

62. The remainder of the substantive claim is stated to be for £3509.40, claimed on the basis that the Respondent has a contractual liability to pay all costs, charges and expenses incurred in the claim. The sum is said to be the costs incurred by the time of issue and it is added that they will continue to accrue.

63. The Respondent's case concentrates on the effects on the Respondent of the breaches of the Lease he alleges of the Applicant, including in the Defence and Counterclaim document [62- 67].

64. It is said that the Respondent wrote to the Applicant's managing agent by letter 30th March 2012 about structural movement.

65. The counterclaim particularly concentrates on claims for damages for physical and mental suffering and abuse of human rights, although also refers more generally to quality of life. There is a specific claim that noise from roof damaged the Respondent's hearing permanently. Medical evidence is provided [103- 1-7] describing a number of medical problems, including facial pain, headaches and tinnitus.

66. There is also a claim that the Respondent's bicycle was removed and not returned, despite being tagged.

67. The Applicants Reply to Defence and Defence to Counterclaim did not respond to the allegations about defects because the Respondent had not sent them with the Defence and Counterclaim (he did subsequently), although did not deny previous receipt. The remainder of the counterclaim was not accepted.

68. The Applicant relied on a witness statement of Mr Shambrook referred to above. The Respondent did not file a witness statement as such but did file a detailed response to the Applicants Reply and Defence, which was in effect a statement about the matters raised.

Summary of the Respondent's oral evidence

69. This part of the document includes matters which veer from factual evidence into submissions. In response to matters asked of the Respondent, the Respondent commented about his case and not all of that was strictly evidence. However, as the Respondent made no formal submissions, all such matters are dealt with in this section.

70. The Respondent firstly explained that his argument was that the service charges were solely not payable due to the effects he asserted on him of the breaches he asserted by the Applicant.

71. The Respondent did not contend that there was any defect with any demand rendering service charges not payable. He also stated that he did not contend that anything demanded as service charges could not be so demanded pursuant to the terms of the Lease.

72. The reason for not paying the service charge was that the Applicant knew that there were the problems described below and had not tackled them.

73. The Respondent made no assertions about the claims for ground rent either.

74. The Respondent also said nothing against the part of the substantive claim which related to contractual costs, although that was not determinative of the payability of those- see below.

75. The Tribunal found the Respondent to be entirely credible and his evidence to be cogent where he had the relevant knowledge of the matters involved.

76. The Respondent helpfully explained that his flat is above a vehicle entrance. There is no other flat either above or below it. The roof above his flat serves only his flat. The roofs to the sides are separate and at a higher level. The flat is, he said, in effect a box attached to two walls and with a roof on. The flat was unique, at least as compared to those around it. Whilst there are two other vehicle entrances further along, the way in which those have been built involved the flats above the entrancing having roofs at the same height as the rest of the buildings to the sides.

77. For completeness, it was indicated that the river and river wall is off to one side and not directly visible from the windows of the Property.

78. In order to access the flat, there is a door from street level. There is a set of stairs and that leads to first floor level. Two other flats are accessed via the same staircase. There is a little corridor with a fire door. That contains an electricity cupboard. There is then the front door to the Respondent's flat.

79. He said that he noticed noise from the roof and reported that. The attendance of the surveyor followed that. He explained that in the first instance, a person from Taylor Wimpey attended on or about 26th June 2012 with another man who was an engineer or similar, but they did not identify an issue.

80. However, after that scaffolding was erected and the surveyor and/ or (it was not clear if the Respondent merged the two persons) Mr Colin Rae attended and externally inspected the roof from that. Works to the roof were identified as required, including removal of the slates, the membrane being attached to the frame, everything being securely battened down and a windguard being fitted to protect the "vortex". The Respondent clarified in response to questioning that it is the membrane which is loose rather than the slates/ tiles.

81. The Respondent was clear that he had not instructed anyone and that Mr Rae had been instructed by the managing agent for the estate-. He believed that the work required was that identified by Mr Rae and was firmly of the view that the managing agent knew of the work, having instructed the surveyor. It was also said that the agent was in possession of photographs (which the Respondent indicated he assumed the Tribunal would have).

82. A contractor's estimate was subsequently obtained. The work had still not been undertaken by the time of the hearing. He still experienced roof noise.

83. The Respondent described different levels. He said that the day before the hearing, in what the Tribunal understood (correctly or not) to be windy weather, the Respondent said the roof was "dancing".

84. It was also explained by the Respondent that he had contacted NHBC by letter in 2013 but said he was referred back to the builder.

85. In relation to cracking, the Respondent said that remained the same. He suggested that in dry weather the walls expand and cracks increase, sufficient that a piece of paper could be slid in. He also said that it is hard to open the door. In the winter, the reverse occurs. The door- which is wooden- has not been trimmed. The Respondent asserted that the Applicant or its agent have seen the problem and are aware of the cause of it. He also said that Taylor Wimpey has seen and that he was told that the issue is nothing to worry about and nothing unusual.

86. The Respondent added that he had filled in the cracking and sanded down. He did that each year in summer. His evidence was that cracking had returned each time.

87. Those various difficulties had been ongoing without progress.

88. The Respondent said that he had not made further reports to the Applicant/ its agents. His reason why is that they know what works needs doing. He had just waited. The Respondent lives in his flat- it is not tenanted.

89. In response to a query as to whether he might have concluded at some point that he would not hear, the Respondent said not.

90. In response to being asked about the documents being dated 2012 and 2013, the Respondent said that the managing agents had told the resident that there was no issue.

91. Specifically with regard to the cupboard door, the Respondent said that is some 3 inches thick. He hadn't been able to shut it. The Respondent said that he had informed the managing agents. More recently, the door must have been rammed shut he said, although an electrical engineer had attended the day before the hearing, had opened the door and has left it open.

92. The Respondent additionally referred to carbon monoxide detector. That was not located within his flat but within the area between his front door and the fire door. He said that the battery had needed replacing and that the detector made a noise when the battery was at the end of its life. He said the agents had taken it away. The Respondent added that he had one inside the Property and he had

replaced his when the same noise giving indication of the need to replace the battery occurred.

93. The Respondent also described a large extraction pipe and ducting. He said that Taylor Wimpey needed to change the flue to the Property and to his neighbour's flat. However, the Respondent said he subsequently needed to contact that company because a hole had been created and it had been filled with foam badly. A box had been built around the pipe and inspection hatches had been created.

94. The Respondent described that ongoing effects and lack of progress as wearing for him, saying that it affected him greatly. He also expressed regret that when he first approached the Respondent or its agents he had called them rather than putting matters in writing. He felt that they had become fed up with him.

95. The Respondent added in respect of his bicycle that he was asked to tag it, he did so. He was unhappy that he asked for a list of bikes removed but that was refused and so was his request for details of the company which had removed them.

96. The Respondent expressed a general concern that the managing agent had not done that which it ought.

97. He said that he had no dealings with Mr Shamrock, the Applicant's witness who had not attended.

98. In respect of his counterclaim, the Respondent said that he has a right to quality of life and his home. He asserted that having contacted the Applicant/ its agent, there should have been a response.

99. He also said that the carbon monoxide detector not working was a matter of life and death. He added that a lavatory in the flat has no overflow pipe (it was understood meaning to outside) and that he does not use it in the time immediately before leaving home in case it overflows.

100. The Respondent said that he believed that he had provided the medical evidence requested to show the effects on him of the issues with the Property. He said that evidence shows a sharp decline in his hearing and it was suggested to him that it had been caused by him hitting his head or by loud bangs. He added that the teeth grinding is due to stress.

101. The Respondent could not identify where those last specific matters were written down. He accepted that he had not approached doctors and said to them that his home is the cause of the problems. However, he said that the only loud bangs he had experienced were from the roof and the only stress had been caused by the Applicant's agent.

Findings of Fact, application of the law and consideration

102. It merits recording that this Decision seeks to focus on the key issues and 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 matters mentioned in the bundle or at the hearing require a 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 on the balance of probabilities.

103. The Tribunal determined that as the Respondent had not raised any dispute with regard to the payability and reasonableness of the service charges, other than a very general assertion about the managing agent, those would be payable as demanded subject to the argument as to set-off. The Tribunal did not consider, even in the context of the other issues raised by the Respondent and the Tribunal's determinations about those, that there was enough basis on this occasion to consider reducing the service charges insofar as charged for managing agent fees.

104. The Tribunal determined on balance that the relevant sum of those was £6,002.74. The Tribunal was unable to identify any ground rent arrears on the statement of account. If it had, it would have ignored that element, ground rent not falling within the jurisdiction of the Tribunal.

105. The Tribunal notes, however, that the last invoice and account summary included in the bundle as sent prior to December 2019 is dated 31st July 2019 [164- 165] and gives the sum due as £4,334.21. The evidence demonstrates that is the amount due as at 31st December 2019.

106. The Tribunal notes that separately, there is a statement of account which totals £6002.74. However, that is for the period to 1st January 2021. Hence, it includes both service charges for 2020 and also the first part of the service charge for 2021. It thereby goes significantly beyond the date in the Particulars of Claim.

107. Doing the best that it can in the absence of any attendance on the part of the Applicant to help provide an explanation, the Tribunal determines that the Particulars of Claim was badly drafted and intended to bring a claim for the period up to and including 1st January 2021, given that the amount claimed is the correct sum- according the statement of account at least- as at that date.

108. Albeit that the Particulars suggested an ongoing claim, no identifiable attempt was made to amend and to update figures and no evidence of any additional sums had been provided in the Court proceedings, such that both because no additional period of claim was transferred for

consideration and it could not have been considered on the evidence in any event, the Tribunal does not go beyond April 2021.

109. In particular, the witness statement of Mr Shambrook did not add anything in that regard. Indeed, it served little discernible purpose at all and this is as good a point as any to address that.

110. Mr Shambrook is described as a "Property Manager" at Firstport, the managing agents under their current name. As to whether that is the manager of the Building and wider development is wholly unclear. The statement does not deign to indicate whether Mr Shambrook has any dealings with Property and whether he has any first hand knowledge of any of the matters about which he comments. The Tribunal would have found it useful to discover that in the event that he had attended. The standard wording about matters being in his knowledge or identified where told by others is given in the statement but there is no hint that it has then been followed.

111. Save for reciting various matters about title and quoting various provisions in the Lease, Mr Shambrook exhibits a statement of account, which he may or may not himself have printed off and about which he may or may not have any other knowledge. He exhibits various demands, again which he may or may or may not have printed off and may or may not have been otherwise involved in. A copy of a letter of claim is exhibited. That is the sum total of his evidence about the claim.

112. The comments of Mr Shambrook about the set- off and counterclaim are referred to below insofar as required. For completeness, there is otherwise a summary of what the Defence is perceived to say and what are essentially submissions as to costs.

113. The Tribunal found it unclear whether the £3,509.40 fell within its jurisdiction. It would do so if the costs were said to have been demanded as administration charges (it appeared clear that they had not been demanded as service charges because they were specifically referred to separately to the service charges said to be payable.

114. The Respondent had not said anything about this aspect of the claim separate to his case more generally. The Tribunal did not find that especially surprising where it was not clear of the basis for it.

115. However, the Tribunal considered that it was well able to examine the particular matter as an expert tribunal, being very well within the range of points which may be taken by the Tribunal, and at the very least to establish whether it was something which fell within its jurisdiction and which it had been asked by the County Court to determine. Establishing that was fundamental.

116. At first blush, a claim for legal costs as part of the substantive sum would require them to have fallen due for payment by the time of issue of the proceedings, which is to say that they have been demanded from the Respondent by the Applicant and have not been paid within a

reasonable time or any prescribed time of that demand. Not uncommonly in such cases, there are also other administration charges said to be due. It is not obvious on what basis the costs could form part of the substantive claim otherwise.

117. However, in this case there is no hint within the claim that the legal costs are claimed on that basis. The Tribunal determined on balance that the Applicant was not asserting the costs to be administration charges demanded and so its jurisdiction was not engaged.

118. In the event that it may be determined that the Tribunal was wrong with regard to the above, the Tribunal addresses the position, firstly, in the event that the costs have been demanded as administration charges (or service charges) or are subsequently so demanded.

119. The Tribunal determined that if the amounts which the Applicant claimed as contractual costs were said to be payable as administration charges, they were not so payable- there was no evidence of any valid demand.

120. Leases can provide for contractual costs of proceedings or other steps to be payable such that they are payable as administration charges (or if appropriate, service charges). However, as with any other sum payable as a service charge or administration charge, there has to be a demand for it and it must be demanded in accordance with the provisions of the Lease and statute. That demand has to be a valid demand, the protections for lessees applying to charges related legal costs and similar just the same as they do for any other such charges.

121. No demands were included in the bundle and there was no hint in any document that demands had been made. There had on the evidence been nothing to trigger the need for the Respondent to pay any such administration charges. The Respondent was not in breach by failing to pay them.

122. The Tribunal also considered whether the Applicant may be entitled to payment of legal costs incurred in respect of the proceedings pursuant to the provisions in the Lease on which the Applicant relied in the event that the Applicant does demand them as administration charges (or service charges).

123. The Tribunal considered it one of the simpler aspects of this case to determine that the clauses relied on by the Applicant- that is to say clause 6 and paragraphs 5 and 7 of the second part of Schedule 7 do not go remotely close to forming any basis for a claim for legal costs pursuant to the Lease.

124. The references in the paragraphs of Schedule 7 to rates, taxes, charges for services and similar make plain the nature of at least most of the matters involved. There is a reference to “other services” but in a sentence that refers otherwise to water charges, implying that the “other services” of a similar nature to that. The wording indicates that

it relates to sums paid out by the Applicant and freeholder to third parties for supplies to the Building: it does not suggest anything to do with the instruction of lawyers or similar.

125. There is not only no actual mention of legal costs- where caselaw is clear about the need for reference to such costs for a lease to be likely to be construed as including provision for them- but there is nothing in the clauses relied on by the Applicant which even hints that legal costs, or any similar charges, are intended to be payable.

126. Clause 6 is clear that it relates to the freeholder and a person authorised to pursue forfeiture on its behalf. There is no indication that it may be relevant to the Applicant in these circumstances or at all.

127. The Tribunal would be surprised if any contractual basis might be advanced on the wording of the particular provisions. The Tribunal consider that it is abundantly clear that any such argument is unsustainable.

128. The Tribunal does not know whether legal costs have been claimed in other proceedings on the basis of the same provisions by this Applicant and can only decide the case before it. However, it does so in unequivocal terms.

129. For completeness, the Tribunal identifies that the only provision within Schedule Seven which refers to legal costs is paragraph 3 but that is specifically related to proceedings or anticipated proceedings for forfeiture. As there are no such proceedings, there is no suggestion made in the Applicant's claim of contemplation of such proceedings and there is no reliance on the provision in any event, it is not necessary to dwell on the matter. However, the Tribunal determines that provision would not entitle the Applicant to costs of these proceedings.

130. In relation to the Respondent's argument as to set- off, the Tribunal firstly finds that there was defective work which had been undertaken to the roof above the Respondent's flat and that the Respondent reported affects of that. That was back in 2012.

131. **T**he Respondent wrote to the Applicant's agent about the roof by letter 26th June 2012 [73]. The letter in relation to the roof refers to violent rattling and specifically identifies the membrane doing so. It says that photographs have been sent to NHBC. The agent appears to have acknowledged that by letter dated 13th July 2012.

132. It was identified in March 2013 in a survey report [76- 77] by Mr Paul Philips MRICS, a chartered building surveyor of PPA Chartered Surveyors dated 28th March 2013 and addressed to the managing agents, Chamonix Estates, that work was required to the roof. The report was copied to the Respondent by the managing agents [75].

133. The surveyor says that underlay was recently replaced by C Rae Roofing and sealant applied to bond tiles. The report explains that work was undertaken in an attempt to address the problem which had been reported by the Respondent. The sealant is explained to have been an attempt to reduce the noise of lifting tiles.

134. The report identifies that the roof is lower than the adjoining buildings and provides details about the roof. Poor workmanship is identified- not in the work by Mr Rae but undertaken earlier- as the tiles were not nailed twice, increasing the risk of uplift, and as the battens were not nailed sufficiently. Hence no doubt the attempt to address that.

135. The surveyor recommends that Redland, the manufacturer of the roof tiles, was asked to attend and provide a specification. An alternative approach including stripping the roof covering and related work was also suggested as an option but suggested to be more expensive.

136. The surveyor's attendance was not in windy conditions and so was not able to confirm noise, but he identified a problem occurring in windy conditions and the Tribunal finds that is very significant.

137. The Applicant, through its agent, obtained an estimate for the cost of the works required to the roof from Mr Rae [83- 84], which gave an estimated cost of £6330 plus VAT.

138. The Tribunal determines that the survey evidence was clear as to the nature of the defects. The matters described by the Respondent were, insofar as they went, consistent with the survey evidence subsequently obtained by the Applicant. There was no evidence adduced, most markedly by the Applicant, to suggest that the survey evidence might not be correct.

139. The Tribunal finds that the roof above the Respondent's flat had the defects identified by Mr Philips. The Tribunal finds that the roof did so ever since the works had been originally undertaken.

140. The Tribunal has noted the correspondence from NHBC, firstly stating that the claim fell beyond the minimum level, and later stating that the noise claimed for by the Respondent does not fall within the cover provided. The correspondence sent in July 2013 to the Respondent by the agents [86] is also noted, which explains that NHBC will not meet a claim for the required roof works because that falls below the minimum claims value. The Tribunal finds that closed off a route for obtaining payment for the required works but did not alter the fact that works were required.

141. A party is liable immediately where the defect relates to a part of the Building within the occupation of the Applicant such that notice of defects, and more so reports of defects, are irrelevant to that liability (*British Telecommunications PLC v Sun Life Assurance Society* PLC [1996] CH 69). Although it is not liable as being in occupation, being a management company and holding no title in the Building, the

Tribunal determines that it is liable where it undertakes- through a contractor in the event- works which it is entitled to undertake, and indeed is obliged to undertake, to a part of the Building other than the Property and does so negligently or to an inadequate standard.

142. The Tribunal finds that the roof has continued to suffer from the same defects ever since and up to the current time and that it will do so on an ongoing basis until such time as it is repaired.

143. The Tribunal unhesitatingly finds the Applicant to be in breach of its covenants under the Lease from the time at which the remedial work ought to have been completed.

144. The statement by the managing agent at the residents' association meeting on 10th September 2013 as recorded in the minutes [89] that the recommendations of the surveyor and roofer have been reviewed by Taylor Wimpey and NHBC and not accepted are surprising at best.

145. There is no evidence that Taylor Wimpey reviewed the documents with regard to roof works and did not accept them, still less why. There is documentation from NHBC but, as identified by the agents themselves above, the issue taken by NHBC as that the minimum claim which would be met was a higher sum. That is not a failure to accept the surveyor and roofer to be correct. In the judgment of the Tribunal, the agents- and thereby their principal the Applicant- misrepresented that no works were needed.

146. The Tribunal has noted that Mr Shambrook refers in his statement to there being no evidence of a flapping membrane, that work had been undertaken and that no other lessee had identified problems with the tiles. The latter comment demonstrates a failure to properly consider the report, which makes it abundantly clear that the roof above the Property is separate to other roofs to the Building and does not affect other lessees.

147. Insofar as the statement may demonstrate the Applicant's position over the years, it fails to recognise that the surveyor, who had been instructed to provide an expert opinion on behalf of the Applicant, attended after the works by the roofer and unequivocally stated in his expert opinion that other work was required. He identified poor workmanship.

148. The surveyor also identified the sort of situation which in the expertise of the Tribunal may well have caused flapping of a membrane or similar. Wind causing tiles to lift is likely to have penetrated under the tiles and affected other layers of the roofing. Whilst Mr Philips did not identify flapping as such, the Tribunal considers, contrary to the statement of Mr Shambrook, that his opinion was consistent with the problem the Respondent first described and where the work by the roofer attempted to ameliorate that but was not sufficient.

149. The Tribunal notes that the Respondent contends that he wrote to the managing agents on 15th November 2013 [although it may be the date is incorrect- see below] identifying the comments to be wrong but that nothing was then dealt with.

150. The Tribunal re-iterates that it accepts the opinion of the surveyor and the indication of appropriate works by the roofer.

151. The Tribunal is mindful that the issue with the roof is on balance a problem with the roof as originally fitted. The Tribunal determines that the works fall within the scope of the works required to be undertaken by the Applicant pursuant to Schedules One, Five and Nine of the Lease.

152. The Tribunal accepts on the evidence received that the unrepaired defects with the roof in particular- and the other matters to a rather lesser extent- have as a matter of fact impacted on the Respondent's enjoyment of his home.

153. The Tribunal understands the Respondent's thought process that the Applicant knew what work was required and to there was no need to report it again. The Tribunal considers that it ought to have been wholly unnecessary for further reports to have been made and that the evidence for the necessary work was clear.

154. However, the Tribunal notes that the last identified attempt by the Respondent to achieve progress was by way of a letter dated 28th May 2014 where he challenged the statement in the minutes referred to above. The Tribunal finds that by failing to make further reports, the Respondent failed to ensure that the Applicant understood there to problems on an ongoing basis. There is potential for a party informed of an issue to perceive as time passes and nothing else is heard about it that it is less significant than had first been suggested and even that it is has somehow resolved itself, unlikely though that would be in the normal course.

155. The Tribunal finds that it would have been reasonable for the Respondent to have contacted the Applicant/ its agent again once a period of time had elapsed without progress and to have done so subsequently from time to time. Although the Respondent may be correct to say that the agent was fed up with hearing from him back several years ago- and may well have continued to ignore the Respondent- the opportunity for the agent to take heed of further reports was not given. Whilst that by no means makes it the Respondent's fault that the works were not undertaken- and in contrast it is the fault of the Applicant which was aware and failed to attend to the work- it has some relevance when considering the value of the set-off argument.

156. Nevertheless, the Tribunal considered that for the period of just over 7 years from almost the end of 2012 to the end of 2019, being the end of the service charges demanded, the value of the Respondent's

entitlement for breach of covenant by the Applicant and the effects of that equalled the whole of the value of the service charges. The Tribunal's consideration of value was not required to go further than that.

157. The Tribunal found that the Applicant knew of the issue with the roof sufficient to take action by certainly June 2012. The Tribunal considers that date is the appropriate one from which to start for the consideration of the value of the Respondent's case as a point at which there is clear evidence of effects on the Respondent and a need for action to be taken. The Tribunal then allowed a period of 6 months from the date of the contractor's estimate for the works to be completed.

158. The Tribunal did not consider that the work was an especially large project or would have taken more than a small number of weeks, perhaps less, to complete. The Tribunal had no evidence that a consultation pursuant to section 20 of the Landlord and Tenant Act was required but had some regard to the possibility of that. The Tribunal also had regard to the potential for the contractor not having been able to undertake the work immediately and for its opinion as to the potential timescale for the works. The Tribunal lacked clear evidence of the overall timescale but applied its experience and expertise to the nature of the work indicated to be involved.

159. Taking those matters together and doing the best possible on the available information, the Tribunal determined a period of 6 months to be the maximum reasonable period. In broad terms, that took the date for completion of the works to just before the end of 2012.

160. The Tribunal identifies in that regard that the surveyor's report was dated March 2013. However, the Tribunal finds that reflects the managing agent on behalf of the Applicant having taken what was very much an excessive time to respond. The Tribunal, having taken account of the date of the report, is content that the timescale it has found above is appropriate.

161. The Tribunal considered the other issues raised by the Respondent.

162. The Tribunal accepts that the Respondent informed the Applicant about cracking, although the letter in the bundle is dated 30th May 2012 [78] rather than March 2012. That letter refers to cracking and in particular a large crack by the front door to the Property.

163. It accepts that the lack of a working detector in the area outside of the entrance to the Property was a cause of concern to the Respondent, so too the fact that the electrical cupboard door could not be closed.

164. The Tribunal determines that the Applicant can only be liable in respect of cracking from the date of the report by the Respondent, given that is within the Property and not in an area which is occupied by the

freeholder and the responsibility of the Applicant. However, plainly the report was many years ago.

165. The more significant matter in relation to this element of the set- off is that the Respondent has not demonstrated the cause of the cracking and more specifically that the cause of the cracking is a matter for which the Applicant is responsible. It may be that the cracking is because of other structural movement to the Building and further that there is something which the Applicant ought to do but which it has not done.

166. However, it may be that the cracking is simply an effect of the plaster becoming drier or less dry and expanding or contracting and is purely about the internal surface of the walls of the Property. In that event, it is not apparent that it falls within the responsibility of the Applicant. Alternatively, there may be another cause, which may or may not be something for which the Applicant is responsible.

167. The Tribunal determines that it was for the Respondent to prove on the balance of probabilities that the cause of the cracking was a matter for which the Applicant is liable. There is no expert evidence with regard to the cracking and all that is clear is that there has been cracking, no more than that. The Respondent has therefore failed to prove that part of his counterclaim.

168. In respect of the detector and the electrical cupboard door, those are located outside of the Property. They are matters which are the responsibility of the Applicant pursuant to the terms of the Lease as identified above and, applying *British Telecommunications*, the Applicant was liable to attend to the issues from the time at which they first arose. By failing to do so, the Applicant was in breach of covenant.

169. That was the case with the detector until the battery was changed, the Respondent has said, in 2020, and is the case with the electrical cupboard on an ongoing basis. The Tribunal notes that those matters were chased up by the Applicant in October 2020 [92- 94].

170. It was said in the statement of Mr Shambrook that the Applicant is not responsible for a detector in a flat. That is correct. It is irrelevant to the Respondent's actual case about the detector outside his flat.

171. Whilst the Tribunal accepts a degree of worry to have been caused to the Respondent, there was not the same problem as there was with the roof- noise affecting living in the Property- and no actual problem arose. The Tribunal considers those matters to therefore be regrettable and to have added to concerns but to be relatively minor in comparison.

172. The Tribunal had regard to case authorities about loss of enjoyment of home and similar in general in cases involving lessees of long leases such as that held by the Respondent. The principal authorities in respect of the value of a disrepair or similar claim include (although

there are others in a similar vein) *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 as money could, to the position he or she would have been in if there had been no breach and was not limited to diminution of the rent paid, very low as that was, but rather was the appropriate sum for the unpleasantness of living in the flat. *Earle* held that a long lessee was not limited in a damages claim to discomfort and inconvenience, which was only a symptom of the wider interference with enjoyment of the asset suffered, that asset being a distinction between properties held on long leases and those held under tenancies. The starting point, but not necessarily the end point, was the resulting reduction in rental value arising from the disrepair.

173. There is no evidence as to the rental value of the Property. There is therefore, and rather inevitably, no evidence of the reduction in rental value in consequence of the issues with the roof or any other elements and little to work on in order to identify what that reduction ought to be. The Tribunal has experience in determining market rents of assured tenancy properties, being one of its longstanding jurisdictions. However, the Tribunal is provided in such cases with the previous rent and the proposed new rent and is likely to be provided with specific comparators relied on.

174. In the circumstances, the Tribunal considers that it must take a very cautious approach and allow what may be an overly modest and somewhat notional sum for interference with enjoyment as being the best it can do on the information available. The Tribunal has also allowed for the Respondent's lack of chasing up since 2013 and what it regards as an element of consequent failure to mitigate loss.

175. The Tribunal also determines that in all the circumstances the most appropriate and practical approach is to take an average sum for each month over the several years, lacking sufficient on which to be able to accurately distinguish one period from another. The Tribunal nevertheless records that it considers that the sum appropriate would have been lower month on month for the earlier period since towards the end of 2012 and would have been greater for the later years approaching the end of 2019.

176. The Tribunal determines that the appropriate sum is £100.00 per month or £1,200.00 per year in respect of the effect of the roof. That alone exceeds £6002.74.

177. The Tribunal considered that the other matters raised by the Respondent would have had a much lower impact on the rental value of the Property and was mindful that it ought to consider the impact of the Applicant's breaches in total, rather than allowing for each element in turn. Given that the roof was regarded by the Tribunal as very much the key matter, it considered that anything else added only very modestly to value.

178. The Tribunal allowed what it accepts is not much more than a token sum of £100 per year for the impact on loss of enjoyment of the items accepted other than the roof.

179. The Tribunal identified that the Respondent's case in relation to his bicycle was separate to defects with the Building. That arose from a particular event. It formed part of his argument as to set off.

180. The Tribunal accepted the Respondent's evidence that he had tagged his bicycle with the red tag provided: the Tribunal also accepted that the bicycle was removed. The Tribunal noted the detailed information provided to the agents in correspondence [95- 96]. Further, the Tribunal noted the other letters demonstrating that the Respondent had pursued the matter with the managing agents of the Applicant.

181. However, the Respondent did not know what had occurred beyond that, including whether the tag had come away or had been removed by a third party. The Tribunal considered that it was unable to identify a basis on which the Applicant had shown to be at fault or otherwise legally liable.

182. That part of the Respondent's defence of set off was therefore dismissed.

183. The Tribunal did not seek to consider the more specialist elements argued by the Respondent in relation to human rights and personal injuries but in the circumstances had not need to do so, the amount of set off in relation to the loss of enjoyment more generally having rendered no service charges payable.

184. The net effect is that the Tribunal determined that no sums within the jurisdiction of the Tribunal were payable by the Respondent.

185. The Tribunal limits it determination as to set off to the period of the claim for service charges. The value of any balance argument as to set off is left to be determined another time in the event of a demand for subsequent service charges in respect of which set- off may arise.

Decision

186. The Tribunal accordingly determines that the service charges demanded by the Applicant from the Respondent for the period 1st January 2014 to 31st December 2019 are not payable because the set-off argument extinguishes those.

187. Further that the balance of the claim is not a claim for service charges or administration charges and so does not fall within the jurisdiction of the Tribunal.

Costs in the Tribunal proceedings

188. The Tribunal does not identify any request of the Tribunal to award costs of the Tribunal proceedings in favour of the Applicant.

189. Any such claim would be required to be made pursuant to the provisions of the relevant rules- The Tribunal Procedure (First Tier Tribunal) (Property Chamber) Rules 2013 ("the Rules"). There has been no such application.

190. In the event that the Applicant seeks legal costs on the basis of a contractual entitlement to them which it is said the Tribunal must follow, the same reasoning set out above applies, namely that that the clauses mentioned by the Applicant do not go remotely close to forming any basis for a claim for legal costs pursuant to the Lease.

191. The Tribunal explained to the Respondent following a break to consider the case that it had determined no charges to be payable by the Respondent. It was explained that the reasons for that and other elements of the case would be set out in a written Decision.

192. The Respondent orally applied for any legal costs of the proceedings to be disallowed as recoverable as service charges or administration charges pursuant to the relevant provisions. In the circumstances of this case, the Tribunal would have granted those applications.

193. Given that it is clear that the Lease provides no basis for any such costs being charged as either service charges or administration charges, strictly there is no need for an order preventing recovery of costs which cannot be recovered in any event. The Tribunal was mindful that sometimes orders disallowing recovery of costs are made nevertheless.

194. Section 20C (3) of the 1985 Act, provides "the … Tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances". The Tribunal is given a wide discretion. The provisions of paragraph 5A are equivalent and for practical purposes the test to be applied to each limb of the applications that costs of the proceedings should not be recoverable is the same.

195. The provisions of section 20C were considered in *Re: SMCLLA (Freehold) Ltd's Appea*l [2014] UKUT 58, where the Upper Tribunal held that:

> "although [the First-tier Tribunal] has a wide jurisdiction to make such order as it considers just and equitable in the circumstances" (at paragraph 25), "an order under section 20C interferes with the parties' contractual rights and obligations, and for that reason ought not to be made lightly or as a matter of course, but only after considering the consequences of the order for all of those affected by it and all other relevant circumstances" (at paragraph 27).

196. In *Conway v Jam Factory Freehold Ltd*, [2014] 1 EGLR 111 the Deputy President Martin Rodger QC suggested that, when considering such an application under section 20C, it was:

> "essential to consider what will be the practical and financial consequences for all of those who will be affected by the order, and to bear those consequences in mind when deciding on the just and equitable order to make".

197. Whilst there is caselaw in respect of general principles, in practice much will depend on the specific circumstances of the particular case.

198. The Tribunal determined applying the above that it would make an order for the avoidance of any danger that the Applicant may seek to demand any costs of these proceedings as service charges or administration charges and any issue may arise which might require a further determination. It is preferable to draw a clear line now.

199. The Respondent did not make any application for his own costs to be paid pursuant to rule 13.

Note

200. The Tribunal has dealt with the service charges said to be payable up to and including 1st January 2021 as being those specified in the Claim Form. There are presumably other service charges which have been demanded more recently and if the claim had been altered and those transferred up to the date of issue of proceedings or beyond that to the date of the hearing or some other date, the Tribunal would have considered those.

201. Equally, the Respondent has an ongoing case in respect of the failure of the Applicant to undertake appropriate repairs and he will continue to do until such time as those repairs are carried out. If the Applicant had altered the claim, the same approach in respect of set-off would have applied.

202. The Tribunal has no doubt that the only appropriate course is for the Applicant to arrange to undertake the works to remedy the defects to the roof as identified by Mr Philips, subject to any updating required, and to remedy the longstanding defect with the Building, thereby alleviating the effects on the Respondent which the Applicant has inexplicably allowed to continue for so many years. The Applicant should similarly attend to the electrical cupboard and to the detector if required.

JUDGEMENT OF THE COUNTY COURT

203. The County Court issues have been considered by Judge Dobson alone. The Court has had regard to the determinations of the Tribunal. The Court has noted the provisions of the Lease between the parties as identified and/ or quoted in the determination of the Tribunal. It does not repeat those.

204. The Court noted the date of issue of the Claim Form, the amount of the claim and the contrasting period of the claim stated in the Particulars. The Court adopts the same approach in treating the claim as being for the sum of £6002.74 and hence relating to service charges for the period up to and including 1st January 2021.

205. The Court noted that the Tribunal found there to be no service charges or, if applicable, administration charges payable and so adopts the determination of that specialist tribunal both in respect of the service charges and in respect of the defence of set-off, including where that forms the foundation for the counterclaim.

206. The Court finds no service charges, or administration charges, to be unpaid and due.

207. The Court notes that determination of the Tribunal that the element of the claim that related to contractual costs was not a claim for administration charges and did not fall within its jurisdiction. It was therefore a matter to be decided by the Court.

208. The claim is for contractual costs as a sum due by the time of the issue of the claim; it is not a claim made costs as costs of the litigation and sought pursuant to the provisions in respect of such costs. Rather it is expressed to form part of the substantive claim and the amount forms part of the value of that for the purpose of calculation of the total amount of the claim and the applicable issue fee.

209. There is no evidence that the sums claimed of costs as part of the substantive claim have been notified to the Respondent and demanded from the Respondent. In the Court's judgment, very simply, if the sums have not been demanded and indeed validly demanded, they have not become payable. There has consequently been no failure to pay sums payable. There has been no breach on the part of the Respondent.

210. Valid demands are necessary not only in themselves but because if the sums have not been demanded and then remain unpaid beyond such period as the Lease provides or, in the absence of such a period, a reasonable time, there has been no breach of covenant by the lessee. The lessee cannot be in breach for failing to pay something which he or she has not been (validly) asked to pay.

211. Of course, the above requires that the sums could be payable in the event of being demanded. The Court agrees with the Tribunal that there is no contractual entitlement to legal costs. The Court adopts the

determinations of the Tribunal as to the clauses relied upon by the Applicant that those do not provide for an entitlement to legal costs.

212. The claim for contractual legal costs necessarily fails there.

213. The Court additionally, although nothing turns on this in the event, cannot identify on what basis a demand could be made if it were not a demand for administration charges, or perhaps rather less commonly service charges. In order for costs to be payable other than as costs of the proceedings, they must be demandable as something else due under the Lease.

214. If that is not as administration charges or service charges, the Court cannot identify what else there is. The Court certainly cannot identify anything within the provisions of this particular Lease. Hence, even if there had been a potential entitlement to such costs under the terms of the Lease- once validly demanded and unpaid- it is not apparent that there could be a basis for such demand other than as charges within the jurisdiction of the Tribunal

215. In addition to the matters transferred for consideration of the Tribunal, the Claim Form may have included a claim for unpaid ground rent. It is expressed as being for service charges and/ or service charges ground rent, rather than clearly one or the other and in specific sums. However, the Court was unable to identify any unpaid ground rent on the evidence presented by the Applicant.

216. The wording used in the Claim Form and Particulars comes across as standardised wording which has not been directed at the circumstances of the particular case. If that is correct and so there is reference to ground rent but there has never been a claim for ground rent, that is decidedly unhelpful- the Court would then have wasted time in attempting to identify whether there was a claim which in fact the Applicant never sought to bring.

217. If, which is not clear, the Applicant brought any claim for unpaid ground rent, that claim consequently failed.

218. There was no demand for ground rent contained within the bundle and so inevitably no valid demand. There was no demonstrable entitlement to recover ground rent (or other rent). It was not apparent from the various invoices/ demands [146- 170].

219. Hence, nothing is due from the Respondent to the Claimant.

220. The claim for interest fails, there being no sum on which to award interest.

221. The Court therefore turns to any value of the counterclaim over and above the sum of £6002.74.

222. In terms of the Respondent's counterclaim, the Court shares the view of the Tribunal that the Respondent's oral evidence was both credible and cogent. The Court adopts the summary of the parties' cases set out by the Tribunal and does not repeat that unnecessarily. In the premises, it is only the Respondent's substantive case which the Court is required to further consider.

223. The claim is stated in the Claim Form to be in the sum of £9,595.42 at the time of issue. The Counterclaim seeks up to £10,000.00. A fee was paid in respect of that counterclaim appropriate to £10,000.00, such that it is apparent that the Counterclaim is for up to that sum over and above any amount applicable to a defence of set-off against the claim. As identified above, in practice the relevant counterclaim is for any sum over and above £6,002.74.

224. The Court agrees with the findings of the Tribunal as to loss of enjoyment of the Respondent's flat. The Court agrees with the observations made by the Tribunal and the way in the value of the loss has been calculated, applying the same authorities of *Calabar* and *Earle*. The Court determines that the scope of the counterclaim as issued includes that loss within the references to suffering and quality of life.

225. Applying the sum of £1,300.00 per year to the full period from towards the end of 2012 to 1st January 2021 would give a sum of a little over £9,800.00. Taking matters in the round, the Court awards the sum of £3,800 over and above the value of the set of against the service charges up to 31st December 2021.

226. The Court has noted the approach of the Tribunal and the taking of an average over a seven- year period. The Court is mindful that it is the later part of the period where the value of the counterclaim exceeds the value of the claim and that the impact on rental value and diminution in enjoyment of the home are likely to have been greater during that period than the average of a seven- year period. However, on balance the Court retains the approach of taking the average sum identified by the Tribunal.

227. The Court proposed that it would adjourn the remainder of the Applicant's claim for loss on enjoyment generally with liberty to restore. The Respondent accepted that approach. The Respondent can apply to re-instate the balance in the event that is subsequently relevant.

228. No doubt the Applicant will be alive to that and will give it due consideration in relation to any service charges which it may assert are unpaid since the date of its claim in these proceedings. Without in any way seeking to pre-judge the value of any claim or counterclaim that there might be, the Court makes the obvious observation that the cautious £1300 per year adopted as an average across a period 2012 to 2019 is unlikely to be the appropriate sum for 2020 onward. The

parties would do well to avoid any dispute arising in advance of the works being completed.

229. The Court determines that the Respondent has no claim for breach of his human rights.

230. Leaving aside difficulties with such breaches sounding in damages in any event, the Applicant is not a public body. It owes no duties under the Human Rights Act and cannot therefore be in breach of any.

231. The Court has not ignored the matters raised by the Respondent in respect of this element of his case. However, the Court regards the matters raised as part and parcel of the wider case brought by him and so has taken account of the matters, insofar as they add anything (which is very little in the event), when considering loss of enjoyment more generally.

232. In respect of the claim for personal injuries, the Court noted the oral evidence of the Respondent and noted the references in his written case, including to headaches and consequent lack of sleep; to teeth grinding and myofascial pains; and to hearing loss. The Court carefully considered the medical evidence provided but considered that the evidence did not support there being injuries caused. For the avoidance of doubt- and mindful of the fact that the transfer order had raised the fact that the Tribunal may consider that there were matters it could not address, of which the personal injuries were the most obvious- the Judge records that he was entirely content with the benefit of experience of hundreds of both personal injury cases and housing disrepair cases during 25 years in practice, that he was able to deal with that aspect of the case.

233. The Court accepted that the Respondent suffers from headaches and myofascial pains. The Court accepted the evidence of the Respondent about the fact of those conditions and also found the medical information provided to offer clear support. The Court also accepted that the Respondent had suffered hearing problems- and that the medical information supported that- and further that included some decline in hearing over the years.

234. However, the evidence demonstrates that the Respondent has a long history of headaches, tinnitus and jaw tenderness. One letter [106] suggested that to pre- date 2012 and further correspondence [110] indicates the tinnitus to have arisen in or about 2011 with no reference being made to the Property. It is said by an ENT specialist that tinnitus has been caused by hyperawareness following his facial pain [106]. That facial pain is described as chronic, that is to say persisting for a long time.

235. Separate Consultant Neurologist evidence [108- 109] indicates that headache problems have been experienced by the Respondent for the previous 20 years and that “nothing has changed at all”. There is no

support for the issues with the Property having caused or exacerbated any headache problems.

236. It is right to say that the letter from a Hearing Therapist [110- 111] discusses tinnitus. It refers to high levels of stress but also to exposure from noise from work in theatre but gives no clear opinion as to cause.

237. The evidence does not demonstrate that any decline or other medical matters relate to the difficulties described by the Respondent with regard to the Property. Indeed, none of the medical evidence makes specific mention of a matter being related to the Property. Although the Respondent asserted that he was able to obtain additional evidence, the Court identified that the hearing was the trial of the counterclaim.

238. Whilst the Court did not disbelieve the Respondent and instead accepted that the Respondent believes there to be a connection, the Court had careful regard to the fact that is a subjective belief about what is a medical matter. The believe of the Respondent in a connection was insufficient to demonstrate an actual connection.

239. The Court did not discount the possibility of a connection between the conditions at the Property and the dealings with the Applicant/ its agent and any increase in medical problems. However, the Court must determine matters on evidence and the burden is on the Respondent to prove his case on that evidence. He might manage to demonstrate injuries on other evidence but that is not the position in these proceedings. The Respondent did not do so on the evidence actually presented in this case.

240. The Court did not allow any sum for the loss of the Respondent's bicycle. Most simply, whilst the Respondent had raised that, the Respondent had not identified the loss or any value of such a claim as part of his counterclaim.

241. The Respondent's counterclaim therefore succeeds in the sum of £3,800.00, being the value at £1300.00 per year for the period late 2012 to the end of 2019 less the £6007.24 which applied as set- off against the service charges claimed.

Cost and expenses of the Court proceedings

242. The Court noted that the bundle included a Skeleton Argument, as termed, from the Applicant's solicitors in respect of costs.

243. That document adopts a wildly optimistic approach to the costs, both in terms of the Lease providing an entitlement to contractual costs and as to the approach of the Applicant to the dispute, the latter of which in particular flies in the face of the findings of the Court (and Tribunal). Even if the Applicant had succeeded and had any demonstrable entitlement to costs, the manner in which the case was presented would have had a dramatic impact on any costs which might have been awarded.

244. The Court considered that there was no reason to award costs other than to the successful party, which the Court regarded as the Respondent, if anyone.

245. In the fast track, Part 44 would have required a series of decisions as to awarding costs and as to the amount of the costs. However, in the normal course there would be no order for costs in proceedings in the small claims track.

246. The Court identified that the Applicant might assert that the costs of the proceedings which it claimed to be contractually due could be claimed as legal costs in addition to the substantive claim, rather than as part of the claim, as presented. In the event of a contractual entitlement to costs, that would potentially provide an exception to the usual position in the small claims track.

247. However, firstly, that was not how the case was presented and there was no clear indication that the Applicant sought to pursue costs on that basis. It was not possible to clarify the matter with the Applicant in the absence of attendance at the hearing. Secondly, given that the Court had determined that there was no contractual entitlement to costs, there was no basis for any such claim. There were also no details of any costs incurred by the represented Applicant and claimed in the event that had been relevant. That last point was not especially significant given the lack of contractual entitlement and the outcome of the case.

248. There was no claim for costs as such by the Respondent. He also said that he had incurred cost of £19.00 in expenses to attend the hearing, which the Court accepted as correct. The Court determined that the Respondent was entitled to payment of those expenses from the Applicant.

249. The Respondent also sought the balance of £100.00 for his time and inconvenience in relation to the case. It was established that the Respondent no longer works and so any award would have been at the basic rate for an unrepresented party.

250. The other exception to the usual rule that a party does not recover costs in the small claims track is pursuant to 27.14 of the Civil Procedure Rules. That is to say where the other party has acted unreasonably.

251. The Court determined that the Applicant had done so, in failing to attend the hearing including by way of a representative and by seeking to adjourn the hearing at the eleventh hour with very limited information (combined with the lack of attendance to then present that application and provide any additional information).

252. The Court accepted that the time spent by the Respondent even in relation to the hearing alone was sufficient to merit £81 at the hourly rate applicable and considered the claim for costs made to therefore be eminently reasonable.

253. The Court awarded the Respondent costs of £81.00.

254. The Respondent had plainly paid a Court fee in respect of his counterclaim, in the sum of £455.00. Given that the counterclaim succeeded, the Court determined that the Respondent ought to recover that against the Applicant.

255. The Applicant had also paid a fee for the issue of the Court proceedings but having failed in the claim, there was no reason, the Court determined, for the outcome to be anything other than that the Applicant must bear that fee.

256. The Court determined that, for completeness, it was appropriate to make the same orders in respect of any potential recovery of costs of the Court proceedings as service charges or administration charges as had been made in the Tribunal proceedings. The Court did so notwithstanding the determination that no costs could be recovered on that basis pursuant to the terms of the Lease in any event.

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.