FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Tribunal Case reference	**:**	**CHI/00HC/LIS/2022/0004**
County Court claim	**:**	**G66YX562**
Properties	**:**	**First and Second Floor Maisonette and Waterloo House, Waterloo Street, Hove, East Sussex, BN3 2DL**
Applicant	**:**	**Chapel Mews Freeholders Limited**
Representative	**:**	**Mr Fournillier of Counsel instructed by Dean Wilson LLP**
Respondents	**:**	**Mr Angus Roger Barry Malcolm**
Representative	**:**	**Ms Emma Read of Counsel**
Type of application	**:**	**Transferred Proceedings from County Court in relation to Service Charges**
Tribunal member(s)	**:**	**Judge J Dobson** **Mr P Turner- Powell FRICS**
County Court Judge	**:**	**Judge J Dobson**
Date of Hearing	**:**	**24th October 2022**
Date of Re- convene	**:**	**2nd December 2022**
Date of Decision	**:**	**6th February 2023**

DECISION

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

Summary of the Decision of the Tribunal

1. **The Residential Lease service charges claimed by the Applicant in the proceedings were not payable.**

2. **There is consequently no sum otherwise payable against which set off is relevant.**

3. **There is insufficient information for the Tribunal to be able to determine whether the service charges would be reasonable had they been payable.**

Summary of the Decision of the County Court

4. **The Applicant's claims related to both the Residential Lease and the Commercial Lease and related interest are dismissed.**

5. **The Respondent's Counterclaim in respect of both the Residential Lease and the Commercial Lease succeeds.**

6. **The Applicant shall pay £20,000 in damages to the Respondent in respect of his counterclaims by 6th March 2023.**

Background

7. The Applicant is the freeholder and the Respondent the lessee under two separate leases ("The Leases"), those of First and Second Floor Maisonette, Waterloo House, Waterloo Street, Hove, East Sussex, BN3 2DL (also identified as 67 Waterloo Street) and Unit 1, Chapel Mews, Waterloo House, Waterloo Street, Hove, East Sussex, BN3 2DL ("the Properties"). The former is a residential dwelling ("the Residential Property") and the latter is a commercial unit ("the Commercial Property"). The lease of the former alone will be referred to as "the Residential Lease" and the latter alone as "the Commercial Lease". The term "the Lease" is used where it is convenient to talk about a lease singular, but it is not necessary in the context to repeat the full term used for one or other of the individual Leases specifically and "the Leases" where it is appropriate to refer to both collectively.

8. Chapel Mews is a cul-de-sac off Waterloo Street. Waterloo House is on the corner of the entrance to the cul-de-sac and the other residential and commercial properties within Chapel Mews are arranged around three sides of the road of the cul-de-sac.

9. The Residential Property is a four bedroom first and second floor maisonette accessed via a staircase from a hallway with a front door at ground floor level (the specific situation in respect of the hallway and related is addressed further below as far as required). Waterloo House includes another dwelling to the ground floor, being a two- bedroom flat. That has its own entrances although was originally also accessible through the hallway mentioned above. Waterloo House has a somewhat complicated roofing arrangement. There is a mansard roof within which the second storey is located, there is what is referred to in documents as a "crown" roof above that, there is an area of flat roof. The areas are variously covered by tiles, shingle and a membrane.

10. The Commercial Property is a single storey and situated next to Waterloo House, being attached to it. The property is let by the Respondent to a commercial tenant for use as workshop/ office. The appearance from the photographs is that it may well have originally been a garage for a vehicle but if that is not correct, nothing turns on the matter.

11. The Commercial Property is similar to the other single storey commercial units within Chapel Mews. The other properties within Chapel Mews are understood to be or predominantly be flats. It is apparent that the Residential Property is quite different to the other properties within Chapel Mews and, as explained below, therein appears to lie much of the issues which have arisen.

12. The Respondent became the lessee under the Residential Lease in early 2000 and registered at the Land Registry on 20th March 2000 and subsequently became the lessee under the Commercial Lease on 21st December 2000. The Applicant was registered as the freeholder on 28th May 1998.

13. The Applicant is a lessee owned company. The members are the lessees of the various properties within Chapel Mews. Pursuant to an amendment to the previous position and agreed at an Annual General Meeting, there are 26 shares in the Applicant company. One share is allocated to the lessee of each property (and as such the Respondent holds 2) following a decision taken at a meeting in February 2001 [s2]. There are 2 directors of the Applicant company, Andrew Gumbrill and Mark Jay.

Procedural History

14. As far back as May 2020, the Applicant freeholder filed a claim in the County Court under Claim No. G66YX562 [4-9] in respect of sums said to be due from the Respondent lessee. The claim related to unpaid

service charge, interest and costs. The stated value of the claim on the Claim Form was £5068.70 excluding the court fee paid which reflected that value and excluding legal costs on issue. The principal parts of the £5068.70 comprised £3268.58 of service charges, of which half (£1634.29) related to the Residential Lease and half to the Commercial Lease, and additionally £1672.00 said to be costs incurred to date. Interest is claimed at 4.1% per year.

15. The Respondent filed a Defence and Counterclaim dated 14th April 2021 [11 -12], although subsequently amended but bearing a date of 12th April 2021 [13- 26], including set- off against the value of the Applicant's claim plus a counterclaim for a sum limited to £20,000. The subsequent amendments have not altered the value of the Counterclaim. No additional fee was paid when filing the amended document to facilitate any other remedy.

16. The case was transferred to the administration of the Tribunal and for the determination by the Tribunal of the payability and reasonableness of the residential service charges and by the Tribunal Judge sitting as a County Court Judge of the elements, pursuant to the Order of Deputy District Judge Jabbour by an Order dated 10th December 2021. The Court file was transferred a time after that.

17. The history since transfer has been more involved than might have been hoped for. The time which has elapsed before the trial/ final hearing has been longer than originally provided for. During that period, the Amended Defence and Counterclaim was produced, permission having been granted for that, and a Defence to Counterclaim [27-28] was provided on behalf of the Applicant. A Reply to that was also served by the Respondent [33-36]. Most recently prior to the trial/ final hearing, there were a number of difficulties in relation to the hearing bundle. That third and final bundle comprises, including the index, of 369 pages.

18. It was also set out in correspondence that the bundle produced by the Applicant was not agreed by the Respondent. The Respondent produced what was described as a supplemental bundle containing an additional of 108 pages giving the reason that documents he required where not within the main bundle. There had been no permission requested or given for the Respondent to be able to file any additional bundle. However, it was explained in the hearing that there had been correspondence seeking an agreement about bundle contents which and there was no strenuous objection from the Applicant's side, much as it was asserted the contents were not relevant. The supplemental bundle was allowed to be relied upon. That was notwithstanding the degree of duplication with documents in the main bundle. The Court and Tribunal adopted the approach that there was not the time available to address that.

19. The hearing took place across one day but with insufficient time following the hearing of the evidence for the Tribunal to receive oral

closing submissions received. Written submissions were directed, by 4th November 2022 and received from both Counsel. Those submissions were lengthy, comprising some seventeen pages from Mr Fournillier and sixteen pages from Ms Read. A Skeleton Argument was provided in advance of the hearing on behalf of the Respondent, with eleven case authorities. The Written Submissions referred to a further two case authorities, bringing the total to some thirteen relied upon by one party or another.

20. It was necessary to arrange for the Tribunal to reconvene to consider those. Regrettably, difficulties arose with scheduling a suitable date, which was only achieved on 2nd December 2022. Time has then been required to be allocated for the writing of a Decision involving several elements, not assisted by the Christmas and New Year period.

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

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

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

The Leases

24. A copy of each of the Leases was provided within the bundle. The Residential Lease [306-326] is dated 30th October 1992. The Commercial Lease [327-343] is dated 27th January 1995. The parties to this dispute were also in neither instance the original contracting parties under either of the Leases. The term of each of the Leases in 125 years from 25th March 1992.

25. The relevant terms of the Leases are the same in each instance. 1.2 of the Definitions defines the residential and commercial units comprising Chapel Mews collectively as the "Building" and 1.4 defines the Residential Property as "the Flat" and in the other Lease the Commercial Property a "the Unit". Whilst those terms have not been adopted in this Decision, they are relevant to understanding the wording used in clauses quoted. Clause 1.15 includes with "the rents" the proportion of service charges for each of the Properties. Clause 2, Interpretation, provides at 2.4 that "repair" includes "the rectification or making good of any defect in the foundations roof or structure of the Building notwithstanding that it is an inherent or latent defect" and so extends the repairing obligations on the Applicant from those which would be implied in the absence of equal or greater express provision.

26. The contribution to service charges in respect of each of the Properties and each of the others within Chapel Mews, called "Service Expenses" in the Leases is provided in clause 4.1 to be "1/26ths of the costs expenses outgoings and matters mentioned in Part 1 of the Fourth Schedule". The clause continues as follows:

> "4.2 The service expenses for each Accounting Year shall be estimated by the Managing Agents (or if none by the Lessor) during the preceding Accounting Year and Lessee shall pay the estimated contribution by two equal instalments on the 25th day of March and the 29th day of September in the relevant year
> 4.3 As soon as reasonably practicable after the end of each Accounting Year when the actual amount of the service expenses for that year due from the Lessee has been ascertained the Lessor shall give notice of such amount to the Lessee and the Lessee shall within 28 days after the date of the giving of such notice pay the balance due to the Lessor or be credited in the books of the Managing Agents (or if none the Lessor) with any amount overpaid

27. The service charge mechanism providing for an estimate of service charges with demands for two instalments each half of the required contribution and with a balancing credit or charge following the end of the service charge year once the actual expenditure is known is a very common arrangement.

28. The obligations on the Respondent in respect of relevant payments is contained in clause 6, reading as follows:

> "The Lessee hereby covenants with the Lessor as follows:-
> 6.1 Pay Rents
> To pay all the Rents during the Term at the times and in the manner required by the Lease without any deduction."

29. The obligations placed on the Applicant in respect of repairs and maintenance and other relevant expenditure are found in clause 7, which states:

> "7.1 Quiet Enjoyment
> That the Lessee paying the Rents and performing and observing the Lessee's covenants in the Lease shall and may peaceably and quietly hold and enjoy

the Flat during the Term without any lawful interruption or disturbance from or by the Lessor or any person or persons rightfully claiming under or in trust for him.

7.2 .....

7.3 Repair Structure etc

That (subject to the payment of the proportion of service expenses referred to in clause 4) the Lessor will maintain, repair, redecorate and renew

7.3.1 the roofs, foundations, and main structure of the Building including the joists and other main timbers

7.3.2. the Common Parts

.....

7.4 Exterior Decoration

That (subject as aforesaid) the Lessor will redecorate the exterior of the Building including the windows and window frames and doors which are usually painted with two coats at least of good quality paint once in any four years and more often if he reasonably considers or if he shall be requested so to do so by a majority of the lessees of the Building.

7.5 Common Parts

That (subject as aforesaid) the Lessor will, so far as is practical, provide for the decoration, lighting, and cleaning of the Common Parts.

7.6 To Insure

At all times during the term (unless such insurance shall be vitiated by any act or default of the lessee or any licensee, invitee or sublessee of the Lessee) insure and keep insured the Building in some insurance office of repute in the full reinstatement value and whenever required, (but not more frequently than once in every 12 months) produce to the Lessee the policy ...

7.7 Supply summary of service expenses

To supply to the Lessee, not less frequently than once in every year, a summary of the costs, expenses, outgoings, and matters mentioned in Parts 1 and 2 of the Fourth Schedule for the previous calendar year.... Which summary shall also incorporate a statement of the amount (if any) standing to the credit of the Lessee I the books of the managing Agent (or if none of the Lessor)

30. The Fourth Schedule to which reference is made above states the following:

"Costs Expenses Outgoings and Matters in respect of which the Lessee is to contribute

1 The cost to the Lessor of complying with his obligations contained in clauses 7.3 7.4 7.5 7.6 and 7.7 and of any other matters which are for the benefit of the Building

2 The cost on insurance .....

3 The reasonable fees and disbursements paid to the Managing Agents.....

4 The fees and disbursements paid to any solicitor or other professional.....

5 .....

6 Such reasonable sum as shall be estimated by the Managing Agent (or if none the Lessor) to provide a reserve to meet part or all of all some or any of the costs expenses outgoings and matters mentioned in this part of the Schedule which the Managing Agents (or if none the Lessor) anticipate will or may arise during the remainder of the Term"

31. There are also repairing and painting obligations on the Respondent in relation to the Properties- but excluding those matters for which the Applicant is responsible and not relevant to the issues.

The Construction of Leases

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

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

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

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

34. *Arnold v Britain* is one of the various cases relied upon by Ms Read- see below- and provided to the Tribunal.

The Hearing

35. Mr Fournillier of Counsel represented the Applicant company. Mr Malcolm was represented by Ms Read of Counsel. Ms Read provided a Skeleton Argument mentioned above, of eight pages length, and referring to eleven of the case authorities mentioned above and two extracts from statute law, copies of which she provided in a full ring binder.

36. Oral evidence was received from Mr Andrew Gumbrill and Mr Mark Jay, the Directors of the Applicant, and from Mr Angus Malcom, the Respondent. Written witness statements were provided by each of those witnesses, although that of Mr Jay only added a little to that of Mr Gumbrill. Both Mr Gumbrill and the Respondent displayed some reluctance to answer questions where the answers did not assist their case, Mr Jay gave brief evidence, but his oral evidence also did not add matters of note to that of Mr Gumbrill and hence his evidence is barely referred to below.

37. A document called a "Collective Witness Statement" was also produced apparently signed by 8 persons, although one of those was Mr Gumbrill and one with a surname of Mukhida- the other name written is not easily legible. It is unclear who the other six signatories are and whether they are lessees or other occupiers. None of the signatories other than Mr Gumbrill attended to give oral evidence. The Tribunal and Court put very little weight on the contents in those circumstances.

38. The Tribunal additionally received written evidence [263- 305] from a single expert whom the parties had been permitted to jointly instruct, Mr W H C Grumitt MSc MRICS of Grumitt Wade Mason Chartered Surveyors and Architectural Consultants. The report of Mr Grumitt is dated 14th July 2022 and is some forty- three pages long. He inspected the Properties on 21st June 2022. The report included several paragraphs in which Mr Grumitt set out his opinion and a Schedule of Condition in respect of the Properties.

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

40. The Judge and Tribunal are grateful to all of the above for their assistance with this case. However, the Tribunal does identify at this point- and returns to the specific instances below- that both Counsel went some way beyond the pleaded cases of their clients and sought to introduce what were, with differing degrees of merit and significance, various new arguments.

41. The bundle includes a report from a surveyor, Mr Stuart Radley, originally exhibited to the witness statements of each of Mr Gumbrill and Mr Jay. That dealt with works intended to be undertaken to properties within Chapel Mews, including both the Residential Property and the Commercial Property. However, that did not constitute expert evidence in these proceedings.

The Tribunal matters

The jurisdiction of the Tribunal

42. The Tribunal has power to decide about all aspects of liability to pay service and administration charges in relation to residential properties and can interpret the lease where necessary to resolve disputes or uncertainties. For the avoidance of doubt, the Tribunal has no jurisdiction in respect of solely commercial premises.

43. Service charge is in section 18 of the Landlord and Tenant Act 1985 defined as an amount:

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

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

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

46. There are innumerable case authorities in respect of several and varied aspects of service charge disputes, but most have no obvious direct relevance to the key issue in this dispute. Certain ones have been cited by Counsel and specific well- known ones are also referred to by the Tribunal.

47. In a number of case authorities, for example *Knapper v Francis* [2017] UKUT 003 (LC) (although in that case there were more specific points) it has been held that where service charges demanded were so demanded on account, the question is whether those demands were reasonable in the circumstances which existed at that date. As Ms Read

has contended, it is for a landlord to demonstrate the reasonableness of any estimate on which the on- account demands are based. The case of *Wigmore Homes (UK) Ltd V Spembly Works Residents Association Ltd* [2018] UKUT 252 (LC) cited by her is accepted by the Court and Tribunal as applying. Ms Read is correct to say that *Cos Services Ltd v Nicholson and another* [2017] UKUT 382 (LC) (and also earlier authorities such as *Carey Morgan v De Walden* [2013] UKUT 0134 (LC)) applies such that there is a two- part approach of considering whether the decision making was reasonable and whether the sum is reasonable.

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

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

Are the Residential Lease Service Charges payable and reasonable?

50. As noted above, it is amply clear from clause 4.1 and the Fourth Schedule of the Residential Lease that the Applicant is entitled to demand service charges from the Respondent. That is unsurprising. The Respondent accepts that the sums claimed by the Applicant have not been paid.

51. The claim in respect of the Residential Lease made is for service charges said to be due on dates from 25th September 2018 to 25th September 2019. A sum of £0.43 is said to be due from the 25th September 2018 demand (originally demanded for £821.43) and then £621.43 said to be due 28th February 2019 and sums thereafter of £200.00 in March 2019 and £821.43 in September 2019 in relation to the 2019/20 service charge year. The total is £1643.29. Those sums are set out on a statement of account dated 13th February 2020 [358 to 360], which Mr Gumbrill said in evidence had been sent to all lessees. That is accompanied by a Summary of Tenant's Rights and Obligations.

52. Mr Gumbrill's evidence on behalf of the Applicant was that a sum of £200 had been demanded by way of demands prior to 25th September 2018 but that following the AGM on 17th May 2018 (discussed further below) that sum was increased and that the increase was to meet the costs of repairs and maintenance to Chapel Mews for which service charges had not been demanded on prior to that time. The Tribunal accepts that evidence in the general terms given. The Tribunal

understands that the £621.43 in February 2019 was the extra to the £200 demand shortly after- although why the smaller sum which reflected demands prior to 2018 was demanded after the £621.43 is unclear but not relevant- so totalling the £821.43 estimate figure.

53. The Tribunal identified early in the hearing that the actual service charge demands were not in the bundle. Mr Fournillier contended that there was sufficient evidence of the amounts, although in response to the Tribunal expressing the preliminary view that it was unable to see how the Applicant could succeed with the claim, there was a break for Mr Fournillier to take instructions. Thereafter Mr Fournillier stated that there was no further document in the bundle relied on. Ms Read responded that the Applicant's pleaded case did not include any demand.

54. The Tribunal retains it preliminary view, having considered the evidence and submissions received. The Applicant has failed to demonstrate all of the demands to both be valid under the law generally and be valid pursuant to the Residential Lease. The reasons are as follow below.

55. The statement of account identifies the sums said to be due from various dates, indicating that demands were made in the sums stated and on the dates identified. That includes sums described as six-monthly advanced payments. The Tribunal rejects Mr Fournillier's assertion that the statement is the demands. All else aside, there cannot be an advance demand in February 2020 for contribution to 2018/2019 or 2019/ 2020 expenditure. The statement of account is not, the Tribunal determines, the relevant demand for the given sums, or any of them, but rather it is exactly what it says that it is, namely a statement of the Respondent's account with the Applicant at a given date.

56. The Applicant did not, as identified above, produce any of the demands themselves and, although no explanation would have solved the Applicant's evidential problem, in any event no proper explanation was proffered. Mr Gumbrill stated that individual service charge demands were made but shortly after that there were not demands, just statements.

57. It cannot, on the one hand, be demonstrated that the demands comply with statutory requirements, either by way of providing the relevant information about the lessor or whether they were accompanied by the relevant Summary of Tenants Rights and Obligations, and so could be valid in any event.

58. There are other copies of such Summaries in the main bundle but accompanying statements of account again as sent by Dean Wilson LLP on behalf of the Applicant in 2017 and so not assisting the Applicant. The supplemental bundle [s64- 69] contains two other documents with demand numbers and those are also accompanied by the Summary. However, both documents include the same two sums due on different

dates from weeks or months earlier and both documents are dated the same later date of 27th July 2018. The covering letter from PepperFox [s62] refers to a re-issued demand and refers to it being issued retrospectively, although there are two documents, the Tribunal perceives one for each of the Leases. In any event, the Tribunal finds in any event on the evidence that irrespective of their description, they are not actually the demands originally issued for the two sums listed, which were due earlier, but are in practice are further statements of sums due across a period. The effect is statements of account and similar have been provided and contain the relevant details and summary but the actual demands for the service charges in question could as easily not have done as have done.

59. In any event, and effectively rendering the answer to the above question irrelevant, it cannot be demonstrated that the demands comply with the provisions of the Residential Lease. Absent any demands provided in evidence and the basis for them being provided, the Tribunal cannot know one way or the other.

60. Clause 4.2 explains that the service charges must be estimated by the managing agents, therefore PepperFox Ltd. No budgets or any other documents identifying how the service charges have been estimated has been provided by the Applicant which might have identified the anticipated expenditure, to what that related and how that resulted in the service charges to the individual lessees. The Tribunal has no evidence that the provisions of the Lease were complied with by way of there being an estimate, much as the figures must have come from somewhere. Mr Gumbrill gave oral evidence that the works required to Chapel Mews have been costed, although he accepted that did not appear in the bundle, so any assistance which might have been provided was not so provided in the event.

61. The production of budgets produced in respect of anticipated expenditure on which the estimated service charges were based may well have made the answer clear. The absence of them renders it equally unclear in the absence of those as to how the sums on the statement of account which are said to have been demanded have been arrived at. It ought not to have been difficult to provide evidence enabling the Tribunal to determine how the estimated service charges were arrived at.

62. The evidence of Mr Gumbrill and Mr Jay is insufficient, the Tribunal determines, to meet any of the above points without cogent documentary supporting evidence. Mr Gumbrill said that he was not aware of how the service charges were calculated, that being left to the managing agent Pepper Fox, so he could not particularly assist. No evidence was given by anyone from Pepper Fox. Mr Jay was not asked.

63. Mr Fournillier asserted in his Written Submissions that “in the context of the matter” the nature and calculation of the expense claimed was

clear, without clearly explaining that context. In any event, the Tribunal disagrees.

64. The Tribunal considers it appropriate to explain why it has considered the question of validity of the demands in the absence of the Respondent raising it in his pleaded case. There are, the Tribunal accepts, some limits to the extent to which the Tribunal should take points which have not been raised by a party in its case.

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

66. In respect of meeting requirements of the lease, arguably that is even more fundamental. Certainly a party relying on a right to demand service charges and recover unpaid service charges pursuant to the terms of a lease must demonstrate that the given lease permits the recovery of such service charges, irrespective of what the specific sum may be.

67. Ms Read disputed in her Written Submission the validity of any service charges demands, from the perspective that it was unclear as to the nature of the expense claimed but also how the sums demanded by the claim were calculated. In doing so, she sought to raise matters not identified, or not clearly, by the Respondent in his case prior to the hearing. Nevertheless, the Applicant relies on the Residential Lease and the entitlement to be paid the service charges pursuant to the Residential Lease and so it was a necessary element of that case that the Residential Lease does enable recovery of the sums and that the Applicant can demonstrate that it took any required steps pursuant to the Residential Lease. The Tribunal is entitled by way of the Applicant's reliance on the Residential Lease as the basis for the sums claimed to determine whether or not the given sums demanded are indeed payable pursuant to the Residential Lease.

68. In the absence of evidence of valid demands both pursuant to statutory requirements and to the Residential Lease, the Tribunal determined no service charges were demonstrated to be payable under the Residential Lease.

69. The Tribunal has given careful consideration to the fact that the Respondent was asked in cross examination whether he accepted the service charge statement to constitute a valid demand. He replied that

he did. The Applicant's position was that the Respondent therefore accepted or admitted the sums claimed and so the Tribunal has no jurisdiction. However, the Tribunal determines that whilst payment of service charges demanded may well amount to acceptance or an admission an answer in oral evidence without identifiable knowledge of the legal requirements does not. A simple expression of uninformed opinion does not, the Tribunal determines preclude it having jurisdiction and does not alter the ability to consider the matters above and below.

70. It is not necessary to go beyond the above determinations. However, there is some merit in briefly indicating just how far away the Applicant was from there being a likely finding of the sums claimed being due.

71. The Applicant has also failed to demonstrate that the costs to which the demands relate are costs payable under the Residential Lease. That was one element of Ms Read's argument. If it had necessary to determine the point, the Tribunal would have determined there is insufficient for the Tribunal to be able to determine that the costs to which contributions are demanded are matters for which service charges are properly payable. There is nothing which identifies whether the service charges are to meet the relevant share of the "costs expenses outgoings and [other] matters" or include other elements not claimable. Not all of the potential expenditure that there could ever be is recoverable under the terms of the Residential Lease. The Applicant has to demonstrate that the sums demanded do fall within the costs to which the Respondent must contribute and how they relate to the expenditure anticipated.

72. The Tribunal records that the Applicant has produced annual statements of expenditure for the years ended 24th March of 2019, 2020 and 2021 [369, 368 and 367 respectively], although of those only that of March 2019 might potentially assist in respect of the demands the subject of this case by indicating the actual amount of expenses for that year immediately prior to 2019/ 2020 but even that can only hint at how the particular demands in 2019/ 2020 were estimated. The supplemental bundle included a demand dated 24th July 2018 [s67] but that did not take the Applicant further.

73. It is right to say, and Mr Fournillier properly does, that the Respondent was asked about the 2018 meeting minutes [92] and the sums referred to (see above) and that the Respondent stated that he understood the figures but no more information followed and the Tribunal does not find the particular evidence sufficient to assist the Applicant.

74. Given that the Applicant has failed to demonstrate valid demands in the first place, the reasonableness of any service charges included in the demands and the applicable test does not arise, so this point need not be unduly dwelt on. However, if the Applicant had got past the question of whether the service charges were payable, the Tribunal would not have considered it appropriate to explore reasonableness where that

had not been raised in the Respondent's case, drawing a distinction between that and payability.

75. The Tribunal cannot identify how it might have assessed the reasonable figure for the service charge demands without evidence of the anticipated expenditure and the ability to identify that service charges were payable to meet all or any given element of it.

76. It follows from the above determination that the Respondent's case that he would be entitled to set- off any sums otherwise due because of the asserted breaches by the Applicant is strictly not relevant to the Tribunal. Nevertheless, if the Applicant had been able to demonstrate any service charges to be reasonable and payable, the Tribunal does not consider that the terms of the Residential Lease preclude any such case, for the same reasons as explained in the County Court part of this Decision below. However, given that the service charges were estimated ones the Tribunal considers that would have prevented set off such that the estimated charges would have been payable for the Tribunal's purposes. The County Court counterclaim is another matter.

The County Court issues

Claim in relation to service charges under the Residential Lease

77. The County Court issues have been considered by Judge Dobson alone, having regard to the findings and determinations of the Tribunal in respect of the Residential Lease service charges. The answer in respect of this aspect of the claim is simple.

78. The Tribunal has determined on the evidence presented that no service charges are payable. It necessarily follows that the claim must fail. The Court need not and cannot go beyond that determination.

Counterclaim in relation to the Residential Lease

79. The Respondent's claim totals £20,000 in respect of the Residential Lease and the Commercial Lease combined, with no breakdown between the two. He asserts that the Applicant had failed to and continued to fail to comply with its maintenance obligations in clause 7 of the Residential Lease. It is said firstly that the Applicant has incurred various elements of expenditure and secondly that there has been water penetration into the Residential Property.

Agreement/ Estoppel

80. The Applicant's case in respect of both elements is described by Mr Fournillier in his Written Submissions as "straightforward". The Court would not have adopted that description. Nevertheless, the Applicant's case is that there was an agreement, which Counsel describes as an "informal arrangement" (which term the Court does adopt), between the Applicant, the Respondent and the other lessees of residential and

commercial properties within Chapel Mews that the lessees would be responsible for the decoration, repair and maintenance of the unit(s) leased by them and so varying the written provisions of the Leases and all other leases within Chapel Mews. Mr Gumbrill accepted in evidence on behalf of the Applicant that the Applicant was not "adhering to the lease", albeit for that reason.

81. The Court understands that for many years the service charges demanded therefore reflected that asserted informal arranagement and made no provision for the cost of any maintenance, although that position altered prior to the sums on which the Applicant's claim had been based, as discussed below.

82. The Applicant's case is that the arrangement existed before the Respondent became a lessee and that he accepted it or acquiesced in it. The Applicant's Counsel, Mr Fournillier, made very detailed submissions about the question of the Respondent being estopped from relying on the terms of the Residential Lease, amounting to some ten pages of his seventeen- page written closing submissions. He advanced at length the argument that the Respondent had accepted the position and why the Respondent should be bound by that. Ms Read made rather shorter submissions about why the Respondent was not estopped, including that there was a distinction between company membership on the one hand and being a lessee on the other. Both Counsel referred to *Geoquip Marine Operations AG v Tower Resources Cameroon SA and another* [2022] EWHC 531 (Comm), although Mr Fournillier also referred to an earlier authority *of Republic of India v India Steamship Co* (The Indian Endurance and The Indian Grace (No2) [1998] AC 878

83. The estoppel argument is another example of a situation- and there are more yet to be addressed- where Counsel for a party raised a matter which the Court determines not pleaded by the party. It is right to say that the Applicant asserts agreement on the part of the Respondent, as set out above. The Applicant did not in terms refer to estoppel prior to the hearing. Mr Fournillier quoted from the Applicant's Defence to Counterclaim, setting out paragraph 4 of that in full, in his Written Submissions. He did so having correctly identified in the Submission that a party must specifically plead the facts relied on to establish the estoppel including the facts on which the estoppel arises and must identify that which it is said the other party is estoppel from arguing. The Court accepts that paragraph 4 sets out relevant facts but nevertheless it makes no mention that reliance is placed on estoppel in consequence of them and ought to have done so. Ms Read for the Respondent made no mention of estoppel in her Skeleton Argument, indicating that reliance on estoppel by the Applicant was not understood by the Respondent at that point.

84. However, at the start of the hearing, Mr Fournillier suggested that Ms Read objected to the estoppel argument being run, to which Mr Read replied that although estoppel was not pleaded, she did not object. The

Court therefore considers the estoppel argument, although with some caution about doing so. Even in her Written Submission after the hearing, Ms Read's position was that it was unclear as to the precise nature of the estoppel asserted, which the Court can understand, given that Submission was prepared prior to receipt of that by Mr Fournillier which set matters out in full, although that did not preclude her from making three- pages of submissions about Geoquip and generally about estoppel.

85. The effect of the judgments in *India* and *Geoquip* includes that there must have been an assumption of fact or law made by and shared between both parties (or an assumption made by one party and acquiesced in by the other), that it must be clear, that there must in effect have been agreement about the assumption, that the party asserting estoppel must be able to demonstrate having relied on the assumption and that it would be unjust or unconscionable for the party asserted to be so estopped to be permitted to resile from the assumption and to assert a contrary legal or factual position generally either because of detrimental reliance by the party raising the estoppel or benefit to the other party.

86. However, the Applicant's case relies first on the Respondent having agreed to or accepted the situation and may have merit if the Respondent did so irrespective of whether the Applicant can specifically rely on estoppel as such. The Court therefore deals with the factual question of whether there was an agreement or acceptance.

87. The Court considers that the meetings on which the Applicant relies were Annual General Meetings of the Applicant company and the involvement of the Respondent where applicable, and of other lessees, was strictly as members of the Applicant company and agreeing the approach that the company could take in respect of its members, to an extent accepting a point made by Ms Read in that regard. The meetings were not, as such, meetings between a freeholder and lessees.

88. However, the Court considers that irrespective of any technical point, the practical reality is that the members of the Applicant company were all lessees and that in practice they were addressing the responsibilities as freeholder and leaseholders in respect of the properties and not just as company and members, doing so in the knowledge that there would be impact on the Applicant and themselves and others as lessees. The Court is content that any agreement or acceptance of the agreed approach by the Respondent would apply in respect of the Leases as lessee and not just as a member of the Applicant company.

89. The Respondent's case is that he first became aware of the informal arrangement at a meeting of the Applicant at a time after he had purchased the Residential Property. It is not clear how that fitted with acquisition of the Commercial Property, the Respondent' statement not being clear and there being no clarification sought by Counsel, so the Court can make no finding. His case is that he made repeated protests

about the agreed approach. More generally, he asserts that the arrangement was without his consent and against his wishes and that he was "obliged" to deal with matters which were the responsibility of the Applicant.

90. The Applicant asserts that the informal arrangement was dealt with at annual meetings and agreed to/ was continued to be agreed to or implicitly agreed to as it was not challenged, which Mr Gumbrill essentially re-iterated in oral evidence. The Respondent was present at various of those meetings it is asserted and did not raise any issue with that approach. The Court does not agree that the Respondent was, as Mr Fournillier contents, a "regular attendee". Rather the minutes indicate that the Respondent did attend some meetings, but he could most accurately be described as an irregular attendee, attending five times in the fourteen years between his letter in 2003- see below- and 2018 when the Applicant accepts its informal arrangement ending.

91. The Court notes that there were evidenced complaints about the approach taken by the Applicant from the Respondent. Issues were raised in correspondence dated 11th February 2003, 23rd November 2012 and 31st October 2017. The first of those in 2003 [s9-12] sets out the landlord's obligations under the Residential Lease and continues, including stating that the Applicant stands in the shoes of the original lessor and quoting much of clause 7 of the Leases. The Respondent referenced an agreement being asserted and stated:

> "I am not party to any such agreement as that to which you refer".

92. The Respondent continues by referring to various external works paid for by him prior to that date and adds the following:

> "it is not acceptable that Norah [the then lessee of the ground floor flat] and the Company should continue to assume that I alone am to accept responsibility for such serious matters as the roof, the gutters, exterior decoration and the like…… Why does the Company or Norah think that I should release either of them from their obligations under the lease in the absence of a reasonable and financially viable arrangement…".

93. It is sufficiently clear that the Respondent was stating that he considered the Applicant to bear the responsibility for repairs. Both the tenor and specific statements run contrary to the Respondent agreeing that the lessees will themselves each be responsible for repairs to the properties leased by them.

94. The 2012 letter [s51-53] complains about the Applicant's failure to discharge its obligations and asserts that the provisions in the Residential Lease continued to bind the Applicant, using strident terms. He states that the Applicant:

"has failed to discharge the Grantor's various obligations in respect of Waterloo House and instead shamefully left the [ground floor lessee] and me to our own devices……."

95. Reference is made to clause 7.3.1 and 7.3.2 of the Lease. It is fair to state that much of the letter relates to issues about the communal hall within Waterloo House but the references to the Applicant's obligations are clear enough. The suggestion of Mr Gumbrill in oral evidence that the Respondent wasn't complaining about the Applicant complying with obligations was optimistic at best.

96. The October 2017 letter [s30] again refers to the Applicant's obligations in respect of maintenance.

97. The Court finds that the protests by the Respondent in the items of correspondence in 2003, 2012 and 2017 were ample to demonstrate that the Respondent did not agree to the lessees being responsible for their own leased properties on those dates and through the whole of the period from February 2003 onward. The Court accepts the oral evidence of the Respondent that he considered his position was known.The surprise at the Respondent challenging the arrangement expressed by Mr Gumbrill must reflect him having forgotten or misunderstood the above communications. So too must Mr Jay's assertion in his statement that challenge only started around January 2018. Any assumption made by the Applicant was not, the Court finds as a fact, assented or acquiesced to by the Respondent, the Applicant falling a long way short of so demonstrating.

98. The Applicant's case fails to get to grips with the communications from the Respondent and the effect of those, perhaps inevitably given that there can be no dispute about what the Respondent said in writing and it is abundantly clear that flies in the face of the Respondent agreeing or acquiescing. The Court rejects the assertion of Mr Fournillier that the Respondent's evidence was "unclear, inconsistent and wholly implausible", an assertion which can only ignore the written words of the Respondent in the correspondence. Mr Fournillier's apparent submission that the Respondent was unable to point to other specific instances where he raised objections seems to the Court to relate solely to a suggestion that the Respondent should have objected to the accuracy of minutes, but the Court does not consider that any failure to object to the accuracy of meeting minutes alters in any way the content of the communications sent and referred to above.

99. The Respondent could arguably have written more regularly or protested in even stronger terms but there is no regularity of protest or particular wording required to cross from acquiescence or agreement to lack of it. Rather the question for the Court is whether taking matters overall the Respondent did acquiesce or agree on the one hand or, on the other, did not.

100. There were various other assertions made about meeting minutes. The Court finds as a fact that the minutes of the meetings are broadly accurate record of them and that there is no evidenced objection by the Respondent to the approach adopted by the Applicant within those minutes but that does not preclude any objection having been made in minutes and most importantly, the Court finds the accuracy or other wise of the minutes in no way alter the clear protests raised in writing. Ms Read referred to 2008 minutes not being clear about agreement and Mr Gumbrill stating in oral evidence that there was no express agreement. The Respondent was not present at a 2009 meeting when the Applicant asserted agreement was reached. The Applicant also relied on a minuted vote on the maintenance arrangements in the 2014 minutes [77] that the informal arrangement should continue. However, that merely demonstrates support from a majority of those who attended and the minutes show that the Respondent did not. Suffice to say, the Court determined none of the matters raised demonstrated agreement by the Respondent to outweigh his letters.

101. In a similar vein, the Court rejects the Applicant's Counsel's submission that even if the Respondent repeatedly voiced and raised his objections to the informal arrangement (which it is said the Applicant denies), it is that would be irrelevant, as estoppel by convention may be established either through a shared/ common assumption of fact, or, through the proven acquiescence in it by another party. Mr Fournillier failed to explain how there was such assumption of fact or acquiescence where the Respondent demonstrably expressed his disagreement.

102. The also Court rejects the assertion on behalf of the Applicant that it was only the sending of a letter from solicitors instructed by the Respondent in January 2018 [s32-33], whether alone or in combination with other subsequent letters from solicitors, which sufficiently demonstrated that the Respondent did not agree. The Court finds that essentially the solicitors stated the same as the Respondent had, which indeed even Mr Gumbrill accepted in oral evidence. The Court also makes the rather obvious finding that it is not necessary for a party wishing to register a protest to instruct solicitors to do so for him or her.

103. The Court additionally finds that the enquiries made by the Respondent of other potential managing agents as to their fees to undertake the same level of work as undertaken by Pepper Fox does not indicate agreement by the Respondent to the agreement asserted by the Applicant, not least in the face of the protests referred to above.

104. Mr Gumbrill has expressed the opinion in evidence that the Respondent by contacting other agents demonstrated agreement to the informal arrangement on which the Applicant relies. Mr Fournillier pursued that argument. However, no specific wording used by the Respondent which stated such was pointed to and the Court can identify none which demonstrates that the Respondent accepted the informal arrangements notwithstanding his protests. The Court does

observe in passing that where the Respondent gave as his reason for contacting other agents poor service from PepperFox including regarding preparation of accounts and an attempt to wrestle management away from Pepeprfox, Mr Gumbrill at least accepted Pepperfox were not the fastest at submitting the accounts.

105. Similarly, the record in the minutes of the 17th May 2018 meeting that the arrangement which the Applicant asserted had been entered into had been "convenient…[but] legally weak" was certainly correct for at least many lessees of properties in Chapel Mews in respect of the first part that it was convenient to those lessees.

106. The fact that Mr Gumbrill was happy with the informal arrangement is and so too other lessees does not assist the Applicant. The relative size of the Residential Property compared to the others in Chapel Mews insofar as the Court has any information about those and the nature of Waterloo House- with its size, roofing and white stucco rendered frontage onto Waterloo Street- will be likely to involve the lessees other than the Respondent in greater expenditure. However, the leases they took split service costs twenty- six ways irrespective of the six and nature of the individual units and so if Waterloo House produced a greater than average maintenance cost to be borne, that was a consequence of the terms agreed by the original contracting parties. Hence even "legally weak" puts matters too high.

107. The fact that the Residential Lease states at clause 7.9 that the Applicant shall have regard to the wishes of a majority of the lessees when complying with its obligations simply relates to manner of performing the obligations which the Applicant has and does not translate to the Applicant being able to avoid its obligations if a majority of the lessees agree to that. The assertion of the Applicant's Counsel that in 2018 the Applicant could have continued to ignore the provisions of the Residential Lease and the other lessees if the majority of attendees at the meeting had favoured that is unhesitatingly rejected.

108. The only point which the Court considers lends some support to the Applicant's position is that the Respondent continued to pay the service charges up to 2018 at the level demanded by the Applicant in the knowledge that those were charged to cover a limited amount of expenditure and would not be sufficient to meet the Applicant's maintenance obligations. The issue would be whether the Respondent implicitly or impliedly admitted or accepted the limit to the costs which the service charges would meet and further in doing so agreed to the approach taken. However, the Court considers it unrealistic to expect the Respondent to have paid sums not demanded towards the cost of work which the Applicant was not willing to undertake. The letters sent by the Respondent as to responsibilities amply meet any point which could have been made.

109. It can be added that it is also an odd feature that the service charges not paid by the Respondent post- date the 2018 meeting rather than pre-

date it. Neither side brought out the reason behind that. As the Court would have to speculate as to the Respondent's motive and reasons, the Court seeks to make no finding on the matter.

110. Given the finding of fact that the Respondent did not agree to or accept the position asserted by the Applicant, namely that the lessees would attend to the repairs of their own properties, the question of whether such agreement would mean that the Respondent is estopped from pursuing the Counterclaim does not require further consideration. The Applicant's argument could not stand on the findings of fact made irrespective of the outcome of aspects which have not required consideration. However, if, for example, it had been relevant to find detrimental reliance by the Applicant or benefit to the Respondent, the Court would not have done so.

111. The net effect of the above is that the provisions of the Leases always applied and the Applicant was consequently always obliged to undertake the works provided for in the Leases.

112. It also follows that where Mr Gumbrill referred in his witness statement to the lessees not agreeing that they would subsidise works which it was considered individual lessees ought to have undertaken prior to 2018, that agreement or lack of it is not relevant.

113. For the avoidance of doubt, the Court determines that the terms of the Residential Lease, and indeed the Commercial Lease, were never varied, even the agreement which the Applicant asserted only amounting, had it been found to have been reached, to an agreement not to apply the terms of the Lease for the period of the agreement. The Applicant's case was not put on the basis that a variation of the Leases took place. Whilst cases were cited on behalf of the Respondent in relation to the means of varying a lease, in light of the findings above, it is not necessary to refer to those.

Set- off

114. It is right to say, as Ms Read does, that the Applicant raised no other argument against the Counterclaim. Nevertheless, she herself refers to the question of whether there is a right to set off (and at least implicitly to counterclaim) and the Court considers that the point merits dealing with, if only to demonstrate that it would not have taken the Applicant further had the Applicant argued it.

115. The Applicant's obligation to "maintain, repair, redecorate and renew (7.3.1) the roofs, foundations, and main structure of the Building including the joists and other main timbers and (7.3.2.) the Common parts" "subject to payment of the proportion of service expenses" is determined by the Court not to be sufficient to create a condition precedent. That is to say that, notwithstanding the suggestion of such from the wording of the Residential Lease, the Applicant is not entitled to avoid its obligations because of a lack of payment by the Respondent

at the given time (not that the opposite conclusion would have assisted the Applicant for the much of the relevant period).

116. The Court has noted the cases of *Connaught Restaurants Ltd v Indoor Leisure Ltd* [1994] 4 All ER 834 and *Edlington Properties Ltd v JH Fenner and Co* [2006] 1 WLR 583 relied on by the Respondent and is aware in any event of the reasoning. As Ms Read has cited, in order to exclude the normal right of equitable set- off a clear indication of that in the lease is required. The wording of the Leases, both Residential and Commercial, are insufficient to preclude set off, or indeed a counterclaim. The Respondent is therefore able to bring the counterclaim.

The nature of the Counterclaim for current defects

117. The relevant questions in the circumstances are what elements of the Residential Property require repair and/ or decoration, from when did any given one of them impact on the enjoyment by the Respondent of the Residential Property, at what stage, whether the same time or a later one, did they become pursuable and also whether there is any defence open to the Applicant where they have not been dealt with to date. The related matter, if relevant, is the value in damages payable to the Respondent which should be attributed to any breach by the Applicant..

118. The relevant elements of the Residential Property referred to in the Defence and Counterclaim are the roof, the back bedroom and the bathroom. That is a very brief mention but they have been pleaded. There is brief other mention of the roof and surveyor attendance. More specific reference is made ingress of rainwater into what are described as the upper rooms of the Residential Property (so one or more of three bedrooms and a bathroom), that one of the rooms became inhabitable/ the Property is partially uninhabitable (which the Court treats as referring to the same matter) and that the internal decoration had deteriorated. General inconvenience, loss and damage is also referred to. The Respondent did not add anything extra in his witness statement. No other items of disrepair are mentioned as being in existence at the time of those documents.

119. The Court has carefully considered and is content to adopt the expert opinion expressed in the report of Mr Grumitt as to the elements of disrepair requiring work which form part of that pleaded Counterclaim. Those externally comprise the roof, more specifically to the crown roof edging, the asphalt and slipped and defective tiles, rot to timber elements such as fascia and soffit boards. In addition, Mr Grumitt identifies the need for work to rainwater goods and works to render, although the condition of the render is not considered to be serious, and various other external areas but ones which the Court considers are not directly relevant to the Respondent's advanced claims. Therefore, whilst for example photographs [e.g. 298] appear to show damp and

mould to render around rainwater pipes, internal effects and impact on this case are unclear.

120. Internally, Mr Grumitt identifies damp to timber above the staircase, mould to the underside of dormer windows, mould to an old tank cupboard in the bathroom and dampness at the lower level of the roof and under the ceiling to the northwest corner of the WC.

121. Whilst not directly relevant, the Court also notes that Mr Radley [141] provided for scaffolding access to the crown roof and dormer roofs and provisionally for re- covering the felt roof and dormer roofs and for repair works to the tiled sections of roof, including 100 new tiles for the south facing slope. Other works to gutters, downpipes and tiles to the mansard roof were also provided for. Works to render and include decoration to the exterior of Waterloo House were also provided for. Mr Radley's works are very much in line with the repairs identified by Mr Grumitt.

122. The firm opinion is expressed by Mr Grumitt that the "leaks to the second floor are due to poor detailing around the edge of the crown roof whereby water is able to penetrate under the asphalt. The asphalt requires to be re-worked or renewed, so that a curb is supplied with a proprietary drip, which will prevent water from penetrating under the asphalt". That detailing was the subject of comment. Mr Gumbrill also referred in both written statements and in his oral evidence to the issue with the roof which allows water penetration as being in relation to the detailing around the edge of the roof, putting that down to work undertaken by the Respondent's contractor.

123. The Court considers that it has no adequate evidence as to whether the poor detailing does relate to work undertaken by the Respondent's contractor- the assertion of Mr Gumbrill not being adequate- or pre-existed. The Court has insufficient evidence as to the work that contractor undertook. Mr Gumbrill could not give expert evidence about adequacy of works. He also asserted the issue to be a lack of a seal, which was not identified by Mr Grumitt other than that Mr Grumitt stated he was informed that application of mastic was carried out in 2020 and where he states that he cannot himself comment on when any such mastic was applied. The Court understood the evidence of Mr Gumbrill to be that he had arranged that work. However, irrespective of that, it is apparent that relevant work to the roof remained required and the internal damage to decoration remained, such that there is no impact on value.

124. Most importantly there was no pleaded case on behalf of the Applicant asserting the effects on the Residential Property to be the fault of the Respondent's contractors so as to render the Applicant not liable for them and so the Court considers it unnecessary to consider further that potential question as not one arising.

125. The point could potentially have a significant impact on the counterclaim. If the argument had been pleaded, the Court would have hoped for better evidence and for submissions about it and the lack of those quite likely reflects the lack of a pleaded point. The Court would have been likely to require submissions as to any potential effect if the Applicant had failed to repair the roof and the Respondent had to do so in its stead as to any failing by the contractor employed by the Respondent and in any event as to the Applicant's liability when any difficulties subsequently arose.

126. There is evidence that damp and related internally resulting from water penetration, although the evidence of Mr Grumitt of the extent of the connection between the water penetration and the internal condition seen by him is not clear. The Court mentions for completeness that Mr Gumbrill in oral evidence doubted water penetration and contended the internal effects arose from condensation, although on the one hand that appeared to fly in the face of his statement mentioned above and on the other, the attempt to give opinion evidence not as an expert is to be disregarded. Nevertheless, whilst the Court finds on the evidence there to have been relevant water penetration, the lack of clarity as to the extent of internal effects is very relevant to the level of damages- see below.

127. In terms of the period of the counterclaim, it was firstly common ground that no repairs had been undertaken to the Residential Property since the reports of Mr Grumitt (or earlier Mr Radley) and until the trial date.

128. The Respondent's evidence indicates that he made a report in letters dated 1st December 2017 [227] to Dean Wilson LLP and PepperFox Ltd of problems ongoing at the time of the Counterclaim. Roof repairs were required and also that exterior painting was needed. It is apparent that those problems existed at that time and the Court infers from the available evidence that the Residential Property suffered internal problems from the roof disrepair, although it has not been shown exclusively, by way of the damaged decoration to which the Respondent referred in his Counterclaim. The correspondence later sent by the Respondent's then solicitors in June 2018 referred to substantial repair being required to the roof and taking that to be correct- and it has not been disputed- the Court finds it reasonable to infer that there were internal effects then and earlier. The Applicant has not disputed dates of reports asserted by the Respondent. The Court has noted in that regard that Mr Grumitt [270] consider that very little work had been undertaken within the last five years prior to his inspection in June 2022, expressing no opinion about any earlier period, so that does not alter the position.

129. The next question is whether the Respondent has demonstrated disrepair impacting prior to December 2017. There are references in the Respondent's correspondence protesting as referred to and quoted from above. The Applicant did not plead limitation and so in principle

the Respondent may have a claim from whenever difficulties first arose during the Residential Lease. The Counterclaim asserts various items of work to have been undertaken by the Respondent which it is asserted should have been undertaken by the Applicant.

130. However, perhaps understandably, evidence from earlier times is limited. Hence, whilst it is apparent that the Respondent was caused to undertake work very early on and prior to his 2003 letter, the Court has concluded that it is insufficiently clear what effect there was at that time or at later times to be able to consider a further award of damages for that period. As will be apparent below, there is no practical effect for the Respondent and so the Court considers it unnecessary to consider that period further.

131. Necessarily any work could not have been undertaken instantly and as such the Court is required to determine the reasonable time for the undertaking of the required repair works after report of them having determined what such repair works are. The Court is mindful that Counsel have made no submissions about either the principle or the extent of a reasonable time and so the Court considered whether such submissions ought to be sought. However, the time at which the Applicant became liable to undertake repairs was always relevant to the Counterclaim and was always required to be dealt with by the Court. As such, it was a matter for Counsel to make any submissions if they wished to but in any event, the Court is re-assured that a party required to undertake repair and/ or maintenance work being given a reasonable time to do so from the date when the problem first arose or was first reported (principally dependent on whether within an area occupied by the party bound to repair- see for example *British Telecommunications PLC v Sun Life Assurance Society PLC* [1996] CH 69- or by the party requiring a repair (at least subject to any unusual contract clause bringing forward the timing of the obligation)) is long-settled law. It was held as long ago as 1973 in *O'Brien v Robinson* [1973] AC 912 HL that where a repair is required of the appropriate repairer of a property occupied by the person requiring the repair, the repairer has a reasonable time from the effects of the defect first being reported within which an repair can be effected prior to the repairer being liable for breach of its covenant. It is therefore difficult to identify what submission could have been made by either Counsel which might have altered the Court's view as to the relevant legal position. Thereafter, the question becomes what findings of fact the Court considers appropriate on the evidence produced.

132. The Applicant relies on the report of Mr Radley dated January 2019 but apparently supplied by way of a letter dated 20th March 2019 to the extent of the work to the properties in Chapel Mews being carried out in three phases. Mr Radley assigns works to one of the three phases. In effect the Applicant's case appears to be that the appropriate time for the works to be undertaken is when they are reached during the phase to which they were assigned. The Respondent does not accept the appropriateness of the phasing of the works to the properties in Chapel

Mews. He contends an email sent by Mark Jay as indicating that the Applicant intended to prioritise other lessees above the Respondent. The Court is not considering the approach taken by the Applicant in respect of its Directors' properties or those of any other lessee and so need not make any finding about that. The Court is considering whether the Applicant can demonstrate the approach to the remedial works to the Residential Property to complete them in a reasonable time.

133. The Court notes that the phasing starts by dealing mainly with properties along one side of Chapel Mews, then moves onto another sides and finally deals with the majority of the works required to the side which includes the Properties, apparently working from the back of the development out towards the front. As Waterloo House is at the entrance to Chapel Mews, working from the back inevitably makes it the last property to be attended to. That does not reflect relative seriousness of defects and effects produced. Whilst the Court accepts that phasing the works may have been considered an efficient and convenient approach and the Court can accept logic to such an approach if the effects on the various properties were relatively similar and ignoring this case, the Court does not find the approach to be a reasonable one in light of the repairs required to the Residential Property and, to a lesser extent, the Commercial Property and the effects of lack of repair. It is particularly difficult to understand why the roof to Waterloo House should fall into phase 3 of Mr Radley's phased approach where Mr Grumitt's report indicates effects on occupation of the Residential Property identifiably arising from that. The Court does also note that Mr Jay suggested to Mr Radley and Mr Gumbrill by email 9th May 2019 [s89] that Waterloo House should be dealt with first in an extra phase he termed "Phase A" but it appears that the suggested approach did not materialise. Mr Gumbrill's immediate response [s90] does not reflect well on him.

134. The Court finds that the Applicant has failed to- and as at the trial continued to fail to- undertake works within a reasonable time. Nevertheless, the Court is required to identify what a reasonable time was, in order to establish when that elapsed and so the date from which the Applicant was in breach and the Respondent's claim for damages for the breach runs.

135. The Court accepts in that regard that the roofing and related work to the Residential Property would always have required an assessment of the required works and would always have been likely to require formal tender documents and invitations to bid, together with the remainder of an appropriate consultation process. Prior to that a time would have been required to consider the complaints, undertake any initial investigation, reach a decision to proceed and make other arrangements. In addition, once the tender process had been completed, the work would have been required to be timetabled and undertaken, although the Court is concerned with the work to the Residential Property and not work to Chapel Mews as a whole. Whilst it

appears clear that there were ongoing effects it is not apparent that those were increasing substantially and that there was urgency sufficient to require the period to be shortened.

136. Taking a necessarily broad-brush approach, the Court considers that the reasonable commencement date for the works would have been eight months after problems requiring attention were reported by the Respondent. The Court considers it appropriate to allow a further two months for that work to be completed. The Court has borne in mind that Mr Grumitt expressed the opinion that the Residential Property is long- overdue for repair but save for confirming that little work has been undertaken for many years, there is no specific assistance in terms of timescales.

137. Applying that to the date of notice above, and as explained discounting earlier periods, it follows that the repair works to the roof of the Residential Property and internal effects caused to the bedroom and bathroom ought to have been undertaken by the start of October 2018. The period for which the Respondent is therefore entitled to damages is from October 2018 to the Trial in October 2022, so four years. The period will of course have increased to date if the works have not yet been undertaken and will increase further until the works are undertaken but the Respondent will need to bring a claim in respect of those periods at a later date if relevant.

Other claims for disrepair, including earlier works

138. The Respondent claims in the Counterclaim not only for ongoing problems and effects but also for previous problems and expenditure asserted to have been incurred in addressing those. No limitation defence was run by the Applicant and so expense on any date by the Respondent would fall for consideration.

139. Ms Read argued in her Written Submissions that a right of set-off can arise in circumstances where the tenant incurs the cost of repairs which ought to have been carried out by the landlord, referring to an authority of *Lee-Parker v Izzet* [1971] 3 All ER 1099. Ms Read referred to abatement of nuisance but if in doing so she intended to advance an argument other than pursuant to that authority, that was no apparent and so adequately explained (and certainly was not specifically pleaded) and so the Court does not consider any separate point. The Court has carefully considered the authority, noting that the facts of that are unusual and very different to those of this case. Nevertheless, the Court rejects the Respondent thereby having a counterclaim for expenditure incurred.

140. Ms Read is right to refer to set- off. Goff J held that the tenants in the particular case were entitled to recoup the cost of repairs carried out insofar as those repairs came within express or implied covenants of the lessor against future rents. The High Court did not determine the tenants to be entitled to any free- standing claim. The Tribunal, and

necessarily the Court, have found no rent- service charges being expressed as payable as rent- to be payable and so there is nothing against which to offset within this case.

141. No other legal basis for recovery of expenditure incurred by the Respondent is advanced. The Court finds that is the end of the matter in terms of expenditure incurred by the Respondent. In case the Court is wrong about the above- although it will be seen below that there is no financial effect- the Court runs through other aspects of this element of the case.

142. Firstly, other points were made by Goff J as the need for the lessor to be given notice in advance- the Court surmises so as to able to repair- and the ongoing benefit of the work enjoyed by the tenant. The notice given in this specific case is at best unclear and there could have been questions to decide as to the extent to which works undertaken by the Respondent related to matters within the Applicant's repairing covenants or the nature of those from the perspective of the Respondent being able to attend to them and claim any offset for the cost. The Court has in mind, by way of example, the iron railings to the Waterloo Street side of Waterloo House which belong to the Applicant and fall outside of the Residential Property. There is some room for doubt as to legal entitlement for the Respondent to undertake work and recover cost even if there has been rent against which to set- off. In other circumstances, those matters would have needed to be addressed.

143. Secondly, some £43,208 of expenditure is said by Mr Founrillier to be detailed in the invoices which have been produced by the Respondent (and the Court having reached a number close to that in quick totting up accepts the precise figure). Those were in neither the main nor the supplemental bundle but nevertheless, Mr Fournillier was able to deal with them and no point was taken that they should not be considered and hence they have been, much as matters were again somewhat unsatisfactory. They are said to relate to the elements of expenditure referred to in the Defence and Counterclaim [24]. It should be said that they do not relate entirely to the Residential Property and include some work to the Commercial one but £16,804.64 is work to residential windows in 2008 and a similar sum is work (by two different contractors one in 2007 and one in 2008) to what are presumably different elements of the residential roof- although how they fitted together was no explained. As something of an aside but as Ms Read accepted in her Written Submissions, if the Applicant had undertaken the work and demanded contribution to the costs as service charges, the Respondent would have been liable for 2/26 of it, so very approximately £3100.

144. Thirdly, Mr Fournillier made the point in his Written Submissions that in evidence, the Respondent was asked why he would expend such large amounts effecting repairs which he never considered to be his responsibility, and not seek to recover such funds with legal assistance. The answer given that the Respondent did not have the financial means

was not simple to understand taken in isolation. However, the Court notes the Respondent's explanation in his witness statement that he considered it better to use limited resources on the Residential Property and not on a legal dispute, which is by no means implausible as an approach for someone to take and on balance the Court accepts it. The Court accepts that work paid for by the Respondent was paid for under protest. The better point on behalf of the Applicant is that the Respondent's counterclaim insofar as it relates to expenditure is well evidenced nor quantified in the Counterclaim. Mr Fournillier contended on the extent of documentary evidence existing, that it is unclear as to actual expenditure, which he just about managed to advance within the pleading in paragraph 7 of the Defence to Counterclaim. The Respondent said in oral evidence that all of the invoices had been paid, although there was no corroboration of that.

145. It is accepted that works were instructed by the Respondent to be undertaken to the roof- hence the argument as to whether that was satisfactorily and did or did not include poor detailing around the edge of the crown and/ or application of mastic. The report of Mr Grumitt indicates the Respondent to have stated the works to windows was replacement of them [269] as the previous ones were considered to be rotten and at significant suggested cost. Other evidence indicates decorating works to have been undertaken. On balance, the Court would have accepted that the Respondent incurred the expenditure in the invoices produced by him.

146. However, it was quite unclear in advance of those works whether notice of those had been given, when that was, whether a reasonable time had passed and so whether the Applicant was in breach and there was any potential basis for the Respondent to undertake works on the Applicant's default. Mr Gumbrill indicated in the hearing that works were undertaken fairly soon after the Respondent moved in but the condition of the Residential Property then is unclear. It is also not apparent what effects there were at any other given point prior to December 2017. The Court perceives that there may have been water penetration into the Residential Property because of the condition of the roof prior to works but finds that there is insufficient tangible on which the Court can properly make a finding or draw an appropriate inference. Similarly, the extent of any rot to windows and the effect on enjoyment of the Property are not demonstrated. The protest letter in 2003 certainly refers to the roof and to decoration amongst other matter but says "I have personally undertaken or paid for the items", so that appears to refer to the work fairly soon after the Respondent moved in and is separate to the 2007/8 work. The letter does not state that further work is needed. There is no evidence of expenditure on the 2003 work. Hence the Respondent would not have proved his case in respect of recovery of historic expenditure even if a legal basis for the Applicants failure to maintain entitling the Respondent to incur the cost of doing so had been pleaded and argued.

147. The Court specifically refuses the element included in the Respondent's counterclaim in respect of the cost of a replacement door to the communal hallway of Waterloo House and/ or the cost incurred in blocking the entrance to that from 67, the ground floor flat in any event. There is a lot said about the Applicant's approach to that issue in the Counterclaim, although none alters the fact that the Respondent had no permission from the Applicant to alter any matters in respect of the communal hallway, which belonged and still belongs solely to the Applicant. There is no indication the Applicant has done anything to terminate its entitlement. The existence of other entrances to the ground floor flat and use or otherwise of the communal hallway by the occupier of that flat is neither here nor there. There was nothing in respect of the communal hallway and related which the Court considers can properly be regarded as nuisance impacting on the Respondent's home, a storey above should that on any level be relevant. There is no claim on the part of the Applicant in respect of the steps taken by the Respondent as referred to above or any cost of re-instatement which may be incurred by the Applicant. As it is not appropriate for the Court to venture into issues not relevant to claims in any way raised and requiring determination, the Court says no more about the issue.

Value and remedies

148. The value of the Counterclaim in respect of the Residential Property is, in combination with the similar claim in respect of the Commercial Property, limited to the combined total of £20,000 plus any applicable interest in light of the level of court fee paid and the maximum value provided for in the Counterclaim.

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

150. An old authority to which reference is still often made but which relates to a tenancy and not a long lease is that of *Wallace v Manchester City Council* [1998] 30 HLR 1111, it which is said an unofficial tariff proposed by Counsel of between £1000 and £2750 per year dependent upon the seriousness of the disrepair was accepted by the Court of Appeal. It is worth remembering that related to social housing at

relatively low rent even at that time- £45.26 per week rising to £47.40 per week during the relevant time- and a fraction even of social rents now, so that the "tariff" figures ranged from a substantial percentage to all of the rent. It is at best questionable that there was any acceptance of such a tariff but worthy of note that even where the tenant held no asset, there was at least potential for a significant percentage of the rental value to be awarded.

151. The Respondent's Counsel's eleven authorities did not include those to which reference has just been made. Neither did the Applicant's Counsel refer to them. That created the arguable dilemma as to whether the Court ought to have sought submissions about the above cases specifically. The Court considers that if there had been a particular, perhaps contentious, point then it would have been only appropriate to do so, especially if that impacted to any appreciable extent on the amount awarded to the Respondent in respect of his counterclaim. However, in the event, the Court considers that the general principles of the above authorities are long and well established and fall to be applied in broad terms. In addition, the limited value claimed by the Respondent limits the amount recovered by him and so any submissions would have needed to have affected on the Court's approach to a matter in which the Court has considerable experience, to more than the effect of that limit to make a practical difference.

152. The ground rent payable in respect of the Residential Property is not an appropriate yardstick as explained above. The Residential Property is not rented out by the Respondent and so there is no firm indication of the market rent achievable for the Residential Property in its actual condition, never mind the condition in the event of a lack of disrepair. An advantage of sitting as a Tribunal Judge might be said to be the holding of some knowledge as to market rents but that does not assist in this particular instance and so the Court has not formed any view on that basis and been required to inform the parties of anything evidential which falls outside of the submissions or evidence in this case. The service charge were also payable by the Respondent as rent and recoverable by the Applicant as rent. However, the Tribunal does not consider that take matters further either. The service charges should reflect the cost of expenditure on items to which the lessee has to contribute from time to time, which is in any event unclear in this case as referred to above. It bears no more relation to the rental value than does ground rent.

153. The Court finds that the relevant disrepair to the roof produced some internal effects to two of the rooms in the Residential Property, the bathroom and a bedroom. The Court struggles to identify the extent of the effects, which are not obviously revealed on the photographs taken by Mr Grumitt or by other photographs. The Court considers that it is compelled to be cautious about the severity. The Court proceeds on the basis that there was some problem with damp caused or contributed to by water penetration and a somewhat less than ideal bedroom and bathroom because of effects of that. The Court does not take account of

Mr Gumbrill's oral evidence that Mr Radley stated that the internal condition was caused by condensation. The Court does take account of the lack of positive evidence for the Respondent's case as to the cause and extent of all of the internal damp and related.

154. Considering all of the circumstances, the Court determines that the appropriate sum in damages to reflect the disrepair to the Residential Property month by month is £400. For the period October 2018 to October 2022 and taking months in the round rather than counting specific days, that amounts to £19,200. The Court accepts that on the basis that the Residential Property continued to deteriorate, there is argument for a greater sum for later months and a consequent lower one for earlier months but in the absence of any clarity as to the different effects during any given period, the Court is content that applying the same figure for each month is the best practically achievable.

155. The Court is mindful that payment of that sum and the remainder of the sum found due to the Respondent will impact on the lessees- the Applicant will need to raise the funds. That or use funds which were to be utilised for some of the works. There are also significant works to be undertaken which will need to be paid for. However, none of that is relevant to the Applicant's obligations or damages for breach of them.

156. It is not apparent to the Court that the Applicant intends to attend to the redecoration which is required inside the Residential Property, although attending to the effects of disrepair forms part of the repair work. That principle of making good consequential damage is another not referred to by Counsel for either party but is another long-established one – see *McGreal v Wake* [1984] 13 HLR.

157. The Court considers that the most appropriate approach in the circumstances of this case is an award of damages to the Respondent for the costs of decoration. However, there is no evidence as to the likely cost and so the Court would be engaged in speculation as to cost. No figure has been demonstrated as appropriate. The Court therefore makes no award for the internal decoration. Whilst that is less than wholly satisfactory from the perspective of the Respondent, it is just one of several elements of this case where the Court has taken an approach based on the evidence presented and the pleaded cases of the parties and where in other circumstances elements of this Decision may have been different. Both parties are affected by that to different extents and in different ways.

Specific Performance

158. It is notable that Mr Grumitt considers that the cost of the required works to the Residential and Commercial Property combined will be approximately £100,000 including VAT and fees as at June 2022[272], of which it is apparent that by far the majority relates to the Residential Property. That said, much of that work, whilst required, relates to

matters beyond the Respondent's identifiable complaints and the Residential Property leased and so the extent of the Counterclaim. It is work to which the Applicant needs to attend. Mr Grumitt has not, it falling beyond his instructions, estimated the cost of works to Chapel Mews more generally but neither has he provided an item by item breakdown of cost in a Scott Schedule (essentially a table of items and rectification costs).

159. In any event, the Respondent did not state a claim for specific performance of the Applicant's repairing obligation in his Amended Defence and Counterclaim, or indeed in the original version. The Court acknowledges that the Amended Defence and Counterclaim claims "Such further and other relief as the Court deems meet" and it is arguable that could include an order for specific performance, or indeed an array of other possible reliefs. The Court has considered very carefully the assertion in Ms Read's Skeleton Argument that the Respondent is entitled to an order that the Applicant carry out the works.

160. Counsel did not address the complete lack of clear, if any, pleading of such a remedy or identify on what basis the Court could in those circumstances make such an order, still less on what basis such an order might or might not be appropriate. The Court determines that a remedy of an order for specific performance, and if it were relevant, of such substantial works, had to be specifically pleaded to be pursuable in this case. The Court does not consider it appropriate to allow a potentially very substantial remedy- although one where the extent may be the subject of no little argument- for works which remedy was not directly mentioned at any time prior to the Skeleton Argument just before trial. The fact that the Respondent did not pay the required fee to advance a claim for an additional remedy than the money claim is of some relevance in that a fee would have been required in the event of an order for specific performance or other additional remedy being pursued. The fact that the relevant works are planned to be undertaken, notwithstanding the Court's conclusions about the appropriateness of the approach, would potentially have had a bearing on the appropriateness of an order for specific performance, although not of itself a complete answer.

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

Claim in relation to the Commercial Lease

162. The claim made by the Claimant mirrors that in respect of the Residential Lease and so again, service charges said to be due on dates from 25th September 2018 to 25the September 2019, comprising a sum of £0.43 said to be due from the 25th September 2018 demand,

£621.43 said to be due 28th February 2019 and sums thereafter of £200.00 and £821.43. The total is therefore again £1643.29.

163. In relation to the Commercial Lease, protections given to a residential lessee by the 1985 Act do not apply. Instead, and as both Counsel accept, the questions for the Court are limited to whether the Commercial Lease entitles the Applicant to recover service charges, whether any requirements of the Lease have been complied with, whether the particular service charges all relate to matters for which the Applicant is entitled by the Lease to charge service charges and whether there have been demands which are overdue for payment and have not been paid.

164. It is as equally apparent as it was in respect of the Residential Lease that clause 4.1 and the Fourth Schedule of the Commercial Lease entitles the Applicant to demand service charges in principle. In terms of the costs which may be included in such demands, clause 7 of the Leases as quoted above sets out the sorts of matter for which costs may be charged and to which contribution may be demanded.

165. The Respondent's Counsel has not relied on any of arguments the Respondent raised in his Defence and Counterclaim (to both this and the residential aspect of the claim) in her Skeleton Argument or her Written Submission and understandably so. Instead, she submitted that the costs recoverable depend upon the wording of the lease in question, an uncontroversial proposition. Caselaw was relied on, including *Arnold v Britton* referred to above.

166. Ms Read argued again as to the nature of the expense claimed and the calculation of the service charges in respect of the Commercial Lease as she did the Residential Lease. She asserted that it was for the Applicant to demonstrate that the sums claimed fell with the recoverable costs in the Commercial Lease and that the Applicant had failed to do so. As that was very much along the lines of the arguments in respect of the Residential Lease, it is unnecessary to repeat them at length. She also contended that on the basis that the share of costs attributable to the Commercial Lease were also 1/26 and the service charges were £1642.86 for the year, that would mean £42,714.36 charged which significantly exceeded expenditure in the accounts without explanation.

167. Mr Fournillier relied upon his submissions made in respect of the Residential Lease and noted again that the service charges demanded post-date the 2018 meeting.

168. The Court approaches the points with greater caution than the Tribunal did in relation to the Residential Lease. As identified earlier in this Decision, the Court is not in the general habit of taking points not pleaded by the parties or indeed otherwise determining points not pleaded by parties and it will be appreciated has, for example, refused the remedy of specific performance where that had not clearly been pleaded. Whilst submissions have been made by Ms Read, she has not

identified- and the Court cannot identify- where the matters raised by Ms Read and set out in the preceding paragraphs were raised by the Respondent in his Defence and Counterclaim.

169. However, as explained in respect of the Residential Lease, as the service charges are claimed to be payable pursuant to the terms of the Commercial Lease, it is for the Applicant to prove entitlement to them in accordance with the Lease. The Tribunal discussed relevant points about the requirements of the Residential Lease and payability and the Court does not seek to repeat those at length in respect of the Commercial Lease but instead gives a short summary of the relevant matters. That does not involve repeating the precise words of the Tribunal's longer discussion but the Court records, for the avoidance of doubt, none of the matters set out below intend to be inconsistent with or vary from the approach taken by the Tribunal to the same issues.

170. As with the Residential Lease, the Applicant has not produced any of the demands themselves and has not provided any budgets or other estimates on which the on- account demands were based. The Applicant has inevitably therefore failed to demonstrate the demands to have been validly made pursuant to the Commercial Lease and that the sums demanded are payable pursuant to the Lease for costs to which the Respondent must contribute. As previously observed, it ought not to have been difficult to provide evidence enabling the Court to determine whether the sums demanded under the Commercial Lease did fall within the Fourth Schedule.

171. The Court determines that the claims for payment of sums said to be payable under the Commercial Lease therefore fail. The Applicant has failed to demonstrate on balance that the estimated service charge sums are due. Whilst it is quite likely that an amount was payable, the Court has no means to properly determine that in any given sum and does not seek to undertake what would be no more than speculation as to any appropriate sum if any.

172. The Respondent argues in his pleading that he was justified in failing to pay the service charges because of failings on the part of the Applicant in respect of repairs- see below in respect of that. As noted in the Tribunal part of this Decision, that argument may be run as against actual service charges but not against estimated ones. However, even if the sums demanded as service charges payable pursuant to the Commercial Lease had been found to be payable because the Respondent had been limited to his pleaded case, or if the Court was wrong not to limit the Respondent to his pleaded case, the net effect would have been that the value of the Counterclaim determined below would have extinguished those sums.

Counterclaim in relation to the Commercial Lease

173. The matters recorded above and the findings made under the heading "Counterclaim in relation to the Residential Lease", for example as to

agreement or acquiescence in the "informal arrangement" apply equally to the Commercial Lease up to the specifics of disrepair to the Residential Property. Those matters are not therefore repeated in this part of the Decision. As the Applicant relied on the agreement asserted and not other arguments, the Court accepts the Respondent's case in respect of the unchallenged matters advanced.

174. Consideration is needed of what elements of the Commercial Property require repair and/ or decoration, from when did any given one of them impact on the enjoyment by the Respondent of the Commercial Property, at what stage, whether the same time or a later one, did they become pursuable and also whether there is any defence open to the Applicant where they have not been dealt with to date. The related matter, if relevant, is again the value in damages payable to the Respondent which should be attributed to any breach by the Applicant. The Court is required to determine the reasonable time for the undertaking of any required repair works after report of those by the Respondent, having determined what such repair works are.

175. The Respondent's case as pleaded is that there has been damage to internal decoration and that he has previously incurred cost in respect of works to the Commercial Property. The relevant element of the Commercial Property is found to be a leaking roof about which the Applicant was aware at least by 5th March 2020. The Defence and Counterclaim includes reference to an email describing it as "pretty bad and needs immediate attention", which the Court understands is an email from Mr Jay [253], which mentions two or three leaks. The Respondent asserted that nevertheless that no work was undertaken. He said that a roofer attended on 13th March 2020 and was shown water between layers of felt, a soft spot indicating rot underneath and dripping inside the unit in several places. The Respondent refers to the email of Mr Gumbrill [254] but despite suggestions of work being undertaken and a different contractor attending in June 2020, the Respondent's case was that the roof was not attended to, albeit that there was no identified dispute that work needed to be undertaken at that time. The Court has noted that Mr Jay suggested that the Respondent needed to contact the managing agents to request inspections and quotes, but the Court cannot identify why the Respondent needed to do so where an officer of the Applicant was already aware. The roof to the Commercial Property is very clearly within the Applicant's repair obligations.

176. The Court again has carefully considered the report of Mr Grumitt as to the elements of the Commercial Property requiring work, which only referred to the roof- said to be in reasonable condition overall but with areas of ponding. It is not apparent that any external repair work is still required, although neither is it clear when any repair preventing the need for further such work was undertaken. Mr Gumbrill stated in evidence that work was carried out by a former employee of his at the end of 2021 and that the Respondent's tenant said that there was no further water penetration. It is not unclear whether the Respondent

accepts that but it is not inconsistent with the contents of Mr Grumitt's report and in the absence of clear evidence of ongoing external repairs being required, the Court determines that the Respondent has not demonstrated the need for further such works.

177. Damp/ damp staining and bubbling paintwork is identified internally to areas of ceiling and a beam with evidence of water penetration by Mr Grumitt. At least some of the internal disrepair is found by the Court to arise in consequence of the condition of the roof, albeit that it is far from clear that all is, and to be ongoing as at the date of trial. No other disrepair to the Commercial Property is pleaded in the Amended Defence and Counterclaim.

178. The Court again finds that repair of decoration falls within the repairing obligation where the need for that redecoration is caused by a breach of the Applicant's obligations. It is not apparent that the Applicant intends to repair that decoration and so the Court again considers that the most appropriate approach would award of damages for the costs of decoration. There may have been, but in the event there is not, a need to consider how much of the decoration cost should be awarded where it is unclear to what extent that was damaged by the relevant disrepair or for other reasons. However, there is again no evidence as to the cost and so the Court would be engaged in speculation as to that cost. In the absence of any figure having demonstrated as appropriate, the Court therefore makes no award for the internal decoration.

179. In principle, any repairs works to the Commercial Property done and / or to be done do not appear to involve or have involved a cost requiring detailed consultation or a tender process separate to works already to be dealt with. It ought to have been capable of undertaking any appropriate works in a relatively short timescale. The Court considers the reasonable period to completion of the works to be four months, so in July 2020.

180. In terms of damages for discomfort and inconvenience and wider interference with enjoyment of the asset suffered, the Court applies the case authorities referred to above but mindful of the commercial nature of the unit and the sub-letting of it. The Commercial Property is not actually occupied by the Respondent but rather is occupied by a commercial tenant, who the Respondent's statement says sub-lets it to local artists. There is no evidence that the rent paid by that tenant to the Respondent altered. Indeed, there is no evidence of the rent paid to the Respondent, despite the fact that the unit is let. However, reduction in rental value, and that as opposed to actual rent, is only a starting point in considering interference with enjoyment of the asset.

181. Taking matters in the round, the Court determines that the appropriate level of damages for interference with the leased asset is a relatively modest figure and that the appropriate one is £100 per month. For the

period of twenty- three months (in round terms) from July 2020 to the date of trial in October 2022, that amounts to £2700.

182. No order for specific performance is made for the same reasons explained in respect of the Residential Property and not repeated.

Conclusion re awards, and interest

183. It should be apparent from the above but is summarised for the avoidance of doubt, that no service charges have been found demonstrated to be due on the evidence presented, either in relation to the Residential Property or in relation to the Commercial Property. The set-off argued for by the Respondent is not relevant.

184. The Respondent has been determined to be due in principle sums by way of Counterclaim which exceed the amount of the Counterclaim which he has sought to bring, namely £20,000.00. The Respondent is consequently awarded £20,000.00 as the maximum claim brought by him.

185. The Court notes that the Defendant has not in his Amended Defence and Counterclaim set out any claim for interest and hence there is nothing to consider in that regard. The Applicant had sought interest but has recovered nothing and so that is not relevant.

Costs and fees- Court and Tribunal

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

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

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

ANNEX - RIGHTS OF APPEAL

Appealing against the Tribunal's decision

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

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

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

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

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

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

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

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

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

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

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

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

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