FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY) &

IN THE COUNTY COURT at KINGSTON, sitting at 10 Alfred Place, London WC1E 7LR

Tribunal reference	**:**	**LON/00AX/LSC/2020/0355**
Court claim number	**:**	**G41YX191**
Property	**:**	**32 The Watergardens, Warren Road, Kingston-upon-Thames, KT2 7LF**
Applicant/Claimant	**:**	**The Watergardens (Kingston) Management Company Limited**
Representative	**:**	**Mr S Madge-Wyld (Counsel)** Instructed by J B Leitch
Respondent/Defendant	**:**	**Mrs Kyung-Ran Moon**
Representative	**:**	**Hearing: Mr Bong Wan Lee** **Costs only: Mr Christopher Jacobs (Counsel)** instructed by Murray Hay Solicitors
Tribunal members	**:**	**Judge N Carr** **Mr S F Mason BSc FRICS**
In the County Court	**:**	**Judge N Carr**
Date of decision	**:**	**22 July 2021** Amended pursuant to the slip rules (rule 50 Tribunal Procedure (First Tier Tribunal) (Property Chamber) Rules 2013, and rule 40.12 of the Civil Procedure Rules) 10 August 2021

DECISION

This decision takes effect and is 'handed down' from the date it is sent to the parties by the Tribunal office

---

DECISION made by the Tribunal:

(1) The estimated service charge budgets for 2019 and 2020 are reasonable, and the sum of £9,064 is payable by the Respondent to Applicant.

ORDER made by the Court:

(2) Judgment for the Claimant for the following sums, payable by the Defendant by 26 August 2021:

(i) The service charges found payable in paragraph (1) above;

(ii) Interest pursuant to clause 4(F) of the lease calculated in the case of the service charge demands on the sum of £4,463.00 from 1 July 2019 and for the sum of £4,601.00 from 1 January 2020 and in the case of both to the date of judgment: £612.69.

(iii) Legal costs under paragraph 17 of the Second Schedule of the lease: £28,352.50.

The Proceedings

1. Proceedings were originally issued against the Respondent, Mrs Kyung-Ran Moon on 18 March 2020 in the County Court under claim number G41YX191. The Respondent filed an Acknowledgement of Service on 1 April 2020, and then (after being given permission to file it by 4pm 28 August 2020) a Defence and Counterclaim, in response to which the Applicant filed and served a Reply and Defence to Counterclaim dated 18 September 2020. The proceedings were then transferred to this Tribunal by the order of District Judge Armstrong dated 3 November 2020.

2. After the proceedings were sent to the Tribunal offices, the Tribunal took administration of the whole claim so that the Tribunal Judge at the final hearing performed the role of both Tribunal Judge and Judge of the County Court (District Judge).

3. Directions were issued at a case management hearing by Judge Latham on 26 January 2021, and the matter eventually came to hearing before us on 13 – 14 May 2021.

The hearing

4. The Applicant, The Watergardens (Kingston) Management Company Limited, was represented by Mr S Madge-Wyld of counsel, instructed by J B Leitch solicitors, for whom Ms Jessica Stanway attended. Also in attendance were Dr David McAughtry, chairman of the Applicant and owner of Flat 35 the Watergardens, Warren Road, Kingston-upon-Thames, KT2 7LF ('Flat 35'), Mr James Hewitt-Lee on behalf of KFH (Managing Agents), a Ms Silvera (also from KFH), Mr John Chandler (the Estate Manager) and Mr Roland Wade, the Applicant's expert. The Tribunal heard evidence from Mr Hewitt-Lee, Mr Chandler and Mr Wade.

5. The Respondent appeared in person. Mr Bong Wan Lee (her husband), Ms Na Rae Lee (her daughter), and Mr Sang Mun Lee (her son) also attended, as did Mr Christopher Lee (no relation) as her expert. The Tribunal heard evidence from Mr Christopher Lee.

6. It had been stated in that Statement of Case that the Respondent appointed Mr B W Lee, Ms Lee, and Mr S M Lee to represent her, despite the fact that at the case management hearing Judge Latham had explained that was practically not possible.

7. At the outset of the hearing, and for the first time, it was stated that the Respondent did not in fact speak English and required an Interpreter. Ms Lee stated she was going to interpret for the Respondent.

8. There had been in excess of 70 emails sent from the Respondent's email address and digitally signed-off 'Mrs K R Moon', in additional to numerous telephone calls to the Tribunal's case officers from a female individual purportedly identifying herself as the Respondent, in the period leading to the hearing. The Respondent failed to attend the Case Management Hearing, but none of her family who attended had raised any issue with her ability to understand or speak English.

9. It was raised at the outset that the Defence and Counterclaim, and subsequent Statement of Case, each had a statement of truth purportedly signed by the Respondent. Initially Ms Lee stated that the pleadings were from all of the family. Subsequently it was suggested that they had been written, then read back to the Respondent for her to agree them and to sign.

10. For practical purposes we required that only one of the family represent the Respondent. Mr B W Lee stated he was going to represent the Respondent. Ms Lee then stated that Mr B W Lee also did not have sufficient English properly to present the case, and she would also act as interpreter for him. It should be noted that Mr B W Lee was the nominated representative for the Respondent at the case management hearing and no such assertion was made.

11. We expressed concern that, given the communications with the Tribunal, and the matters in paragraph 9 above, Ms Lee would not be an appropriate interpreter, since it was clear she was minutely bound-up in the conduct and framing of the Respondent's case in the proceedings, and we would not be able to be certain that she would interpret neutrally and faithfully. More importantly however, the person from the family representing the Respondent ought to be sufficiently conversant with both the facts and English properly to present the case. It seemed to us that individual might be Ms Lee, and we gave the family the opportunity to reconsider in private whether it might be more appropriate for her to be the Respondent's representative.

12. On reconvening, it was confirmed that Mr B W Lee would be the representative, and that he had sufficient English and conversance with the case to do so. We therefore decided not to adjourn for an interpreter.

13. We therefore reminded Ms Lee that she was not to intervene in the proceedings. This proved difficult for her (which, given what is set out above, and our suspicion that she has taken the burden of the bulk of preparation for the case, might be considered understandable), and on more than one occasion we had to ask that she stop either speaking over, or dictating what to say to Mr B W Lee, or interrupting to tell us that he did not understand or wasn't making the point clearly enough, or indeed speaking over us to tell us we were not understanding. At one point we had to ask that she leave the room in which she was present with her parents, as she had become too disruptive.

14. Whereas this Decision refers to the Respondent as 'her' or 'she' throughout, as she is the correct legal party to the case, we are satisfied that the documentation and communications forming the basis of the dispute indicate that the whole family are involved, and acted interchangeably in the dispute, such that we might as well say 'they' on that basis. This is no doubt in consequence of the family all living at Flat 32.

The Issues

(i) Identified at the beginning of the hearing

15. The sums claimed by the Applicant on the Claim Form were as follows:
    (i) Estimated on-account service charges for
        (a) 1 July 2019 - 31 December 2019 - £4,463.00
        (b) 1 January 2020 – 30 June 2020 - £4,601.00;
    (ii) A late payment administration fee in the sum of £168.00;
    (iii) Interest of £153.54 and legal costs of £642.90 at the date of issue.

16. The costs position had moved on somewhat, and on the previous Tuesday evening the Applicant had served a schedule amounting to £46,092.54.

17. The crux of the Respondent's Defence was that works carried out in May – June 2019 in connection with a leak thought to emanate from the balcony at Flat 35 and making its way through the soffit cladding above the patio of Flat 32 were either wrongly incurred because the responsibility of Flat 35, or not payable as they had not been carried out to a reasonable standard. The Respondent's pleaded case was that this made the service charge sums claimed by the Applicant in totality not

payable by virtue of section 19 of the Landlord and Tenant Act 1985 ('the Act').

18. The Respondent's Counterclaim was for the sum of £11,551.64. It is difficult to ascertain of what this sum is composed, but by far the majority of it is in reliance on a quotation from DBR and Sons Roofing **[142]** ('the DBR quote') for works identified that might be undertaken to the balcony of Flat 35 and the cladding beneath (£10,872), to fix the leak. Of those works, £8,160 are said to be in relation to the balcony at Flat 35, and £2,712 to the cladding underneath, overhanging Flat 32. Of the remainder, some was no doubt formed of costs.

19. At the start of the hearing, we identified the relevant issues for decision by us as a Tribunal were as follows:

    (i) Whether the service charges for the disputed works were reasonably incurred and the works carried out to a reasonable standard, pursuant to sections 19 and 27A of the Landlord and Tenant Act 1985 ('the Act');

    (ii) Whether the administration charges had been properly demanded and were payable;

    (iii) The existence and quantum of any set-off for the Respondent's counterclaim for damages for disrepair, to the extent that they fell to be determined within the Tribunal's ordinary equitable set-off jurisdiction;

    (iv) The Respondent's application, made the night before the hearing, for a paragraph 5A Schedule 11 order under the Commonhold and Leasehold Reform Act 2002 ('the paragraph 5A Application') to reduce or extinguish the Respondent's liability to pay, as an administration charge, the litigation costs.

20. As regards the County Court issues for determination by me sitting alone as a District Judge of the County Court, the remaining issues were:

    (i) The balance (if any) of the Respondent's counterclaim for damages for disrepair;

    (ii) The Respondent's counterclaim in alleged fraud, misrepresentation, blackmail, embezzlement, harassment, mismanagement, abuse of position, perverting the course of justice, the Protections from Eviction Act 1977 and allegations in respect of which the Respondent sought from the Court criminal findings;

    (iii) Interest; and

    (iv) Costs.

21. If and to the extent it might become necessary, I appointed Mr Mason to sit as an assessor of the County Court in respect of any balance of the claim in damages for disrepair in 19(iii) and 20(i) above exceeding the sum of the claim.

22. In an *ex tempore* judgment given during the preliminary part of the hearing on 13 May 2021, I struck out the Respondent's counterclaim insofar as in related to alleged fraud, misrepresentation, blackmail, embezzlement, harassment, mismanagement (save if and insofar as it related to the key issue between the parties of the want of repair and payability of service charges), abuse of position, perverting the course of justice, the Protection from Eviction Act 1977 and any and all allegations in respect of which the Respondent sought from the Court criminal findings, against (variously) the Applicant, the leaseholder of Flat 35, the Applicant's expert(s), and the Applicant's solicitor(s), for the reasons given orally. Mr B W Lee asked for permission to appeal, which I refused for the reasons given orally. I explained to Mr B W Lee that the Respondent would have 21 days from the date of my *ex tempore* judgment to renew any application for permission to appeal, to a Circuit Judge of the County Court.

(ii) Raised during the hearing

23. During the hearing (somewhat surprisingly, given that it had been recorded by Judge Latham in the preamble to his Directions that at the case management hearing appeared no longer to be taken as an issue), Mr B W Lee pursued the question of whether service charges had been properly demanded, asserting that there had been no rights and obligations provided with the demands. Despite indicating orally that once again he retracted from the argument (upon us raising the above during the course of his cross-examination), nevertheless he relied on it in his closing submission. It is to be noted that last-minute paragraph 5A Application by the Respondent (but drafted, as indicated, by Ms Lee) relies substantially on this issue. We therefore consider it necessary for us to deal with that additional matter as an issue before the Tribunal, albeit briefly.

(iii) Conceded during the hearing

24. It was conceded by Mr Madge-Wyld during the hearing that the Bundle contained no evidence of demands for the administration charge sought, and that therefore that sum (£168) was not pursued. We therefore need make no determination on it.

25. The Respondent had taken lengthy issue with the identity of the Applicant in her Statement of Case (though not previously in her Defence and Counterclaim). This was raised in cross-examination by Mr B W Lee, and we questioned the relevance of it to the service charges dispute. On the most generous interpretation, we considered that this was entangled

in the allegations of fraud etcetera which had been struck out at the beginning of the hearing. Mr B W Lee conceded the point and pursued it no further.

(iv) Not taken/pursued before us

26. The Respondent had in each of her Defence and Counterclaim and Statement of Case pursued an argument regarding an arbitration clause in the lease (clause 8(4) **[439]**). It was not pursued orally before us, but for the avoidance of doubt had it have been, in accordance with section 27A(6) of the Act we would have found that such provision in the lease was void.

Preliminary Issue - Bundle

27. Rather unfortunately, as set out in my Decision of 7 May 2021 the Respondent had not followed Tribunal Directions and not endeavoured to agree the Bundle to be put before us at the material time.

28. In that decision, I had given the Respondent the final opportunity to carefully scrutinise what had been provided by the Applicant in the Bundle, and to identify to the Applicant what she said was missing.

29. In the emails that followed, it was plain that the parties could not agree. The Applicant's position was that they had been sent a sheaf of documents, some of which had already been included in the Bundle and some of which had not been previously served.

30. At the commencement of the hearing, we gave the Respondent the opportunity to identify the documents that had been served but that she said were missing from the Bundle. Mr B W Lee was unable to do so.

31. We therefore refused permission to introduce any new documents.

DECISIONS AND REASONS

32. A Bundle of documents of 1332 pages was provided to us. The digital pagination and manuscript pagination differ due to insertion of additional pages sub-paginated 253A – 253G. We therefore refer to the documents by their manuscript page number, as indicated by bold square brackets, e.g. **[1]**. In addition, hyperlinks to several videos were provided by the parties, as well as MP4 sound recordings of extracts of a conversation with Mr Roland Wade, the Applicant's expert in these proceedings, included by the Respondent in her statement of case **[1004-1006]** and separately by email.

33. We were further provided with Mr Madge-Wyld's Skeleton Argument, to which was appended a copy of *Knapper v Francis* [2017] UKUT 3 LC.

34. I have also read all of the Respondent's correspondence with the Tribunal, save to the extent that any of that correspondence contained without prejudice materials (termed by the Respondent 'Blackmail' letters), which I did not read once I had identified that is what they were.

35. While the Tribunal has read the entire Bundle and listened to and viewed the recordings, it is neither necessary or proportionate in this Decision to summarise every single document or recording.

The Background

36. The subject property is Flat 32 The Watergardens, Warren Road, Kingston-upon-Thames, KT2 7LF ('Flat 32'). It is a ground floor flat in a three-floor block known as the 'Japanese Garden Apartments' in The Watergardens development, which is a private gated development down a private road adjacent to the Coombe Wood Golf Club. The Japanese Garden Apartments were constructed in around 1989 by Octagon Developments ('Octagon'), as an extension to the pre-existing 1930s Watergardens development, to offer prestigious low-density apartment living. It is constructed at its core around an in-situ cast concrete frame with concrete slab-flooring, and makes use of traditional timber cladding, render and brickwork, and profiled roof-tiling, to create the aesthetic of a Japanese-style Imperial Palace.

37. Flat 32 itself benefits from an external patio area. Overhanging that patio area by approximately 600mm is a wood-clad soffit, fascia and flank, affixed to the underside of the balcony of Flat 35 above. That balcony is constructed of concrete with a screed to which ceramic tiling is affixed. At the edge of the balcony are located coping stones into which steel stanchions supporting a railing are set. The balcony of Flat 35 is said by the Respondent to be the origin of a leak giving rise to the dispute in these proceedings.

38. Neither party requested an inspection of the property. While we considered whether an inspection would be necessary for the reasons outlined later herein, we decided that it would not be necessary or proportionate.

39. By a lease dated 27 June 1991 (varied by deed in 1998 to extend its term to 999 years **[466]**), the Respondent holds a long lease of the subject property, which she says she purchased on or around 18 April 2017 (which purchase was registered in the title documents on 1 June 2017 **[427]**) ('the Lease').

40. The relevant clauses of the Lease are as follows **[432-468]**. So far as material to the dispute, the provisions of the Lease in respect of Flat 35 are said to be identical.

41. The Demised Premises, by Clause 1 (D) and the Third Schedule, are:

ALL THAT the apartment (herein called 'the apartment') and its appurtenances numbered 32 and situate on the ground floor of the Japanese Garden Apartments (herein referred to as 'the Building') forming part of the Landlord's development known as The Watergardens Warren Road… INCLUDING (without prejudice to the generality of the foregoing):-

…(ii) the plastered surfaces of the ceilings of the apartment

(iii) the plaster on the interior of the external or other load bearing walls of the apartment and on the interior of the walls of the apartment dividing the same from the Remainder of the Building

(iv) the entirety of internal non-load bearing walls of the apartment

(v) the screed on the floors of the apartment and on the balcony (if any) included within the Demised Premises

(vi) the windows and window frames of the apartment and where appropriate the balustrade and/or night vents of the balcony (if any)

(vii) (where the apartment is on the ground floor of the Building) the patio area lying within the red edging of the Floor Plan

(viii) (where the apartment is on the first or second floors of the Building) the balcony lying within the red edging of the Floor Plan

(ix) … all the Landlord's fixtures and fittings which are now or may at any time be in the apartment BUT EXCLUDING all load bearing walls and other parts of the main structure of the Building (whether or not lying within the red edging of the Floor Plan)

42. By Clause 4, the Respondent covenanted to observe and perform the obligations in the Fifth Schedule:

1. To pay to the Management Company a service charge (as hereinafter defined and herein referred to as 'the Service Charge') in two equal instalments on the 1st day of January and the 1st day of July in each year… free of deductions in advance and on account of such Service Charge for such year and (generally) in accordance with the following provisions:

(A) The Service Charge shall be such sum or estimated sum required by the Management Company or its agents to be paid by the Tenant and notified to the Tenant as shall be equivalent to one equal thirty-seventh part of the expense to the Management Company of performing the obligations and the covenants on its part contained in the Sixth Schedule hereto and providing the several services and amenities referred to in the Seventh Schedule hereto for the Benefit of the tenants of the Buildings for the Management Company's financial year…

(F) The Tenant shall pay to the Management Company interest at the rate of three percent above the base rate of Lloyds Bank plc for the time being in force… calculated on a daily basis on all Service Charge contributions payable hereunder which are in arrears and unpaid for more than twenty one days after the same shall have become due and payable…

43. The financial year ends on 31 December each year.

44. By the Second Schedule, the Respondent covenants:

3. (a) To repair and keep the Demised Premises and every part thereof and all Landlord's fixtures and fittings therein and all additions thereto including without prejudice to the generality of the foregoing… all floors walls ceilings plaster and other surface coverings… (but specifically excluding all load bearing walls and other parts of the main structure of the Building) in good and substantial repair order and condition at all times during the Term including the renewal and replacement forthwith of all worn or damaged parts…

17. To pay to the Landlord all costs charges and expenses (including legal costs and fees payable to a surveyor) which may be incurred by the Landlord in or in contemplation of any proceedings under sections 146 and 147 of the Law of Property Act 1925 notwithstanding forfeiture is avoided otherwise than by relief granted by the Court…

45. By the Sixth Schedule, the Applicant covenanted at paragraph 1: '*well and substantially to repair maintain paint pave cleanse amend redecorate and renew*':

(a) the exterior and main structure (including in particular but without prejudice to the generality of the foregoing the roofs external and other load bearing walls floors foundations gutters and downpipes) of the Buildings and also including those parts thereof comprised in this demise or any demises of the other apartments in the Buildings…

(c) … and other parts of the Buildings including all rails … (other than and except any parts thereof comprised in this demise or any demises of the other apartments in the Buildings)…

12. To do all such acts and things as may be required of the Management Company to provide the services referred to in the Seventh Schedule hereto

PROVIDED ALWAYS:-

(1) The Management Company shall in no way be held responsible for any damage caused by any want of repair to the Estate or any part or parts thereof or any defects herein for which the Management Company is liable hereunder unless and until formal notice in writing of want of any such repair or defect has been brought to the notice of the Management Company and the Management Company has failed to make good or remedy such want of defect within a reasonable time of the receipt of such notice…

Applicant's case

46. It is the Applicant's case that the estimated service charges had been demanded on 12 June 2019 and 11 December 2019, and copies of the demands were included at **[476-479]** respectively. The required rights and obligations had been printed on the back of the demands, as shown in the Bundle. Certified Accounts for the year to 31 December 2019 had been provided in accordance with the requirements of the lease **[488-500]**. A service charge budget had been produced and sent to the Leaseholders on 17 December 2019 for the year 2020 **[502]**. The certified accounts were not, at the date of preparing the Bundle, available for the year end of 2020, however, invoices for all sums included in both the 2019 and 2020 expenditure were provided at **[506-949]**. The service charges demanded were reasonable estimates, and payable by the Respondent, as were the interest and costs occasioned by their non-payment.

47. It was submitted that we were to be in no doubt that these proceedings were brought in contemplation of forfeiture. Two further service charge demands had been made since issue, and remained unpaid **[480-483]**. The Respondent was in very substantial breach of the Lease.

48. In terms of the Applicant's position on the Respondent's Defence and Counterclaim, the facts relied on were as follows.

49. On 7 June 2018 the Applicant had instructed Hallas and Co, Chartered Surveyors ('Hallas') to inspect Flat 32 in connection with the complaints

made about water ingress to that Flat and damage below the balcony terrace of Flat 35, affecting Flat 32.

50. In its report dated 1 August 2018 ('the Hallas Specification') **[315-317]**, the findings were given. On attending at first, it had been found that the cladding beneath the soffit had been opened-up due to the deterioration around a section housing the downlighter. They had asked that the front tongue and groove fascia be removed to allow for a more detailed inspection. On that opening-up, it was noted that fixing battens had suffered from water ingress and deterioration. Flood testing was carried out to the balcony at Flat 35, which resulted after approximately 5 minutes in water beginning to appear below the concrete slab in the position where the soffit deterioration had occurred, and subsequently dripping through onto the patio of Flat 32.

51. The Hallas Specification concluded that the detailing to the balcony terrace was poor, and that good practice would have been to have a 150mm upstand to allow a flashing to run under the coping stones at the edge. However, to do so would entail removal of the railings and copings, and then building up the perimeter wall before reinstatement. Retrospective installation would be extremely costly.

52. Instead, what was recommended was that the following works were undertaken, and three-yearly inspections undertaken subsequently:

    (1) Carefully remove all items as necessary and rake out mastic to the entire perimeter of the balcony floor/coping abutment; prepare and apply Geocel clear waterproof sealant (or similar approved) tooled to smooth finish. Allow to carry out water test prior to commencing works below.

    (2) Rake out pointing to copings and renew using pre-mixed waterproof mortar finish to match existing joints;

    (3) Remove all cladding to front fascia and set aside for re-use; allow to remove and renew all rotten fixing battens and renew same using tantalised treated timbers and re-fix cladding.

    (4) Remove sections of rotten soffits to nearest timber bracket and renew using [waterproof boarding] plywood. Allow to [supply and fit] 3no 50mm brown circular soffit vents set at equal distance along the length of the front soffit.

    (5) Allow to fit new LED downlighter and test upon completion.

    (6) Allow to make good all works disturbed and decorate to match existing finish.

53. These are the disputed works for the purpose of the Respondent's liability for payment of the service charge.

54. It appears that at least two companies were invited to provide estimates for the works **[961]**. David Cook Roofing Contractors ('David Cook') were engaged to carry out the works, at a cost (VAT inclusive) of £660 for the balcony works at Flat 35 and £1,260 to the cladding **[725]**. There was some initial snagging when the works were first water tested, but the snagging works had been completed on or around 5 June 2019 **[1163]**.

55. On 14 June 2019, Mr Edward Hawkins of Hawkins Chartered Building Surveyors provided a report ('Hawkins' First Report') on the works **[319-321]**. Mr Hawkins had inspected on 13 June 2019. He was satisfied:

(1) That the new timber sections were of satisfactory design and profile, so as to as closely as possible match the original;

(2) Spruce pine was a reasonable species of timber for repair work of that type, and it had been treated with a stain/preservative to match the Japanese Garden Apartments aesthetically;

(3) Only the front section and parts of the soffit of the balcony cladding had been removed, with sections replaced as required due to historic weathering and more recent water damage;

(4) The parts of the timber framing identified in the Hallas Specification that had been severely water damaged had been replaced with treated softwood, as would be expected;

(5) That the works carried out by David Cook were correct to address the issues revealed by the photographic and video evidence of the water penetration and damage to the cladding;

(6) That the cladding to the left-hand return, which had not formed part of the works, showed some historic weathering that would no doubt be addressed in the next phase of cyclical redecoration and repairs;

(7) That the light fittings were externally rated and ought to have been unaffected by the water seen to be coming out from around them, but were approximately 30 years old and so coming to the end of their natural life. This was an issue affecting the whole Japanese Garden Apartments;

(8) The works carried out to the coping stones at Flat 35 had been inspected. They had included: "*The joints between the stone sections, which had been cut out with an angle grinder; the joints had then been partially filled with a water-proof mastic and the remainder*

covered with a sand and cement mortar. This repair was undertaken to the coping stones to a satisfactory standard";

(9) It had been raining during the inspection, and no ongoing water penetration issues had been visible;

(10) The exterior grade Polyfilla used to repair the retained sections of the cladding was visible through the preservative/stain applied. Being picky, any such repair in the future should either be to replace the entire timber (in the case of significant repairs), or to treat smaller surface and joint repairs with a more sympathetic product range called 'Repair Care'.

56. Mr Hawkins had had a further meeting with Mr B W Lee and Ms Lee on 1 August 2019, leading to a further report dated 7 October 2019 ('Hawkins' Second Report') **[323-327]**. In it, he continued to maintain that the works had been carried out to a reasonable standard. However, the Polyfilla on the fascia timber now looked likely to fail, and the contractor would need to be instructed to return to deal with that issue. The access hatch for monitoring the issue did not 'line up' with the boards on either side or with the decorative cantilevered timber beam, and the steel screws were very visible. Those minor decorative and levelling issues could be dealt with also by the contractor, by the insertion of packing pieces and brass screws and caps. Minor decorative items were noted: the ends of the cantilevered timber beam features were slightly stained and in need of minor attention/decorative repair. New downlights had that morning been installed. The new bezels were smaller, which had left a distinct ring on unstained timber exposed. In respect of the latter two items, Mr Hawkins had been informed that between his inspection and Hawkins' Second report, Mr Chandler had undertaken the decorative touch-ups required.

57. In that Second Report, Mr Hawkins stated as follows:

The design of the three cantilevered balconies serving the Japanese Block are identical. They consist of reinforced concrete structural slabs that cantilever from the main structure. They are clad with timber to the face of the slab and underside (soffit). They are dressed with stone parapet capping, which also retains the metal balustrading. The timber cladding to the face of the slab abuts the underside of the stone capping. These have been designed in this manner, with no water-proofing membranes or any other type of sealant between the timber and stone components. The timber as a natural living element will expand and contract as the temperature rises and falls, this is expected and also part of the original design. This design will allow water to penetrate behind the face of the timber cladding, so the inner face of the timbers will on occasion get wet. While the boards are interlocking, they are designed to allow water to escape from the void between the timber cladding and structural slab.

While there appears to be no or very limited water penetration to the balcony soffit during or after normal rainfall, under very heavy rainfall there may be some more noticeable leakage or drips observed, again this is to be expected given the design and materials used.

The Japanese block has been poorly designed in respect of dealing with excessive rainfall. The guttering and drainage systems are unable to cope with exceptional amounts of rainfall. However, these infrequent bouts of water overflowing the parapets and gutters under very heavy rainfall will not in our opinion be deleterious to the structure of the balcony. It should also not result in any significant damage to the timber cladding.

58. Mr Hawkins goes on to state that water staining should mostly dry out as the timbers dry, but that there is a "*very big difference*" between the timbers being water stained, and being rotten or not fit for purpose. If the timbers were rotten, they would fall apart under small amounts of force. After 30 years of service, there may well have been some rotten timbers, but Mr Hawkins would expect those to have been replaced in the disputed works. He would also expect structurally sound, but possibly stained, timbers to have been reused when the cladding was reinstated.

59. Hawkins' Second Report also sets out in its conclusions that wholesale replacement of all of the timber cladding, as sought by Mr BW Lee and Ms Lee, was unnecessary. The next round of cyclical works, in due to be undertaken in late Spring 2020, would involve a wholesale review of the cladding and repairs undertaken as necessary.

60. In a final report ('Hawkins' Third Report') dated 30 October 2019 **[329-331]**, Mr Hawkins describes having an impromptu meeting on 8 October 2019 with Mr B W Lee and Mr Chandler, in which it was agreed Mr Chandler would remove the access hatch boards for an inspection of the void to be undertaken by him in Mr B W Lee's presence. Mr Chandler had done so on 9 October 2019, at which Mr Hawkins had not been present. Photos of the removed boards had been sent to him, and he had instructed Mr Chandler not to reinstate them and to see that they were replaced. Mr Hawkins was able to inspect one of the boards that had been removed on 16 October 2019 (the second having been retained by Mr B W Lee), and had found it to be in poor condition, with evidence of historic dry rot mycelia (grey/white powder), and of historic water penetration to the board. Mr Hawkins observed that the fungus had spread through parts of the board, causing the particular board to have some physical damage to the edges and inner section. It had cracked and rotted where the screw fixings had been installed. Mr Hawkins posited that the screw hole was the perfect access point for water to collect and the dried-out spores to be reactivated and to grow and spread longitudinally. The external face of the board in the soffit would have

looked to have been in perfectly good order, and only on removing it would you have known that the rot was present.

61. He concluded that while unexpected, this was not a cause for alarm. The inactive historic dry rot spores were likely to be present in the other cladding, but that dry rot would only affect the cladding to the balcony if the moisture levels went above a certain level. It would not affect the concrete balcony structure. It was reasonable to address the matter in the upcoming cyclical works. He set out his recommendations for doing so.

62. In February 2020 the Applicant had commissioned Mr Roland Wade BSc(Hons) MRICS RICS registered valuer to review the three Hawkins reports and to survey the elements of the balcony to provide an independent assessment and prepare a new report on the questions: (1) whether the approach taken in respect of the reported defect had been appropriate; (2) whether the work was done satisfactorily "*given the circumstances*"; (3) whether Hawkins' conclusions regarding the overall design of the building were correct; and (4) to recommend supplemental actions to rectify the problem ('Wade First Report') **[334-344]**.

63. That report acknowledged that there remained, in severe rainfall, some areas off the soffit to which "*small drips*" occurred, and that small amounts of dry rot had been recently found in "*new soffit timbers*". At 9.0, Mr Wade states that he understands that in very heavy rainfall, from the heavily profiled roof-tiles above rainwater overshoots the gutters and "*we assume, the dual weathered coping stones set to the perimeter of the balcony*". He would have preferred that the coping stones used in the construction of the Japanese Garden Apartments had been single- rather than dual-weathered as present at the edge of the balcony at Flat 35, in order to ensure that rainwater oversailing was directed back onto the balcony of Flat 35 from where it could be appropriately drained. Additionally, the coping stones only over-sailed the timber fascias by 35mm, whereas he posited a minimum 50mm would be required to ensure the effective functioning of the drip detail.

64. Joints between the coping stones had been cut out and repointed in mortar and the works had been done well. However, the rebate in the underside of the coping stones which formed the drip detail had not been formed in the mortar pointing between them, which was likely to facilitate localised rainwater to "*track back along the underside of the mortar pointing and run down the outside face of the concrete balcony to discharge between sections of the tongue and groove timber cladding as was found to be the case*".

65. Mr Wade expressed that it was his belief that the approach taken to the reported issues was appropriate and proportionate, and addressed both the symptoms and the cause. He agreed that the wholesale replacement of the timber cladding would be disproportionate. The overhanging

canopy was aesthetic rather than functional and was never intended to act as a waterproof shelter over the patio at Flat 32. It was external to the property and "*the timber fascia and cladding must be seen as sacrificial*" due to the prioritisation of style over function, as otherwise it would have been made of something longer lasting (e.g. uPVC or composite). It had never been intended to last indefinitely. Exposed external elements were very likely to deteriorate over time, particularly mortar pointing, and cracks were likely to appear to facilitate rainwater to drain inappropriately. The cracks between the coping stones had been remediated reasonably well, but would benefit from localised improvement during the upcoming cyclical works. He considered that engaging David Cook to undertake the repairs that it had was "*above and beyond*" as they could have waited until the cyclical works and therefore carried out at reduced cost. He concluded that it would be unreasonable to expect that the problem would not re-occur during very heavy periods of rain, and recommended monitoring the cladding in such heavy rain to establish whether the problem recurred and, if so, to identify how the water was getting behind the cladding, with the intention that this could be mitigated in the future.

66. In his final three paragraphs, Mr Wade stated that he had noted minor defects to the timber cladding, but that he considered these were negligible in context, and could be addressed in the upcoming cyclical works. Two further courses of action could be taken to mitigate the possible reoccurrence of the problem:

"*While the coping stones have generally been repointed to a good standard, the rebate to the underside of the coping stones which forms a drip detail has not been continued through the mortar pointing and there are localised areas of both missing and excessive mortar in these locations. We recommend that the missing sections of mortar pointing are filled, and that a rebate is formed though it so that the drip detail is continuous around the perimeter of the balcony. This should prevent rainwater tracking back along the underside of the coping stones in these locations and down the face of the concrete balcony to drain between sections of timber cladding.*

As noted, the overhang of the coping stones is minimal. While believed to be sufficient to enable the drip detail to operate reasonably effectively, a fillet of mastic could be applied where the timber fascia abuts the underside of the coping stones. This would prevent the ingress of the rainwater to the rear of the timber fascias enabling it to discharge through the cladding. There is a reasonable drip detail to the lowest timber fascia which would prevent rainwater tracking back."

Respondent's case

67. The Respondent chose not to give any oral evidence and Mr Madge-Wyld chose not to cross-examine her. Her case is therefore as set out in the pleadings, and as it was presented to us by Mr B W Lee.

68. The Respondent's case as it was presented to us was that the service charge demands for the sums in question in these proceedings were not valid, as they had not been accompanied by the rights and obligations required by section 21B of the Landlord and Tenant Act 1985 ('the rights and obligations'). She also denied receiving any of the later service charge demands (despite their inclusion, with their rights and obligations printed on the rear, in the Bundle).

69. In any event, the service charges were not reasonably incurred and/or reasonable in amount, and/or the Respondent had a valid counterclaim for disrepair in the sum of £10,872 for the works identified in the DBR quote **[142]**.

70. The Respondent's pleaded case in her Defence and Counterclaim **[55-217]**, reiterated and amplified in her Statement of Case **[972-1148]**, is that there was substantial leaking from Flat 35's balcony causing damage to her property, and that this was '*essentially a property damage and fraud case*' **[975]**.

71. Much of the Respondent's dissatisfaction was directed personally against Dr David McAughtry, the leaseholder of Flat 35, who happens also to be the chairman of the Applicant, and as proceedings went on, the sort of allegation of fraud or other misbehaviour levelled against Dr McAughtry became a feature of the Respondent's case in respect of *any* individual who was involved (including for example, the Applicant's surveyors and solicitors). This led in places to the Respondent's case being difficult to follow and unfocussed on the core of the dispute. There are several places in the pleading in which the Respondent places the responsibility on Dr McAughtry for his failure to repair, though no third-party claim was made against him.

72. The leaking and damage relied on was depicted in videos and photographs that had been taken by the Respondent or her family on several occasions. These appeared in Annexe 1 to the Defence and Counterclaim **[90 – 91]** and were supplemented by an additional video in Annexe 1 to the Statement of Case **[996 – 998]**.

73. In essence, what they record is either staining to the wooden panels of the soffit overhanging Flat 32's patio (relied on as damage), or videos of either droplets/beading of water to the underside of the soffit (said to be in lighter rainfall), or an escape of a more persistent dripping of rainwater between the soffit boards in heavy rain, on a total of six dates between 2 January 2018 – 14 January 2021. They had been discovered shortly after she had moved in to Flat 32, and had been notified to the Applicant in writing on 2 January 2018 (it is said that it had been raised

orally previously) **[92-93]**. The Respondent referred to this as the boards being '*rotten*'.

74. By August 2018, Mr S M Lee had notified that the Respondent was paying the service charge under protest due to the above water staining and leak **[108]**.

75. Works to repair the leak were carried out in May 2019, without notice having been given. The Respondent asserts that she had been told '*extensive works*' were carried out to Flat 35's balcony at leaseholders' expense **[204-205]**, but that all that had happened at Flat 32 was that 3 soffit boards had been replaced, despite '*widespread damage*' having been caused to her property. Those boards had not been fit for purpose as they were '*too thin*' **[108-109]**, and in any event there were 12 other boards with staining on them that also required replacing. It had caused '*extensive damage throughout the woodwork and the lighting fixtures above our patio*' **[55]**.

76. The day after those soffit boards were replaced, further leaking was discovered **[109]**. That itself demonstrated that the works had not been carried out to a reasonable standard. This therefore exculpated her from paying the service charge at large **[56]**.

77. The work that had been undertaken had been substandard, which had caused a loss to the Applicant, and consequently, to the Respondent in her service charges **[57]**. It is asserted that funds to hire the Applicants' experts' services in connection with the leak were 'misappropriated' from the Applicant **[980]** by Dr McAughtry or others. The Respondent disputed that the repair work had been carried out as specified, or that the leaking had been resolved, contrary to the findings of Hawkins' First Report **[152-153]**.

78. Reasonable works would, the Respondent maintained (**[57]** and **[988]**) be those quoted for by DBR **[142-143]**, including (in addition to scaffolding to enable access) the pouring of a self-levelling compound on Flat 35's balcony, installing a glass reinforced plastic (a.k.a. fibreglass) primer and matting to the balcony '*including coping stones'*, and removal and replacement of all timber cladding beneath.

79. That had led to the Respondent's husband asking Mr Hawkins to revisit Flat 32 on 8 October 2019 (on finding Mr Hawkins eleswhere, it seems, in the development grounds), from which Mr Hawkins had '*run off*' **[58]**. On 9 October 2019, Mr Chandler had removed the two boards forming the inspection hatch that were "*so badly damaged that one fell apart on removal*", only 4-5 months after the repairs had purportedly been carried out. Mr Hawkins had chosen to ignore this, identified it as historic dry rot despite it being located in the position of the new inspection hatch, dismissed it as "*not a serious problem*", and insisted, in Hawkins' Second and Third Reports, on maintaining that the repairs

had been carried out to a satisfactory standard. Mr Chandler removed and destroyed the key evidence (the disintegrated board) against her express wishes.

80. The Respondent states that in any event her evidence is that the "*balcony damage*" (by which we believe she means the boards beneath the balcony) has been caused by leaking not dry rot and she relies on an email dated April 2020 from a Chartered Surveyor (a Mr Charles Lewis of FHG Surveyors) to whom she sent videos of the water **[148]**. It should be noted that we could not discern in that email where the asserted information is included, nor do we understand how Mr Lewis could have come to such a conclusion without, in fact, inspecting Flat 32.

81. The Respondent took further issue with the description, in Hawkins' Second Report, of the continuing incidence of water as being in consequence of the design and/or age of the building **[61]**. She states that the fact that the building is mostly in fine condition after 30 years "*is a testament to the design and materials used*" and proves that the damage is due to mismanagement. She obtained emails from Octagon asserting that the design and materials used were fit for purpose and in accordance with the building regulations in force at the time **[1107-1108]**. The email dated 18 April 2020 from Mr Lewis (to whom she sent videos of the water as described above), confirmed that the balcony ceiling "*would not have been designed to leak*" and that Flat 35 might want to investigate their terrace floor **[150 – 151]**.

82. In the Respondent's view Hawkins' Second Report was, in the circumstances, wholly unreliable, and his Third Report contradictory and "*unsubstantiated*" (**[62]** and **[160 – 163]**). She asserts that this "*conclusively proved the substandard work of not only the contractors, but also that the surveyor's work to have been fraudulent…*" **[63]**.

83. The Respondent also complains that, on finding the two rotten boards, she was promised that both those boards and "*several adjacent boards*" would be replaced, but that had not been done. In the context of broken promises, she further complains that on 18 June 2019 the Applicant's managing agents, KFH, had promised to instal ventilation grilles but had never done so (**[64]** and **[1021])**.

84. When Mr Roland Wade had come along to replace Mr Hawkins, he had turned up to inspect on 12 February 2020 without any notice **[985]**. He has gone along with the Hawkins' reports and "*gone overboard to praise the Directors of the Management Company and John Chandler… claiming 'they have gone above and beyond their remit' to address* [her] *concerns'."* **[986]**.

85. The Respondent or one of her family had secretly audio-recorded a conversation with Mr Wade on 19 August 2020. In snippets of the conversation provided, Mr Wade could be heard to state in conversation

with (we think) Mr S M Lee: "*I can see its leaking. You can see it's leaking. I'm going to tell David* [McAughtry] *it is leaking. No problem. It's leaking…*"; and he assured them "*we do want to sort this out. We want to fix it*". In another, he explained he had been sent to scope works for the block specifically, and to address the issue that Flat 32 was having and that they "*were trying to sort it out. We're trying to get it right for you.*" Mr Wade's evidence therefore was clearly contradicted by what he had said to them, and Mr Wade could not be believed. The recording of the full conversation was not provided.

86. The Respondent maintains that extensive damage was caused to Flat 32 by the leaking from Flat 35, against which she wishes to equitably set-off the cost of the repairs that she says will be required as specified in the DBR quote (for £10,872). She asks us to favour the DBR quote, over her own expert Mr C Lee's estimate, on grounds that it "*is reasonable, given the difficulty faced in the claimants' repeated obstruction and act of spoilation*". The Respondent further complains of the delay between reporting the problem and the Applicant doing anything at all. She maintains that the works undertaken were substandard and ineffective **[67]** by virtue of the fact "*prolific water ingress continues to occur*" **[979]**. She asserts that Flat 35 and the Applicant are separately liable to her for carrying out further works at specified in the DBR quotation, which she states is her claim for special damages.

Expert Evidence

87. On 23 February 2021, Mr Wade produced a further report ('Wade Second Report') for the purpose of these proceedings **[266-282]**.

88. He confirmed that he had indeed been to the property on 19 August 2020 while he was at the estate in relation to a different matter. Shortly after heavy rainfall he had been asked by the Applicant to inspect the timber cladding above Flat 32. He had been doing this from the communal pathway and not by arrangement to visit Flat 32. He had on that occasion observed "*rainwater dripping between sections of the cladding in two specific locations towards the front of the balcony. The drops were appearing every 10 seconds or so. Rainwater was also dripping off the fascia at the front of the balcony only inches away onto the patio as designed*".

89. The family had been eating lunch inside very close to the window, and had wanted to know what he was doing. That is how he came to be in conversation with them on that day, and a note of his conversation had been provided to the Applicant subsequently to clarify exactly what he had said. He had been shown the section of the timber kept by the Respondent in connection with the events of 8 October 2019, which he described as "*discoloured on the upper side*", and which he had explained was perfectly normal, whether because of rainwater ingress or condensation, and that the other timbers throughout the Japanese

Gardens Apartments were likely to be in the same condition. He had explained or expanded on a number of the issues that had been previously identified in the Wade First Report, and the conversation had lasted approximately one hour. He had not at any time compromised the Applicant's legal case for recovery of the arrears of service charges and had told the Respondent's family that the issue did not warrant withholding the service charges.

90. Mr Wade's Second Report had been prepared from a review of the materials he had previously reviewed and from his own material gathered in connection with the dispute on 12 February 2020 and 19 August 2020. Orally, he confirmed that he had not revisited Flats 32 and 35, nor had he on either occasion undertaken any testing (by for example flood-testing, using a protimeter, e.t.c). He had, though, observed the dripping from the soffit complained of after heavy rain.

91. Mr Wade confirmed in that report and orally that he believed the dripping to the underside of the soffit to be as a result of the 'trickle-back' effect, "*especially where the drip detail/rebate in the* [coping stone] *bases has been compromised when the coping stones were repointed. This rainwater is not prevented from continuing behind the timber fascia and above the timber cladding as it is not apparent that a bead of silicone has ever been installed where the timber fascia abuts the underside of the coping stones. This rainwater eventually drains where sections of varnished tongue and groove timber abut, as I witnessed on 19 August 2020, close to the outside face of the balcony*". Some of that water dropped onto the patio below. The action was exacerbated by the dual weathered coping stones that had been used in the construction of the balconies. He posited it was further exacerbated by the heavy profiling of the roof tiles, as he had previously explained.

92. The main issue complained of by the Respondent, though, being the timbers themselves and the staining and weathering to them, was not part of the Respondent's demise. The area of the patio beneath the soffit was clearly never intended to provide the amenity of a weatherproof outside space. He confirmed that there was no water ingress to the internal ceiling of Flat 32. The staining to the timber cladding he considered to be of no effect on the use of the outdoor patio, and he did not consider that the trickle-back of water was causing significant or undue damage to the timber cladding, and therefore this was not a responsive repair. Indeed, he considered that the timber cladding was in a good state of repair, and that the trickle-back being experienced was largely due to the design or construction of the building, which had insufficient overhang, and for which the coping stones were both dual-weathered and had never had inserted to them a drip detail between the gap at the end of the balcony surface and to the base of the coping stones which might have assisted in preventing rainwater getting into the cladding beneath.

93. He had scoped works for cyclical repairs for the Japanese Garden Apartments, in which he had identified that there had been localised poor formation or deterioration of the drip detail formed in the mortar pointing between coping stones, facilitating water ingress behind the coping stones which drained through the cladding above the patios. There was also a gap between the timber fascias to the edges of the concrete floor slabs forming the balconies and the underside of the coping stones, into which a silicone bead could be inserted (it not having been previously present) to prevent the escape of water to the cladding beneath. Timberwork that exhibited wear and weathering was to be refurbished/repaired and redecorated using an 'engineered approach'. During those works, any defective timbers would be cut out and replaced, and specifically the Polyfilla used above Flat 32 would be rubbed down and replaced with the more sympathetic product. None of the matters raised required reactive repair.

94. Mr C Lee BSc (Hons) MRICS provided an undated report with appendices **[283-385]**, that related to an inspection on 15 March 2021. He had been given access to flood test the balcony at Flat 35, albeit that as Dr McAughtry had not known that the test was to be undertaken, and had expressed reluctance that the entire balcony be flooded. Mr C Lee had confirmed it would be unnecessary to do so, and Dr McAughtry fully cooperated with Mr C Lee's requirements. The weather had been dry but followed a period of rain.

95. He explained to us that had used a protimeter and discovered that the areas of the cladding that exhibited discolouration also had high readings on the device, indicating water saturation. The flank areas were dryer. The fact that the boards were wet did not suggest that they needed immediate replacement, but rather that there was a source of water ingress.

96. He had observed that all the Hallas Specification had been undertaken "*with the exception of the recommended works to seal the quarry tile balcony finishes with the concrete coping upstands beneath the balustrade*" and the installation of eaves vents. He further concluded that the perimeter works had been carried out using a cementitious mortar rather than the Geocel-type product specified.

97. Mr Lee described simulating heavy rainfall, depicted in his report as directing a hose directly onto the coping stone to the top of which he had identified defective pointing (where it met with/enveloped the steel stanchion set into it). He was clear in his oral evidence that the test had only been carried out to that single coping stone (and that therefore there had not been flood-testing independent of the focus of water on the particular stone). After five minutes there was standing water on the balcony to a depth of approximately 10mm. Five minutes after that he had turned off the hose, and water beads had formed in five locations across the soffit at the front in the location of 'v' joints to the tongue and

groove. Five minutes after turning off the hose, a direct stream of water was found, indicating a direct path of water through the balcony structure and through drill holes in the soffit below, where the timber exhibited the most degradation. He concluded that the water was gaining entry through the defective pointing around the stanchions. He posited that ponding water against the upstand of the coping stones at the front edge of the balcony would allow water to percolate through. Orally, he agreed this was where Mr Wade had identified that a silicon bead could be inserted, and agreed there had been no evidence of one having been previously installed.

TRIBUNAL FINDINGS

(1) Service Charges – properly demanded?

98. In Judge Latham's detailed note of the case management hearing before him on 26 January 2021, he recorded that the rights and obligations point that had been asserted appeared no longer to be a 'live issue' on the Respondent's part. Mr B W Lee nevertheless continued to take the point on the service charge demands not being accompanied by the rights and obligations in cross examination of Mr Lee-Hewitt. Despite our raising the apparent concession, and Mr B W Lee apparently agreeing during the hearing and discontinuing this line of challenge, in his closing on 14 May 2021 he nevertheless once again pursued it.

99. The orally asserted case was that neither demand was accompanied by the rights and obligations and so nothing was owed. That was contrary to the written case, in which it is asserted **[990]** that only the December 2019 was deficient of those rights and obligations. In any event, the documents provided by the Applicants in disclosure, and included at **[476 – 478]** were each accompanied by the rights and obligations.

100. We find that the demands served on the dates indicated on their face were accompanied by the rights and obligations. That is demonstrated by the documents in the Bundle. The Respondent has not produced the allegedly deficient demands, and the documents in the Bundle said to be copies of those emanating from the Applicant on the dates stated on their face each has the rights and obligations on its rear face. The Respondent's case has been (generously) inconsistent on this point. We prefer the evidence of Mr Hewitt-Lee at paragraph 7 of his witness statement that the rights and obligations are automatically generated by the Applicant's software for inclusion in each demand made **[965]**.

101. Even if we had not so found, however, the alleged failure in service of a compliant demand merely suspended the requirement for payment until such time as a valid demand was served. Valid demands have been disclosed before us (i.e. accompanied by the rights and obligations), which formed part of the Applicant's early disclosure to the Respondent.

Even if the previous demands had been deficient, by disclosure of the compliant demands that suspension was lifted.

(1) Service Charge - reasonable estimate?

102. We are satisfied that the documentation in the Bundle at pages **[476-504]**, together with the witness evidence provided by Mr Hewitt-Lee at paragraph 6-14 **[965-967]** of his statement, demonstrates on the balance of probabilities that the budgets, accounts and demands have accorded with the provisions of the lease.

103. The only challenge the Respondent has made to a specific service charge item in these proceedings is in respect of the works carried out in pursuit of the Hallas specification in the period May – June 2019, and invoiced by David Cook on 9 July 2019 **[725]**. The total sum, inclusive of VAT for those works was £1,900, of which her 1/37th proportion is £51.30.

104. We are satisfied that the Invoice for those works was paid in the 2019 Service Charge year and it was included in the Accounts for 2019, and so falls within our jurisdiction to determine in accordance with *Warrior Quay Management Company Limited & Anor v Joachim* 11 January 2008 (unreported) LRX/42/2006.

105. It appears to be the Respondent's case that the works to the balcony at Flat 35 were not reasonably estimated as Dr McAughtry ought to have done them and she ought not, as a leaseholder, to have been charged for them.

106. We disagree. The provisions of the lease as relate to the liability of the leaseholder of a balcony extend to the screed and the balustrade of the balcony, but paragraph 1(a) of the Sixth Schedule specifically reserves to the Applicant responsibility for maintenance to '*the exterior and main structure (including in particular but without prejudice to the generality of the foregoing the roofs external and other load bearing walls floors foundations gutters and downpipes) of the Buildings and also including those parts thereof comprised in this demise or any demises of the other apartments in the Buildings.*' To adopt Mr C Lee's description, the screed is a "*waterproof membrane between the concrete deck and quarry tiles*".

107. Mr C Lee appears to proceed in his report on the basis that the balustrade is the edge of the balcony *beneath* the coping stones, onto which they are set and through which the stanchions are set (see paragraph 5.4 **291]**). We do not agree. In our view, the term balustrade describes the stanchions themselves (being as they are 'balusters' to support a handrail, which together form an ornamental parapet). In our view, it is those elements to which the term refers in the lease, rather than the supporting structural elements such as the edge of the balcony

beneath the coping stones. That is consistent both with the dictionary definition and with the Applicant's approach to maintenance to the balconies (we are told) over the years.

108. No evidence has been provided that there is any flaw in or disrepair to the screed of the balcony, or to the stanchions themselves. The Respondent's own expert's evidence is that it is the pointing *around* the stanchions where they are set *through* the coping stones that is allowing the passage of water to trickle through to the soffit beneath.

109. We asked the experts whether those works would be considered structural. Mr Wade was firmly of the view that they were. Mr C Lee suggested that they would be ancillary to the structure, in the sense of works towards the preservation of it even if they weren't literally going to keep the building up. He agreed that the coping stones would be considered protective of the structure, albeit the stanchions are set into them.

110. We are therefore satisfied that the coping stones are part of the 'exterior' or 'main structure' in the same way as the cladding to the soffit (as agreed by all) is. In our view, as a package of works those provided for in the Hallas Specification and undertaken by David Cook were within the Applicant's obligations and legitimately incurred in that connection.

111. Even if we were wrong in that, and Dr McAughtry had the obligation for those structural elements of his balcony contrary to the wording of his lease, the impact of the works undertaken by David Cook to Flat 35 on the amount of the demand would be the very definition of *de minimis non curat lex* (it would calculate out to be, on the very best case for the Respondent if *none* of the works were structural, £17.82 for the Respondent's proportion), such that this Tribunal would refuse to concern ourselves with it.

112. We considered the evidence of both the experts, Mr Wade and Mr C Lee. Each quite properly accepted that the works as specified were reasonable for the Applicant to undertake. The question that arose was as to the standard of those works, to which we turn next.

(2) Service Charge – works of a reasonable standard?

113. Both experts agreed that there had been no eaves vents installed, and that there had been no obligation on the Applicant to do so. We agree that is the case, as that would be an improvement not a repair.

114. Both experts agreed that the Hallas Specification had been carried out, although there was a difference of opinion over whether the specification should have been read by the contractor as including the pointing around the base of the stanchions where they met the coping stones. Mr

Wade simply stated that this was not specified. Mr C Lee stated that the contractor should have understood that to have been included in paragraph 1 or paragraph 2 of the scope of the works.

115. We do not find that a contractor reading paragraph 1 of the specification ought to have read it as if it included the top faces of the coping stones where they meet/envelop the stanchions. The specific wording refers only to the base of the coping stones. We accept that it is in that context that a contractor would have considered paragraph 2 of the specification to be the bases and joints, and not to the stones where they met the steel stanchions, as evidenced in the email from David Cook on 2 April 2021 **[1160]**.

116. The experts differ as to whether that work was carried out to a reasonable standard, partly because the joints around the feet of the stanchions where they meet the coping stones had not been raked out and replaced (on which our finding above concludes the matter), and partly due to a difference in opinion over whether the waterproof sealant as specified in the Hallas Specification had been used, or cementitious mortar instead.

117. Mr Wade described doing the 'fingernail test' and receiving a 'bounce-back' from the disputed sealant. Mr C Lee stated he had used the 'key test' and received no such bounce-back, nor could he see the 'shine' of Geocel or another such product, leading him to conclude that cementitious mortar had been used in place of the waterproof sealant specified.

118. We considered whether we might need an inspection to determine this matter. However, we note from the bundle that David Cook describe in their email of 2 April 2021 using a waterproof sealant as specified, and as observed by Mr Chandler. Mr Chandler addresses the sealant in paragraphs 7 and 8 of his witness statement **[1156-1157]**. Although the Respondent wished to cast Mr Chandler's evidence as unreliable because of some mistakes in dates he made in his witness statement, we found him an honest witness (who readily accepted those mistakes). We note also that the Hallas Specification indicated 3-yearly review of the works, no doubt in the knowledge that (as Mr Wade stated) mastic hardens and breaks down over time. We note that after nearly two years *in situ*, even a plasticised product is likely to lose its shine whether because of weathering or dirt. Further, in Hawkins' First Report there is offered a description that reasonably explains both of the experts' findings: "*the joints had then been partially filled with a water-proof mastic and the remainder covered with a sand and cement mortar.*"

119. We find that we have enough evidence to determine that on the balance of probabilities, waterproof sealant was used, and that therefore no inspection was necessary. Even if we were wrong on that, we have no evidence that any non-plasticised material used has any lesser value that

the plasticised product specified, nor that it has a shorter lifespan, nor that it has, in fact, failed. Moreover, the likely impact on the cost of the David Cook works to the Respondent is likely to be infinitesimally small.

120. There is no further evidence before us that the works as specified were not carried out to a reasonable standard. The Respondent's own evidence is not that it was a failure of these repairs that had caused continued water ingress, rather a failure to repair the defect in the pointing at the base of one particular steel stanchion where it meets the top face of the coping stone. As indicated above, that was not, we find, specified within the Hallas Specification.

121. Although there continues to be the escape of water through the soffit in very heavy rain, there is no evidence that the David Cook works were of no benefit. In fact, the opposite is true: it is noted that in the first flood testing after the works had been carried out there was, as set out in Mr Chandler's evidence paragraphs 9-12 **[1157]**, a snagging issue in which water was still observed to be escaping. In having carried out the snagging and a second subsequent flood test, no water was observed to be escaping. The works must therefore have had some benefit, even if they did not fix the problem in in its totality for the reasons related to either the trickle-back effect as contended by Mr Wade, or the pointing to the top of the coping stones as argued by Mr C Lee.

122. Much is made of the two hatch boards and the circumstances in which it was found that they had suffered a reactivation of dry rot. Neither of the experts, both of whom had seen the board retained by the Respondent, felt able to tell us that it had rotted as asserted by the Respondent, though they could certainly identify discolouration. In any event, even on the Respondent's evidence, on the discovery of the state of the boards, they were immediately removed and replaced. There is no evidence before us that there is any ongoing consequence of the reactivation of the dry rot in the two specific boards in the circumstances as described in Hawkins' Third Report. Nor is there any evidence that the two boards needed replacement because the Hallas Specification had not been carried out to a reasonable standard by David Cook. The fact that there had been a reactivation of dry rot spores in the boards does not 'speak for itself' on that fact, as the Respondent appears to assert. There is no evidence other than it was in consequence of the placing of an inspection hatch, into which the screw holes had allowed the incursion of the right amount of water to create the conditions for the dry rot reactivation. The Respondent's demand was for the whole of the cladding to be replaced, but there is no evidence that was necessary (even the Respondent's own expert suggests that, in carrying out any remedial works, boards can be reused **[298]**).

123. We are satisfied on the balance of probabilities that the works carried out by David Cook to the Hallas Specification were carried out to a reasonable standard, and that it was reasonable to incur the costs of the

works. On that basis, we consider that the estimated service charge was reasonable.

124. Even had we not so found, it appears to be the Respondent's case that if that sum was not reasonably incurred, the whole service charge sum comprised in the accounts before us for the year 2019, and demanded on the basis of the estimates for the year 2020, is not payable. That is not, of course, the effect of section 19 of the Act. As is demonstrated in the Bundle, the services provided in connection with the property are many and manifold, and without funds the Applicant will not be able to fulfil its everyday duties to the Respondent or other leaseholders – let alone undertake cyclical works or other reactive repairs of the nature she demands. As we have said, even had the Respondent been wholly successful on this point, the most difference it could have made to the sums demanded is £51.35.

(3) Set Off – counterclaim for disrepair

(i) Mr Wade's evidence

125. The Respondent places reliance on the four MP4 recordings, of no more than a handful of seconds each, in which she asserts that Mr Wade has admitted her case. She says that on that basis Mr Wade's evidence is wholly to be disbelieved and she should be awarded the sums in the DBR Quote.

126. On listening to those MP4s, it is clear that, as the Respondent asserts, Mr Wade reassured the Respondent that he was going to do everything he could because he could see that the soffit was leaking. To then report that such repairs were not reactive and could wait for cyclical works, relying solely on the 'trickle back' theory as a result of the way that the Watergardens Apartments have been constructed, the Respondent says wholly contradicts what he told the family on that day.

127. However, those MP4s are a mere handful of snippets from a much longer conversation on 19 August 2020, selected by the Respondent to support her case. We have no reason to doubt that the other matters reported in the record prepared by Mr Wade were also included in those discussions (that he says lasted around an hour), and that casts those snippets in a rather different hue. Furthermore, it is not inconsistent of Mr Wade to tell the Respondent that he had observed the leaking of which they complained, and that the Applicant was trying to do everything they can to address that issue, and that he was there to scope out works to the whole block for the cyclical repairs, and to then report to the Applicant recommending a conservative approach to be taken in the context of the Applicant's duty to all of the leaseholders in the development to approach the issue reasonably and proportionately. Significant by its absence is any recording in which Mr Wade asserts that this will be fixed instantly, which we would expect to be present if he had said it. It must

be noted that at the time of this encounter, Mr Wade expected cyclical repairs to take place a matter of months hence.

128. Mr Wade further gave evidence that he didn't carry out any tests, whether on the first two occasions he visited the property or for the purpose of his expert report to us (in fact, for his report to us, as recorded above, he had not revisited Flat 32 at all, but had relied on a review of his previous reports). At best, he used his fingernail to see whether the disputed waterproof sealant around the perimeter 'bounced back' such that it demonstrated that an appropriate product had been used. It seems to us he had made up his mind on reading the Hawkins reports, and had not left himself open to the neutral and objective possibility of anything other than those conclusions being true. However, we do not agree with the Respondent's submission that Mr Wade had never seen, with his own eyes, the 'trickle-back' effect on which he relied. The Respondent's own MP4 recordings are a record of his own observations of exactly that, and as backed up by his note to the hour-long conversation **[281-282]**.

129. In his oral evidence, Mr Wade was more discernibly objective. He did accept that the water dripping through could be as a consequence of both the trickle-back theory *and* the breakdown in the pointing to the top surface of the coping stone where it met the stanchions, albeit that the weather would need to be extreme to have the effect that Mr C Lee had demonstrated. He pointed to the Respondent's own video evidence of beading on the outer edge of the soffit as the evidence of the trickle-back effect, where those beads formed otherwise that at the 'v' joints.

130. He maintained that in circumstances where the boards used were internal quality for the prioritisation of the particular look of the building, and in the region of 30 years old, the Respondent could not expect them to be in perfect condition, and he admitted that they were not. They were worn and weathered commensurately with their service. He accepted that there were works to be done, which would be done in the next round of cyclical works, but they were not reactive repairs. He asserted that the whole Japanese Garden Apartments suffered from the same issue. The only reason that those cyclical works had not yet been undertaken was the onset of the pandemic.

(ii) Mr C Lee's evidence

131. On the other hand, Mr C Lee seemed to fall into the same trap as Mr Wade's initial approach in his oral evidence. He was convinced that the failure of the pointing to a single one of the coping stones where it met the stanchions, and nothing else, was the cause of the water ingress into the cladding, despite the fact that the concentrated stream of water onto that area was unlike even ordinary heavy rainfall in its mass. He himself accepted that it was the equivalent of 'flash flood' conditions. He had not carried out a trace test to follow this through as he had determined it was

obvious. He had not water-tested even the other stanchions, let alone flood tested the balcony independently of the water directed onto the particular coping stone, in order to support his posited theory that ponding water against the upstand of the coping stones at the front edge of the balcony would allow water to '*percolate through the concrete base*'. It is apparent that he had concluded that he had found the problem, and need go no further in his investigations. The very fact that he posited that standing water might percolate through without further investigation, but then denied the plausibility of the only evidence before us that such percolation might be caused by the structural defect identified (want of drip detail/mastic fillet), undermined his evidence.

132. In regards the water beading, he had observed it in five distinct places across the front of the property in the location of the tongue and groove 'v' joints.

133. He rejected outright the structural design theory, asserting that none of the other properties in the Japanese Garden Apartments suffered from the same issues and therefore that was conclusive on the matter. That was a bold thing for him to assert, since he had not had the benefit of inspecting the balconies above or, at more than a distance (presumably from the path in the same way that Mr Wade had tried to do and of which the Respondent had complained in August 2020), the cladding below the other properties, nor had he had access to inspect documentary evidence in relation to other parts of the Building.

134. There is clear evidence in the Bundle of repairs to the adjoining properties in the Japanese Garden Apartments by the same contractor for the same sum of money in the same description **[726]** in addition to more limited pointing works **[722]** which are supportive of Mr Wade's assertion that this is not a problem limited to Flat 32, and broadly support his assessment that there is at least an element of the original design at the property allowing the water trickling and staining to happen. We accept Mr Wade's evidence, made in the context of have scoped for the upcoming cyclical works to the whole block, that other leaseholders simply have not complained in the same way that the Respondent has.

(iii) Balcony in disrepair?

135. We accept that in very extreme weather conditions – described by Mr C Lee as circumstances equivalent to 'flash-flooding' - there is a water still coming though the cladding and escaping the soffit above the Respondent's patio at a 'v' joint a few boards back from the front fascia, as demonstrated in Mr C Lee's report. We find that in heavy rain of less intensity than flash-flooding conditions, this is a dripping every few seconds underneath the soffit as demonstrated in the Respondent's videos 6 and 7 **[1006]**, rather than the significant stream of water shown in Mr C Lee's plate 30 **[310]** when the particular coping stone/stanchion

junction in respect of which he made his conclusions was subjected to the constant and intense stream of water focussed on it (as demonstrated in plate 24 **308]**). We find that this is due to the failure of the pointing to one particular coping stone at its top face where the steel stanchion is set into it. To that extent, we are satisfied that the pointing to the coping stone in question at Flat 35 is in disrepair.

136. That is the limit of our finding. Mr C Lee did not test the other top-faces of the coping stones where they meet the stanchions. Though he exhibits photos of similar pointing works that he says are required to at least one other coping stone, due to that omission the Respondent has not proved that that other area is (or any other areas are) permitting water ingress. We note that though he carried out a flood test, that was *by* directing the hose at the stanchion. The only result observed by Mr Lee was the pooling of water at the edge of the balcony rather than any escape of that water. To the extent that he did no dye test, we are satisfied that he cannot be sure how much of that water is being allowed to escape below due to the want of a silicon bead in the gap between the edge of the balcony and the bottom of the coping stones.

137. We are satisfied, for the reasons set out above, that the pointing around the stanchions to the coping stones is within the Applicant's obligation to repair.

138. However, we also accept on the balance of probabilities, Mr Wade's 'trickle-back' theory, which would explain the incidence of water droplets on the soffit boards where they abut the fascia (as opposed to the 'v' joints) in conditions less severe than flash-flooding, as can be seen in the Respondent's video of 10 June 2019 (Video 2 **[1005]**). This we find is due to the design or construction of the building as described by Mr Wade, and indeed in the Hallas Specification, and as accepted by Mr C Lee. Mr C Lee's unsupported assertion of percolation of standing water through the concrete slab is consistent with Mr Wade's observations and explanation in regards this flaw. We conclude that therefore at least some of the water incidence and staining under the soffit is not as a result of disrepair, but of the design flaw permitting the trickle-back effect.

139. We do not find that the assertions of Octagon **[1107-1108]** or Mr Lewis **[150-151]**, neither of whom had, it appears, even visited the property, and whose emails must have been based entirely on the way the question was framed by the Respondent, are of determinative weight in coming to a decision on that question. In any event the experts agree that the want of a silicon bead to the foot of the coping stones where they abut the balcony surface would permit water to make its way through the cladding. The gap might be legitimately described as a design flaw regardless of Octagon's statement that it complied with the Building Regulations in force at the time of the construction, and the absence of a

silicon bead could not amount to disrepair, for all that water is being permitted through.

(iv) Cladding in disrepair?

140. Both experts' evidence was that these are not external grade cladding boards. In the construction of the Japanese Garden Apartments, it was accepted that style was prioritised over substance to achieve the 'Imperial Palace' look. Mr Wade stated, and Mr C Lee accepted, that the internal grade boards have for the most part been in place for something in the region of 30 years, and that the Applicant's approach has been to make do and mend.

141. The Respondent's own expert's evidence was that while the cladding across the front elevation and to the stepped left and right flanks was significantly water stained and weathered, on inspection in the void there was observed no significant water ingress, though there was staining and mildew growth. This mildew growth is what was showing as black staining to the 'v' joints of the tongue and groove.

142. Although Mr C Lee's protimeter had demonstrated that the stained timbers across the front elevation had an excess of 50% moisture content, in his oral evidence he accepted that they were not damaged – at least yet. He denied that the issue was to be expected in externally positioned internal grade cladding boards exposed constantly to the British weather, disagreeing that they had to be treated as 'sacrificial'. He suggested that this ought to be a reactive repair in order to prevent them becoming damaged '*in the future*'.

143. We find that the internal grade boards used must, as Mr Wade states, be considered sacrificial in circumstances where both experts agree that it is a feature of this building that style has been prioritised over substance. Rather than a testament to the original design and build of the property some 30 years ago, it would seem to us that the fact that the boards are no more than weathered and stained speaks to their maintenance over the years by the Applicant.

144. We also agree and find that any external boarding is likely to be wet periodically, and externally positioned internal-grade boarding more so, due to the British Weather. It would be absurd if the Applicant had to replace external cladding each time it was wet – even saturated – or water stained from having been previously wet.

145. Mr C Lee's evidence to us was that the boards should be replaced to prevent '*future deterioration*', though they were not deteriorated now. We do not accept that is the Applicant's obligation. If the boards are not deteriorated now such as to require replacement or renovation, that is a killer blow to the Respondent's case on the cladding.

146. We have to bear in mind the age and character of the property in determining whether the cladding remains in repair. Given that style has been prioritised over weatherproof quality boarding for a particular overall aesthetic, and that the property is not new but 30 years old, it would be reasonable for a leaseholder to expect a degree of weathering on those boards, which might appear as staining. Weathering and staining does not, in the circumstances, equate to disrepair.

147. Even if we had come to the opposite conclusion, we would conclude that there was not yet a claim for disrepair as the reasonable time for repair had not yet elapsed, for the reasons set out below.

148. To the extent it is necessary, given it was not pursued orally, no evidence has been introduced to support any assertion that the external downlighters are or were in disrepair. In any event, they were replaced in or around October 2019. The exerts agreed they were in repair, and we so find.

(v) Reasonable time to repair?

149. Had we found that the staining/weathering of the boards amounted to disrepair, we would have concluded that given that they are within the Applicant's retained parts, and not impacting on the leaseholders' use and occupation of their properties (as to which see below), the Applicant would be entitled to address them as part of the cyclical works as planned, rather than as a reactive repair, in the context of 'damage' being no more than aesthetic.

150. As regards the pointing to the coping stone, we note that although this permits water to drip through the soffit below, this is unlikely to occur (and indeed there is no evidence that it occurs) very often, although the frequency naturally depends on the vicissitudes of the British weather. We have evidence of dripping occurring on only 6 occasions between 2 January 2018 and the hearing, and of this it is impossible to break out the causes of the dripping from the separate structural issue and the pointing to the single coping stone identified.

151. In the context of the Respondent having notified the Applicant of the dripping, and the Applicant's experts attending on several occasions to try to identify the cause, we agree with Mr Madge-Wyld's submission that the Applicant was entitled to rely on the results of their investigations. It was not until the latter course of these proceedings that the issue with the pointing around the single stanchion was discovered by Mr C Lee. His report was served on the Applicant on or around 23 March 2021. There is no evidence that the pointing issue existed previously (or, as it appears to have been assumed by Mr C Lee, at the date of the David Cook works). The dripping of water being, as we have found, of mixed cause, the presence of dripping did not speak for itself. The presence under the soffit of black staining is of no assistance on the

point, as we are not satisfied that the cause of the black staining was exclusively from the pointing issue (water, as we put it to the experts, finds a way) nor do any of the Respondent's videos or photos *after* the date of the David Cook works record the black staining to the part shown in Mr C Lee's plates 8 – 10 **[303 – 304]**. Mr C Lee does not define what he means by 'prolonged' in his description of those plates. Mr C Lee told us he could not say whether these were the same boards as previously complained of in connection with the access hatch. The Respondent did not fill that lacuna in the evidence.

152. In technicality, therefore, the pointing issue has only been notified to the Applicant in the currency of these proceedings, it could never have formed part of the Respondent's counterclaim (which was not based on expert evidence at the time it was filed and served, and in support of which expert evidence was obtained only in the latter stages of these proceedings).

153. In any event, and even if that conclusion is wrong, we disagree with Mr C Lee that this pointing should be treated as a reactive repair. The extent of the disrepair and the consequences of it (staining to the soffit), considered together with the degree of impact on the Respondent's use and occupation of her demise (objectively minimal, as to which see below), taking into account the age of the building and the other occupants of it, justifies addressing the repair as part of planned cyclical works.

154. We conclude that the Applicant has therefore not yet had a reasonable period in which to remedy the disrepair.

155. The Respondent complains that the cyclical works were due to take place last Spring and it was unreasonable to delay them. We consider that to be a submission that the pointing issue might reasonably have been discovered in the course of those works had they been carried out as planned, and that the reasonable time for repair has passed by dint of that very delay. While it is very unfortunate for all concerned that the planned commencement of the cyclical works coincided with the COVID pandemic and with a series of lockdowns and other measures (not least because it has fanned the flames of the dispute between the parties), we find that the Applicant was entitled to take a view on the balance of harm in carrying out the works and risking the health of all of the residents against the inconvenience of periodic water dripping onto the Respondent's patio from above, and reasonably conclude that it was acceptable to postpone those works (even if, as the Respondent asserts, the construction industry was still working during this time). We note that the Applicant would have to send workmen to and through the Flats at the Watergardens Garden Apartments to carry out cyclical repairs (such as to access balconies, for example). Regardless of whether the construction industry was working or not, that was not the only consideration.

(vi) Standard of repair?

156. The Respondent appears to require the Applicant to undertake works that would amount to the wholesale improvement in the construction of the balcony to Flat 35 (including insertion of a new self-levelling fibreglass compound and matting), as well as the replacement of all of the cladding overhanging her patio so that the property is 'as new', based on the DBR quote.

157. The Applicant is under no obligation to do so. Its obligation is to carry out works of repair. In the case of the want of or deteriorated pointing to the top of the coping stone, the extent of its obligation is to replace or repair that pointing. If it were to transpire at a later date that there were cladding boards that were no longer in a sufficiently good state to perform their function, the Applicant's obligation would only be to replace such boards as were found wanting.

158. The Applicant has no obligation to remedy structural faults, save in an appropriate case where to do so would necessary and proportionate to prevent damage being caused to a part of the building falling within its repair covenant. We note that the installation of a bead of silicon in the gap between the edge of the balcony and the base of the coping stones might be such a proportionate response, to prevent or reduce ingress of water behind the cladding. While that cladding is not, as we have found, currently in disrepair, Mr Wade indicated that installation of the silicon bead was likely to be included in the cyclical works to prevent them falling into disrepair in the future. We would certainly endorse that approach.

(vii) Loss and Damage

159. Even if we were wrong in our conclusion above and the reasonable time for repair has already elapsed, nevertheless, and despite asserting vociferously in her pleading that this is a case of significant property damage, there is no evidence whatsoever that there has been any damage to the Respondent's property (whether to Flat 32 or to her belongings). No Special Damages are identified that support those assertions.

160. The Respondent has not pleaded any general damages for loss of amenity, whether in her Defence and Counterclaim or Statement of Case, in connection with the disrepair issue (though she purported to do so in connection with the allegations of fraud etc which were struck out). Neither was this addressed before us.

161. There is no evidence provided of the amenity value to be ascribed to the area below the soffit where the drips complained of come through, nor the notional market rent for the property. Though the tenor of her pleading generally demonstrates that the water coming through the soffit

and associated staining has been an irritant on an exponential scale since she moved into Flat 32, the Respondent did not address us at all on the point; only her expert Mr C Lee made any reference to it stating it would be '*inconvenient, it's not nice to look at*'. That was not, of course, his evidence to give, and it is dubious whether looking at dripping water in heavy rainfall a handful of times a year (or even streaming water less frequently), or stained and weathered cladding at other times, could truly amount to inconvenience of the nature that sounds in damages.

162. It is difficult to see how we could ascribe to the area beneath the soffit any amenity value of which the Respondent could be deprived in the prevailing weather conditions in which water trickles through. The soffit is, in our view, too narrow at 600mm to have been intended as a place of shelter for use of the patio in the rain, and the location of the dripping as demonstrated by the photographs and videos is at the front edge where it would be most open to the elements in any event. At most, the evidence demonstrates infrequent incidence of water dripping through the defective pointing to a single coping stone. There is by no means a permanent or semi-permanent deprivation of amenity value. We also do not accept, if and to the extent it is asserted (though it is neither in the pleadings nor was it argued before us), that the boards being stained and weathered interferes with the Respondent's use or enjoyment of her patio in more clement weather.

163. The £10,872.00 sought by reference to the DBR quote is fundamentally misconceived. Firstly, the cost has not been incurred. Secondly, the Respondent would not be entitled to incur the costs set out there, as none of the areas that would be subject to the repair are demised to her. Thirdly, the scope of works to the balcony above can only have been the 'best guess' of the roofer on the basis of the problem as described to him by the Respondent, rather than an informed assessment of what needed doing, since he did not have access to the balcony of Flat 35. Fourthly, the works to the balcony therein described would seem to be improvements rather than repairs. Fifthly, there is no distinction made between timber that is wholly unusable, and timber that might be legitimately reused. Moreover, the Respondent's own expert has told her that the extent of the works in the DBR quote is not required. Mr C Lee's estimate too seems to us to be excessive, based as it appears to be on completely redoing the Hallas Specification even though Mr C Lee's own evidence to us was that some of it does not require redoing.

164. We therefore conclude that, even were we found to be wrong on all of the previous conclusions above, no loss has been proven to flow from any of the matters complained of.

Paragraph 5A Application

165. In light of the forgoing conclusions, we do not consider that it is appropriate to make an order to reduce or extinguish the Respondent's

liability to pay any administration charge raised in connection with the litigation costs incurred as a consequence of these proceedings. Save the conceded administration charges, which formed no more than 2% of the sums claimed, the Respondent has been wholly unsuccessful.

COUNTY COURT FINDINGS

166. In light of the above, I find that the Claimant is entitled to judgment on its claim in the sum of £9,064 for the estimated service charges found by the Tribunal to be due but unpaid.

Claim for Interest

167. Clause 4(F) of the lease obliges the Respondent to pay interest at the rate of 3% above the Lloyds Bank base rate as specified from time to time from the date the sums fell due and unpaid until the date of judgment. For the demand dated 12 June 2019, the sum of £4,463.00 became due on 1 July 2019 and interest began accruing at a daily rate of £0.46. For the demand dated 11 December 2019 the sum of £4,601.00 became due on 1 January 2020 and interest began accruing at a daily rate of £0.47. At the date of this judgment, the interest due from the Respondent to the Applicant is therefore £612.69.

Claim for costs

168. At 16:58 on Tuesday 11 May 2021 the Applicant filed and served a costs schedule in the total sum of £46,092.54. On the second day of the hearing on 14 May 2021 I asked Mr Madge-Wyld to address me on costs. Naturally he was hesitant to do so in the context of this Decision not yet having been made. Nevertheless, he did his best to answer my questions in that context, but reserving his position to a date after the Decision was made.

169. In his skeleton argument he had set out briefly at paragraph 28 his submission on recoverability of the costs sought, placing reliance on *Kensquare Limited v Boakye* [2020] UKUT 359 (LC).

170. I asked Mr Madge-Wyld to address me on the date/time of service of the costs schedule, which ought to have been two days in advance of the hearing (it being part fast track trial) in accordance with Costs PD para 13.5(2), and the consequences in the exercise of my costs discretion. Mr Madge-Wyld maintained that the costs schedule had been served in time.

171. In terms of amount of costs, he submitted that my obligation is to carry out a summary assessment of the costs, in light of the contractual clause, on the indemnity basis. This did not displace the requirement that the costs had to be reasonably incurred and reasonable in amount, however it was for the Respondent to raise issues, and any doubt was to be

resolved in favour of the Applicant. Proportionality was no part of that exercise. Regardless of the allocation of the case to the Fast Track in Judge Latham's Directions, fast track fixed costs were not the starting point for consideration of what might be 'reasonable'.

172. In terms of the attendances section of the Schedule, it was asserted that alike the Tribunal, the Applicant had received countless emails of a particularly aggressive tone. He told me that he was instructed that of the costs sought for Mr Wade, the sums sought were solely for his attendance at the hearing and the report prepared in February 2021. He was unable to explain to me why his instructing solicitor's attendance was necessary at the case management hearing, but asserted that her attendance was unquestionably reasonable for this two-day hearing, and that again, the fixed costs permitted in the Civil Procedure Rules for such attendance were not the level at which 'reasonable' started for the purposes of a contractual clause on the indemnity basis. He notified me that, dependant on the outcome, there were certain matters that he would wish to draw to my attention in the context of conduct over and above what he had already said.

173. The Respondent was unable to tell me how many emails she had sent, and Mr B W Lee found himself unable to make submissions on the recoverability of costs point, though he drew my attention to the paragraph 5A application.

174. I therefore informed the parties that once the decision was made, they would be given the opportunity to provide their written submissions to me (as Judge of the County Court sitting alone) regarding the costs of the proceedings.

175. On the 17 June 2021 I asked to be sent to the parties the Tribunal's draft Decision, and gave directions for the parties' sequential costs submissions. Given the matters I had raised already with Mr Madge-Wyld at the hearing, the Respondent was given the opportunity to make her submissions first.

176. On 25 June 2021 I received the Respondent's costs submissions. These were sent by the Respondent, but were in the form of counsel's submissions. On further enquiry, on 29 June 2021 Messrs Murray Hay stated that they had instructed Mr Christopher Jacobs of counsel to provide costs submissions on behalf of the Respondent, but that they had been retained by the Respondent exclusively for that one purpose and were not instructed by the Respondent to act in any other respect. They therefore provided no notice of acting.

177. On 2 July 2021 I received the Applicant's submissions in response.

(i) Recoverability of the costs under clause 17 of schedule two of the Lease

178. In the written submissions on behalf of the Respondent, Mr Jacobs asserts four main points in support of his contention that no costs are recoverable under clause 17 of Schedule 2 of the Lease:

(a) *Kensquare v Boakye* was wrongly decided and is subject to appeal. The Upper Tribunal adopted too wide an approach. I remain bound by *Contractreal v Davies* [2001] EWCA Civ 928, and the costs of this action are not incidental to the costs of preparing and serving a section 146 Notice pursuant to the Law of Property Act 1925 ('the 1925 Act'). Section 81(4A) of the Housing Act 1996 ('the 1996 Act') does not engage clause 17 of Schedule 2 of the Lease, as the Lease does not refer to anticipatory or precursor proceedings and express words to that effect would be required to give effect to the interpretation for which the Applicant contends;

(b) Reliance is placed on *Barrett v Robinson* [2014] UKUT 322 (LC), in that such costs could only be incurred in contemplation of forfeiture under section 146 and 147 of the 1925 Act if, at the time the expenditure was incurred, the Landlord had such proceedings in mind as part of the reason for the expenditure. The Applicant has not shown that was the case, the letter from JB Leitch on 21 January 2020 asserting that the contemplated proceedings were brought as a precursor to forfeiture **[200]** was not conclusive of that fact, and the Tribunal was correct to 'decline to make a finding on this point'. This was a genuine and acrimonious dispute over matters of substance not, on the facts, brought as a precursor to forfeiture.

(c) Only part of the proceedings before the Tribunal fell under clause 17 of Schedule 2, being those in paragraph 19(i) and (ii) above; everything else fell within the ambit of rule 13 of the Tribunal Procedure (First Tier Tribunal) (Property Chamber) Rules 2013;

(d) The costs claimed were self-evidently disproportionate and manifestly excessive, and therefore irrecoverable under clause 17 of schedule 2. A Landlord cannot contract that he should recover a greater sum in costs then he has actually and reasonably incurred (*Church Commissioners for England v Ibrahim* [1997] 1 ELGR 13). A claim for costs in the sum of £46,000 for recovery of a sum of £9,064 was self-evidently disproportionate. The question of proportionality arose from the overriding objective of the Tribunal that cases be dealt with fairly and justly, in ways that are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties and the Tribunal. The case had been allocated for the Fast Track, had been heard for only one and a half days, and in its Directions Questionnaire the Applicant had both requested allocation to the Fast Track, given a time estimate of a

single day, and estimated the costs of its expert Mr Wade at £1,500 **[232]**. If the case had been allocated to the Multi Track, it is unlikely that a costs budget in the sum now sought by the Applicant would have been sanctioned.

179. In response, Mr Madge-Wyld's submissions are as follows:

(a) *Contractreal* involved a differently-worded clause (in which only costs 'incidental to', and not (as here) 'in contemplation of' service of a section 146 Notice were in issue), and predates *Freeholders of 69 Marina v Oram & Ghoorun* [2011] EWCA Civ 1258, and cannot be relied on;

(b) The Applicant relied on passages at paragraphs 47 – 57 of *Barrett*. Contrary to the facts in that case, in the matter before me there is clear evidence that the proceedings were brought in contemplation of service of a section 146 Notice: letters before action on 17 December 2019 **[1176]** and 21 January 2020 **[200]** each assert the point; the Applicant's statement of case seeks its costs in the context of the proceedings being a prerequisite to service of a section 146 Notice **[401]**, the Applicant's Skeleton Argument further asserted as much (paragraph 28). The Respondent had neither cross-examined the Applicant's witnesses on the point, or contradicted or otherwise taken issue with these documents. The fact that the dispute was acrimonious, and the subject of expert evidence, was nothing to the point.

(c) It is untenable to argue that only the issues identified at paragraph 19(i) and (ii) above were those to which costs in contemplation of forfeiture attached. That ignored the fact that the Respondent's counterclaim was asserted to equitably set-off the Applicant's claim in full. The whole costs of the proceedings were incurred to obtain a determination that the full service charge was reasonable.

(d) *Ibrahim* is authority for the presumption that costs payable under contract are presumed to be reasonable in amount unless the contrary is proven. Simply asserting that the costs are unreasonable is not good enough. The question of proportionality does not arise. Rules in the CPR restricting recoverability do not apply (*Chaplair v Kumari* [2015] EWCA Civ 978; [2015] C.P. Rep. 46 (CA)). It would in any event be wrong to state that this claim would have been allocated to Fast Track; at two days length and with each party relying on an expert, it would have been Multi Track.

Decision: Recoverability

180. In respect of Mr Jacobs' first point, save for the assertion that the Upper Tribunal adopted too wide an approach in *Kensquare*, Mr Jacobs does

not identify in what regard he says the reasoning or conclusions are wrong, save by bare reference to *Contractreal*.

181. Upper Tribunal Judge Elizabeth Cooke dealt with *Contractreal* arguments in *Kensquare* at paragraph 64 to 76. In summary, the *Contractreal* clause was a narrower clause than that in *69 Marina, Barrett* and the other cases cited before her. It did not include within it wording akin to 'for the purpose of' or 'in contemplation of', providing simply for costs 'of and incidental to' the preparation of a section 146 Notice. In *Contractreal*, the Court of Appeal's decision was made in reliance on previous 'pure' costs authorities, rather than costs decisions made in the context of Lease clauses. It pre-dated the insertion into the 1996 Act of the requirement under section 81 for a determination of the Tribunal or Court that services charges reserved as rent are payable as a precursor to a section 146 notice, and indeed the decision in *69 Marina* that there was a requirement for a section 146 notice at all in such a case. Now the determination of a Court or Tribunal and a section 146 Notice are cumulative conditions precedent to forfeiture.

182. Judge Cooke's decision is binding on me. It has not been overturned by the Court of Appeal. I am not privy to the grounds of appeal, and Mr Jacobs does not provide any argument in which he identifies how Judge Cooke's reasoning is wrong. There has been no application within these proceedings to stay my costs decision pending the outcome of the appeal. Moreover, Mr Jacobs does not grapple with the Court of Appeal decision in *69 Marina*, also a decision binding on me, nor indeed the changes to section 81 since 2001, when the *Contractreal* decision was made.

183. Mr Jacobs' submission that the Lease would need express wording to result in the costs of this action being recoverable in the way contended for by the Applicant sits ill with his reliance on *Barrett*, in which the clause relied on and the present clause are expressed in almost exactly the same terms, and which is itself reliant on *69 Marina*.

184. In the circumstances, there is no justification to depart from *Kensquare*, and I reject his first submission.

185. As set out in *Barrett* by Deputy Chamber President Martin Rodgers QC, *69 Marina* is binding authority that, where a service charge is reserved as rent, a determination of the First Tier Tribunal is a pre-condition to the service of a section 146 Notice. The existence of a costs clause in the lease is not, however, conclusive. There is a two-stage approach to be taken. The first question is whether the wording of the clause is capable of giving a Landlord a contractual right to recover costs incurred in such proceedings. Whether they are so capable will depend on the existence of a breach of covenant and the nature and circumstances of the proceedings. The second is the question, factually, whether the proceedings are brought in contemplation of service of a statutory notice.

186. In *Barrett*, the answer to the first question was that the wording of the clause was capable of giving the Landlord a contractual right to recover its costs of proceedings brought in contemplation of service of a section 146 Notice, though what the Landlord sought (and the Upper Tribunal rejected) was a broader interpretation (paragraph 47). In this case, clause 17 of schedule 2 is, as submitted by Mr Madge-Wyld, drawn in almost exactly the same terms as in *Barrett* (see paragraph 44 above), save that in this Lease it excludes any reference to such costs being 'reasonable'. The particular wording of the clause – "*To pay to the Landlord all costs charges and expenses (including legal costs and fees payable to a surveyor) which may be incurred by the Landlord in or in contemplation of any proceedings under sections 146 and 147 of the Law of Property Act 1925*" - is wide enough to encompass the steps the Landlord must take to serve a section 146 Notice, which itself is a precondition of bringing proceedings, as *Kensquare* makes clear. I therefore find that the clause does encompass such proceedings brought in connection with section 81 of the 1996 Act in pursuance of enabling service of such a Notice as required by section 81(4A) of the 1996 Act.

187. In *Barrett*, the answer to the second question was in the negative: those were not such proceedings. The (two successive sets of) Tribunal proceedings had in fact been brought by the Leaseholder for determination of the service charges; there was no evidence whatsoever in either set of proceedings that the Landlord had forfeiture in contemplation at the time they were on foot; the Leaseholder's account was, at the date of the second set of proceedings, in credit such that no valid section 146 Notice could be have been served in any event.

188. In the present case it is the Applicant's uncontradicted evidence, borne out by the documents as referred to by Mr Madge-Wyld, that these proceedings were brought in contemplation of forfeiture. What more, I ask myself, may a Landlord do to prove that forfeiture is in his contemplation, than to write it down in open correspondence, before proceedings have been commenced, not just once but twice, and then maintain that position throughout his case?

189. While I appreciate that Mr Jacobs is in an unenviable position in producing the Respondent's costs submissions, not having been present at the hearing, his suggestion that I should not make such a finding is untenable. I agree with Mr Madge-Wyld's submission that however genuinely or vociferously fought a dispute on the Leaseholder's side, that goes nothing to the point of what is the Landlord's intent.

190. Nor is Mr Jacobs' submission that the Respondent's counterclaim does not fall within the question of costs under the clause sustainable. The Applicant has had to bring these proceedings. The Respondent pursued her counterclaim as a set off against the sums sought. To divide out the counterclaim would be to artificially hive it off when it was, in fact, intrinsic to the question of payability of the disputed service charges. As

to the other items, both interest and the costs of the proceedings are themselves tied up in that same question. The only part of the proceedings in respect of which Mr Jacobs' submission might have some force is that as regards the struck-out counterclaim for fraud etcetera. However, to deal with that element separately would be to allow the tree to obscure the woods. The Respondent's counterclaim in its totality was to fend off the claim for service charges, regardless of the fact that the Respondent was not permitted to pursue her clearly ill-conceived counterclaim in that particular regard. I will deal with that limitation on her pursuit of that part of her case, however, as part of the assessment below.

191. Finally, as regards the recoverability of costs and questions of proportionality, *Gomba Holdings (UK) Ltd v Minories Finance Ltd (No 2)* [1993] and *Church Commissioners v Ibrahim* [1997 EGLR 13 are authority for the proposition that where a party has a contractual right to costs, the court should normally give effect to that right. I cannot see that *Ibrahim* has the effect that Mr Jacobs argues for, nor how the overriding objective of the Tribunal can take precedence over a contractual right freely bargained for or costs assessment principles falling within the county court jurisdiction. Moreover, my decision is not confined to Fast Track fixed costs as argued in the alternative: *Chaplair* is persuasive authority (the comments of the Court were made on an unsuccessful application for permission to appeal) that the contractual clause ousts the regime.

192. Where I depart from Mr Madge-Wyld's assessment, however, is in the suggestion that the costs claimed are to be presumed reasonable unless the Respondent proves to the contrary, and that the matter ends there. The discretion on costs is mine arising from section 51 of the Senior Courts Act 1981. That discretion cannot be fettered by the parties' contractual agreement. As set out in *O'Beirne v Hudson* [2010] EWCA Civ 52, though I should normally give effect to the contractual right, I should give the costs schedule "very anxious scrutiny". The reasonable amount to be paid, even on the indemnity basis, is not necessarily the amount that a solicitor charges.

193. I also draw the Applicant's attention to the fact that this case <u>was</u> in fact allocated to the Fast Track (so far as material) by Judge Latham's directions. No argument was made at any stage that it should be re-tracked. If it had, I would have refused on the basis that although the Tribunal gave the case a two-day time estimate, that is the single factor that would have made this case suitable for any other track. Though I agree that the Respondent's pleaded case was inchoate, and that the Respondent's communications unduly aggressive, including the misguided attempt to include within the proceedings (for example) criminal charges, those are matters to be considered in conduct rather than track. Properly considered and argued, this would never have been more than a one-day case.

(ii) Amount of costs

194. In my invitation for submissions, I asked the Respondent to identify which of the sums charged she said were unreasonable and why, and what she said the reasonable costs were.

195. The Respondent challenged the following items. In each case Mr Jacobs makes reference to proportionality, which is no part of the exercise of my discretion of the recoverability of those costs on the indemnity basis under contract, but nevertheless as may be seen from his submissions the sums are also challenged as being unreasonable and excessive:

(a) attendances on the Applicant: 15.8 hours of emails and letters and 10 hours of telephone calls (total of 25.8 hours of attendances on the Applicant). Mr Jacobs points out that the Respondent is not in a position to check these attendances. This was a straightforward case and the hearing was only a day and a half. The Respondent says I should reduce attendances on the Applicant to allow only £1,000;

(b) attendances on Respondents: Mr Jacobs is instructed that the emails from the Respondent to the Applicant's solicitor '*whilst relatively numerous, were short, as were the telephone calls*'. The Respondents asks me to allow only £400;

(c) attendances on others: it is submitted that this is unspecified so should be discounted. Alternatively, I should allow only £200;

(d) work on documents: the Respondent says only that £7,573.20 is disproportionate, and counter-offers £4,000 as a proportionate sum;

(e) attendance at the Hearing: the Respondent alleges that the Applicant has misrepresented the hearing time and that the case was listed for only 1.5 days. 10 hours at £118 is offered for Ms Stanway's attendance.

(f) it is said that counsel's fee is excessive. No reason is given. The Respondent offers £2,000 for advice and conference, and £4,000 for the hearing with a refresher of £1,500. No mention is made of the case management hearing or pleadings.

(g) The Respondent offers £1,900 for the expert's written report as indicated in the directions questionnaire together with his attendance at the hearing for four hours, on the basis that it was not reasonable for Mr Wade to attend for the whole day on 13 May 2021 and the morning of 14 May 2021, and that he gave evidence in hot-tub format for only 1 hour 40 minutes.

196. Mr Madge-Wyld's responses are that, on an overarching basis, the costs incurred are reasonable, no issue has been taken with the hourly rates charged, nor is it suggested that work was undertaken unnecessarily. Point by point:

(a) attendances on the Applicant: this was far from a straight-forward case, in which the Respondent made very serious allegations of fraud and bad faith, the pleadings were inchoate, and the correspondence sent by the Respondent to the Applicant lengthy, voluminous and incredibly aggressive.

(b) attendances on Respondents: the above is repeated. No evidence has been provided that the emails were not sent and not voluminous.

(c) attendances on others: the Applicant's solicitors were required to correspond with the Court and Tribunal, Counsel, KFH, and Mr Wade.

(d) work on documents: there is no response to be made, as there is no identification of work that is said not to have been done nor time stated to be unreasonable.

(e) attendance at the Hearing: the hearing was listed for two days. The costs schedule was prepared on that basis. The first day went on until nearly 6pm, and therefore the hearing *in fact* lasted almost two days.

(f) counsel's fee: This was a case in which allegations of bad faith/fraud were made. There was cross examination of experts. It was not unreasonable to instruct counsel of 13 years call, nor has the fee been shown to be unreasonably high.

(g) expert fee: the assertion that Mr Wade gave evidence from only 1 hour 40 minutes is patently false. He started giving evidence in the morning and finished at nearly 6pm. The timetable had not been agreed and it was obvious it was necessary for him to attend at the commencement of the day. He was giving evidence for almost all of the day. The costs schedule was prepared before it was known he would not be required for the second day. The fact that the sum of £1,500 was estimated as the sum for the expert report on the directions questionnaire is not determinative of the actual cost of that report. Mr wade was shown to be a very good expert, the majority of his findings having been upheld by the Tribunal. There is no suggestion that the cost of his report was unreasonably high when compared with market rates.

197. Mr Madge-Wyld further draws to my attention that a without prejudice offer was made on 14 April 2021 that the Respondent has failed to beat (the terms offered having been that the Respondent pay the sum of £8,132 plus the Applicant's costs. That is a factor in the exercise of this assessment.

Decision: Amount

198. As Mr Madge-Wyld reminded me on 14 May 2021, I am carrying out a summary costs assessment and not a detailed assessment. As he also stated, it would be wrong of me to go through the schedule line by line.

199. Nevertheless, it is necessary to address each of the Respondent's submissions in turn.

(a) Attendances on Applicant

200. In terms of the opposing submissions that this either was, or was far from, a straight-forward case, there is some force in the submission made by Mr Jacobs that this was straight forward. Of course, by page 47 of this Decision, some may raise an eyebrow at that statement. However, the Applicant's pleadings in response to the allegations of fraud etc were intensely practical: in the Reply and Defence to Counterclaim, they took up a mere 5 paragraphs, or 15 lines of the five-page document **[219 – 223]**. Those allegations took up a few minutes of the case management hearing before Judge Latham on 26 January 2021, in which he explained to the Respondent's representative that to bring such serious allegations they would need to be properly pleaded and supported with cogent evidence. It was (quite properly) not addressed in the Applicant's statement of case **[386 – 406]** at all. In it's Reply to the Respondent's statement of case **[1149 - 1153]** again, very practically, the allegation of fraud etc takes up a single paragraph of ten lines on the first page and a similar paragraph of six lines on the third page, the culmination of which in each case is that the Respondent's case is so evidently deficient that it should be struck out. Mr Madge-Wyld deals with it similarly briskly in his skeleton paragraphs 2-3. When the case came on for hearing, the first thing I did once preliminary housekeeping was dealt with was to strike out the counterclaim as founded on those allegations.

201. Standing back and looking objectively, this issue ought to have been capable of being dealt with similarly practically by the solicitors representing the Applicant. Albeit that I accept that their client may have required some degree of greater attention in this regard due to the conduct of the Respondent (which I deal with below), this is an was always a relatively simple case about service charges and alleged disrepair. It was of course reasonable to incur time attending on the client, but the combined amount of personal attendances, letters and calls of 25.7 hours is unreasonable.

202. In the circumstances, I consider 12 hours is the reasonable time necessarily incurred in the correspondence between the solicitors and their client, which I allow at the Grade B rate.

(b) Attendances on Respondent

203. I do not accept the Respondent's submission that, even if voluminous, her emails were short and therefore did not necessitate the work done. I come to conduct below, but as set out above, over the course of the six months prior to the hearing during which the Tribunal was seized of the case management of this case, it received upwards of 70 emails, often several in one day, making demands and extremely aggressive in tone, in addition to frequent telephone calls in the same vein, that created such an administrative burden that the Respondents had to be asked as early as 18 January 2021 to refrain, and by 5 March 2021 she was told explicitly that due to the volume and manner of her correspondence, the Tribunal would no more than monitor the incoming correspondence henceforth, leaving the contents of it to be dealt with by the determining panel. I have no doubt that, as submitted by Mr Madge-Wyld, the approach of the Respondent to the Applicant in correspondence was the same, and that all attendances on her were reasonably incurred and reasonable in amount.

(c) Attendances on Others

204. I accept that the Applicant had to attend on others as stated, and that these costs were reasonably incurred. Attendances on counsel, however, seem to me to be covered in the work done on documents. I note that in this case, the required correspondence with the Tribunal, as necessitated by the Respondent's conduct of the case as outlined above, was greater than is ordinarily expected in the course of such proceedings, but 5.7 hours in total appears to me to be unreasonable. In the circumstances I allow 3 hours. Given that the greater portion of this was administrative work as described by Mr Madge-Wyld, I allow it at Grade D.

(d) Work on Documents

205. Mr Madge-Wyld is correct that the Respondent has not raised any particular issue with the documents schedule, claiming only that it is disproportionate and that it should be, in effect, halved.

206. I can nevertheless ascertain from that schedule that there are areas of cross over in particular between Ms Waszek and Ms Stanway, that seem to me to have been unnecessary, for example at lines 7 – 11, 17 -19. I also remind myself that the Applicants were heavily reliant on counsel in this case for both their pleadings and case strategy. Nor does it seem to me to have been necessary for a grade B fee earner to have been involved in bundling.

207. I make a broad-brush assessment that the reasonably incurred sum for work on documents is £5,000.

(e) attendance at the Hearing

208. Though the Respondent says that the attendance of Ms Stanway ought to be reduced on the basis that the hearing was listed for only one and a half days, that submission is put forth on a misunderstanding of the facts. Mr Jacobs is in the unenviable position of having been retained after the carriages have arrived and the plates are being cleared, and can only make submissions in accordance with his instructions, so I make no criticism of him. I am not aware of how much of the paperwork he had available to him in making his submissions. Nevertheless, it is correct that the case was listed for 2 full days.

209. It being the case that it did, in fact, finish before lunch on day two, there does fall to be considered a reduction in the hours claimed, however. Further, the claim appears to be made on the basis of the sitting day being 8 hours per day. This was a digital hearing, at which there was no pre- or post-court attendance. Given that on neither day did we commence until 10am, and on 13 May 2021 there was a break for lunch, but we did not finish until 5.40pm, the reasonable time to be allowed is 10 hours as proposed.

(f) Counsel's fees

210. Though the Respondent says that Mr Madge-Wyld's fee and refresher ought to be reduced, no argument is made on the other fees incurred for counsel.

211. I am satisfied that it was reasonable to instruct a senior junior in this case. I note that counsel drafted all pleadings and case statements save for the initial Particular of Claim in this case. In light of the way the Respondent approached this litigation, it was reasonable to hold a conference. It was also reasonable for Mr Granby to attend as counsel at the case management hearing, particularly in light of this case proceeding under the Tribunal's deployment jurisdiction and there needing to be care over Directions proceeding on the twin footings.

212. Despite the Respondent having raised it, Mr Madge-Wyld does not state what his day-one brief fee was in his written submissions, and it is not stated in the costs schedule, as the 'hearing fee' contained there must also include Mr Granby's case management hearing fee. I deduce that the brief fee for day one was between £5,000-£6,000. Allowing for time for preparation and for the Skeleton, I must also keep in mind that Mr Madge-Wyld did not have to prepare from a standing-start as he had been involved throughout. Large parts of the Bundle were also duplication, or invoices over which no issue had been taken. In the circumstances, I agree with Mr Jacobs that around £4,000 is the reasonable fee for the first day. Resolving doubt in favour of the Applicant as I must, I therefore make a £1,000 deduction to the day-one brief fee.

213. I also agree that the refresher falls to be reduced. The Applicant's own trial timetable anticipated that the hearing would be all but completed on day one, and that all that would remain for day two would be one hour for the Applicant's closing. Albeit that proved to be optimistic, it was not so far removed from what happened – in actual fact all that we heard on day two in the end were short evidence from Mr Hewitt-Lee and Mr Chandler, and the closing submissions of both parties. The hearing had finished before lunchtime. In those circumstances, a reasonable refresher would have been the stated £1,500, and I so allow.

(g) Expert fee

214. Though it was plainly reasonable to incur the cost of an expert in this case, as regards his fees, the sum claimed by Mr Wade is frankly eyewatering. Extrapolating the fee for his report from the figure by deducting his daily rate for attendance for two days, the sum for his single report of February 2021, in which he stated he was simply instructed to 'review' his previous reports, and did not even attend at the property, calculates out to £8,226.44. Nor did we find Mr Wade's approach to the issue complained of in this case exemplary, even if we largely agreed with his findings.

215. While I agree that Mr Wade was required for the full day on 13 May 2021, not least because the Respondent's proposed timetable was misguided at best, he in fact gave hot-tubbing evidence for 1 hour 50 minutes, and was then further cross-examined by Mr B W Lee between 4.10pm – 5.35pm. The comparator available to me, Mr C Lee of Lucas Lee, charged the Respondent for his Report £1250 plus vat, and indicated he would charge for his attendance at the hearing at a rate of £250 per hour plus vat **[1130]**. I accept that the Applicant's directions questionnaire indicated that the expert's fee would be £1,500, and they must have had Mr Wade in mind at the point at which that questionnaire was completed, given his previous involvement in the case.

216. Mr Wade was not required on day two, which the solicitor would not have known when the schedule was drafted (at least partly as the Respondent refused to agree a sensible timetable). I therefore allow the requested £1,200 for his attendance on 13 May 2021, and £1,500 for his report.

(h) other matters taken into account in the above assessment

217. It remains a fact that the costs schedule was not served two clear days before the commencement of the hearing (in circumstances in which it was clear that, so far as relevant, the case was allocated to the Fast Track, and that this was part Fast Track trial). I am also mindful that the Applicant only decided not to pursue the administration charges claimed in the course of the second day of the hearing, during judicial questioning of Mr Hewitt-Lee. Albeit that this was barely 2% of the

claim, it ought to have been obvious as soon as Mr Lee-Hewitt's statement was prepared that there was no supporting evidence of demands having been made for the sum.

218. Set against that, however, I do consider that the Respondent's refusal of the offer to settle made on 14 April 2021 was unreasonable. It is clear that she, or the person conducting this litigation on her behalf, failed entirely to engage with that offer, instead sending it to the Tribunal describing it as a 'blackmail' letter.

219. That is but one example of the manner in which this case has been conducted on the Respondent's side of this case. The Respondent has been obstructive throughout. For example, she ignored repeated Orders and Directions of the Tribunal for agreeing a Bundle, and each time she was told that she could not serve her own separately and it was to be agreed simply sent a further barrage of emails of aggressive repeat demands. A full hour of case management time at the start of the day was caused by this failure to follow simple instructions or to be willing to cooperate, even to the extent of agreeing a trial timetable. While litigation of this nature is naturally oppositional, the conduct of the Respondent (or her family members) in this case fell far below that to be expected. Where I have indicated above, this is the Respondent's conduct taken into account in the amount of the sums reasonably incurred.

(i) Conclusion on sums of costs

220. I therefore assess the costs in the following sums:

(a) Attendances on Applicant: 12 hours at grade B	£ 2,304.00
(b) Attendances on Respondent: (allowed in full)	£ 920.00
(c) Attendances on others: 3 hours at grade D	£ 354.00
(d) Work done on documents: overall assessment	£ 5,000.00
(e) attendance at the Hearing: 10 hours at grade D	£ 1,180.00
(f) counsel's fees: (day one reduced by £1,000; refresher at £1,500)	£11,000.00
(g) expert fee: 1 day attendance at £1,200 + £1,500 report	£ 2,700.00
(h) VAT and disbursements (inc court fee):	£ 4,894.50

GRAND TOTAL: £ 28,352.50

221. I consider that the items in respect of which the costs above were incurred were reasonable in amount and reasonably incurred. There is no proportionality cross-check to be done, for the reasons outlined above. Had there have been, I would have agreed with Mr Jacobs' submission that the sums incurred are disproportionate to the issues in this case, and would have reduced the sum further by around 30% (though no further, to reflect the additional conduct issues identified which impacted on the manner in which the Applicant's solicitors were caused to conduct this case).

Conclusion

222. By way of conclusion, as the **Tribuna**l we make the following findings in favour of the Applicant:

    (i) The estimated on-account Service Charges in the sum of £9,064 and properly demanded by the Applicant are reasonable and payable by the Respondent;

223. As a Judge of the **County Court**, I give judgment for the following sums in favour of the Claimant:

    (i) the sum in paragraph 130(i) above;

    (ii) Interest pursuant to clause 4(F) of the lease calculated in the case of the service charge demands on the sum of £4,463.00 from 1 July 2019 and for the sum of £4,601.00 from 1 January 2020 and in the case of both to the date of judgment: £612.69.

    (iii) Legal costs under paragraph 27 of Schedule Two of the lease summarily assessed in the sum of £28,352.50.

Name: Judge N Carr **Date:** 22 July 2021

ANNEX - RIGHTS OF APPEAL

Appealing against the Tribunal's decisions

1. A written application for permission must be made to the First-tier Tribunal at the Regional tribunal office which has been dealing with the case.
2. The application for permission to appeal must arrive at the Regional tribunal office within 28 days after the date this decision is sent to the parties.
3. 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.
4. 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
5. 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 the County Court written decision

1. A written application for permission must be made to the court at the Regional tribunal office which has been dealing with the case.
2. The date that the judgment is sent to the parties is the hand-down date.
3. 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.
4. The application for permission to appeal must arrive at the Regional tribunal office within 28 days after the date this decision is sent to the parties.
5. 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.
6. 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 appropriate County Court (not Tribunal) office within 14 days after the date the refusal of permission decision is sent to the parties.
7. 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 County Court

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