FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**CAM/33UD/LBC/2021/0009** **CAM/33UD/LAC/2021/0005**
HMCTS code (audio, video, paper)	**:**	**F2F**
Premises	**:**	**21A Trafalgar Road, Great Yarmouth, Norfolk NR30 2LD**
Applicants	**:**	**1. Phillip Bannell** **2. Andrew Bannell**
Representative	**:**	**Proprietary Rights Ltd**
Respondent	**:**	**Benjamin Morgan**
Type of applications	**:**	**Determination of alleged: (1) breach of covenant; and (2) liability to pay administration charges**
Tribunal members	**:**	**Judge David Wyatt** **Mrs M Hardman FRICS IRRV (Hons)**
Date of decision	**:**	**28 June 2022**

DECISION

Covid-19 pandemic: description of hearing

This has been a face to face hearing. The documents we were referred to are described in paragraph 4 below. We have noted the contents.

Decisions of the tribunal

The tribunal:

(1) determines that a breach of the covenant in clause 6.3(a) in the Respondent's lease of the Premises (to keep them in good and substantial repair and condition) has occurred in that on 18 May 2022:

a. window B (the bathroom window) was in mild disrepair, in that the external wooden sill was exposed by cracked and weathered paint (so needs to be repaired or treated and painted);

b. window D (the main bedroom window) was in disrepair in that the external wooden sill was rotten (so needs to be repaired or replaced); and

c. window G (the window in the second-floor roof space) was in disrepair in that the external sill and the bottom of the jambs had rotten external areas (so these need to be repaired or replaced);

(2) determines that administration charges of £3,099.07 are payable under the lease by the Respondent to the Applicants (for pre-action legal and other costs); and

(3) orders that all the costs incurred by the Applicants in connection with these proceedings are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the Respondent.

Please refer to the more detailed factual findings and notes below, in particular at paragraphs 37-38 and 47-48.

Reasons

Procedural history

1. The Applicant landlords made two applications to the tribunal. The first sought a determination under subsection 168(4) of the Commonhold and Leasehold Reform Act 2002 (the "**2002 Act**") that breach of clause 6.3 of the Respondent's lease had occurred, in that the Respondent had: "*...failed to keep in good and substantial repair and condition all bar one of the windows and window frames to the property...*".

2. In their second application, the Applicants sought a determination under Schedule 11 to the 2002 Act that administration charges were payable by the Respondent. The Applicants relied on clauses 6.12 and/or 6.13 of the Respondent's lease, which include provisions for contractual costs. The Applicants sought £10,965.86, demanded on 20 November 2021. The sums demanded largely comprised legal costs and were said to have been incurred as a result of the alleged breach of covenant.

3. On 11 January 2022, the judge gave case management directions. These provided initially for the parties to provide more information and for notice of the proceedings to be given to potentially interested

persons. There were no applications by any such persons to be joined to these proceedings. Following the directions, the tribunal received a document from the Respondent with enclosures and notified the parties by letter dated 26 January 2022 that this would be treated as the Respondent's application under: (a) section 20C of the Landlord and Tenant Act 1985 (the "**1985 Act**") seeking an order limiting recovery of the Applicants' costs of these proceedings through the service charge; and (b) paragraph 5A of Schedule 11 to the 2002 Act seeking an order to reduce or extinguish the Respondent's liability to pay any administration charge in respect of the costs of the proceedings.

4. On 2 February 2022, the Applicants were given permission to rely on the expert evidence in the reports and letter referred to below. Pursuant to the case management directions, the Applicants then produced a hard copy bundle of their case documents (301 pages). The Respondent produced an unpaginated hard copy bundle of documents in response. The Applicants produced a bundle in reply (14 pages). On 17 May 2022, the Applicants provided a skeleton argument from Miss Mattie Green of Counsel and a bundle of authorities. The Respondent produced a copy "crime report print", apparently from Norfolk and Suffolk constabularies. On 18 May 2022, the tribunal inspected the Premises before the hearing at Great Yarmouth Magistrates Court. Miss Green represented the Applicants, who attended the hearing; Phillip Bannell gave evidence. David Bullen FRICS gave expert evidence as the chartered building surveyor instructed by the Applicants. The Respondent represented himself, assisted by his father, and gave evidence.

Context

5. The jurisdiction under s.168(4) is part of the procedure which must be followed by a landlord of a long lease of a dwelling before they can commence forfeiture proceedings for breach by a tenant of a covenant in their lease. In essence:

   a) by section 146(1) of the Law of Property Act 1925 (the "**1925 Act**"), a right of re-entry or forfeiture shall not be enforceable until the landlord serves on the tenant a notice specifying certain matters, including the particular breach complained of, and the tenant fails within a reasonable time thereafter to remedy the breach (if capable of remedy) and make reasonable compensation; and

   b) by section 168 of the 2002 Act, a landlord under a long lease of a dwelling may not serve such a notice under s.146(1) of the 1925 Act in respect of a breach by a tenant of a covenant in the lease unless it has been finally determined on an application under

subsection 168(4) that the breach has occurred (or one of the other conditions set out in subsection 168(2) is satisfied).

6. Given the context, we are required to make any determination of breach with the type of particularity that would be required for a notice under s.146(1) of the 1925 Act. We are expected to make findings of fact about any breach and the Respondent's part in it, so that in the event of forfeiture proceedings the county court can assess the seriousness of the breach and the culpability of the Respondent without having to reconsider the same evidence.

Background

7. The Applicants are the registered proprietors of the freehold land known as 20 to 22 Trafalgar Road, Great Yarmouth registered under title number NR386489. They purchased it on 1 November 2019 for a declared price of £45,000 exclusive of VAT. The land had been owned by Barclays Bank, who granted the lease now held by the Respondent and had their bank branch office on the ground floor.

8. The Respondent is the leaseholder of Flat 21A on the first and second floor of parts of the buildings on that land. The lease was granted for 125 years from 29 September 2006, so has about 109 years left to run. The leasehold title is registered under title number NK351505. The Respondent purchased it on 17 August 2012 for a declared price of £65,000. It is subject to a mortgage in favour of Bank of Scotland PLC and two unilateral notices in respect of equitable charges created by interim (18 April 2017) and final (22 June 2017) charging orders in favour of Amigo Loans Ltd.

9. We accept the Respondent's evidence that the previous landlord, Barclays Bank, had never sought payment of a service charge or anything else from him. It appears Barclays carried out little or no repair work other than some external decoration (painting). Mr Bannell explained that the Applicants (who are brothers) work together as a property development/leasing business. He said much of the buildings had been unoccupied for a number of years and were in a very poor state of repair when they purchased in late 2019. Mr Bannell said that, after their purchase, they had worked with the local authority planning and building control officers and created two new flats out of the area previously used as a bank on the ground floor. Mr Bannell said the work began in February 2020 and at that time the Applicants had a good relationship with all three existing leaseholders (all on the first and second floors), including the Respondent.

10. The opposing parties blamed each other for the deterioration in their relationship, referring to a variety of suggested reasons. We have considered everything they said, but as we pointed out at the hearing

the correspondence begins with a letter dated 3 February 2020 from Phillip Bannell to the Respondent:

> "*…Having been out on the flat roof today, I had a chance to inspect the hole that you've been complaining about. The problem has been caused by the gutters being blocked for the last few years. I realise you have now cleared them, but the damage is done. I have a builder coming to site in the next week or so, and I will get him to give you a quote for the work. As my brother and I own the building we would like this repair done as soon as possible…*"

11. On the morning of 6 February 2020, the Applicants arrived at the Respondent's place of work, informing him that a boiler overflow pipe was leaking from his flat. The Respondent informed the police that he was being harassed by the Applicants, who kept knocking on his door. Later that day, Phillip Bannell delivered another letter saying that the overflow pipe was leaking from the Respondent's flat and had caused water damage downstairs, demanding £294 for repairing the damage and seeking payment or details of the Respondent's insurers. Following further correspondence about a proposed service charge, including a letter from solicitors instructed by the Applicants, Phillip Bannell wrote to the Respondent on 25 March 2020 to express concern about lack of maintenance, adding:

> "*We hope you can address this problem, the hole in your wall being a prime example. You left plants growing out of, and blocking the gutters for years, and then seem to think the effects are our fault. You only pulled these plants out when we pointed this out to you.*"

12. The police report document produced by the Respondent has a note on 12 February 2020 (in between earlier and later notes of contact from the Respondent reporting visits from the Applicants and his concerns) which opines that rather than being harassed the Respondent had been "*…avoiding an uncomfortable conversation around the maintenance of his property…*". Correspondence continued through 2020, with the solicitors then instructed by the Applicants discussing the possibility of using an expert to decide who was responsible for repairing what. The correspondence in the Applicants' bundle for 2020 end with a letter from the Respondent saying that rather than incurring costs on experts he would carry out works to the inside of his flat himself but if any more damage was caused by the building failing to be kept in good repair he would make a claim. On 17 February 2021, the Applicants wrote to the Respondent's mortgagee.

March to December 2021

13. On 1 March 2021, a new firm of solicitors instructed by the Applicants, Proprietary Rights Ltd, wrote to the Respondent. Amongst other things, they referred to clause 6.3 of the lease and alleged the flat was in very poor condition, the windows/window frames were in particularly bad order and the flat was not being heated or ventilated properly. The Respondent replied with various questions and allegations. In cross-examination, he admitted that he had initially refused access, but pointed out that access was then arranged for 15 April 2021, as noted below. The solicitors replied substantively and pressed for access for inspection. On 22 March 2021, they wrote again, requiring access for inspection at 10:30am on 26 March 2021, saying that Phillip Bannell would not attend but others, including Mr Chris Burton, surveyor, would. The Respondent replied asking for alternative dates after 12 April 2021. The solicitors replied on 24 March saying that the inspection would be on 12 April 2021 and responding to a short letter at some length, including for example: "*Please supply better details of the health issues that prevented you sending an e-mail for 15 days*" and two paragraphs explaining why their mistaken reference to the incorrect date of a letter had not misled the Respondent. After more correspondence, the solicitors offered 12-15 April and on 25 March 2021 the Respondent agreed 12pm on 15 April 2021.

14. On 25 June 2021, the solicitors wrote to the Respondent with a copy of the report from Mr Burton, the surveyor who had inspected on 15 April 2021, of David Bullen Limited. We were told that health issues had delayed production of his report. The solicitors asserted in their letter that the report identified a number of repairs which were the Respondent's responsibility, including replacement of the front door and window, repair or replacement of most of the windows and extraction in the bathroom and kitchen. They said that if the Respondent failed to commence and proceed diligently with the works within one month, the Applicants could seek determination of breach, serve a notice under s.146 of the 1925 Act and in due course thereafter issue a claim for forfeiture. They acknowledged references in the report to: "*repairs to the exterior that require our clients' attention including attending to sections of re-roofing, gutter clearance and repair and re-rendering sections of the building*." They said: "*Our clients have already addressed many of these issues and will continue to perform their obligations under the terms of the lease*."

15. On 22 July 2021, the solicitors wrote again giving notice that they would inspect on 27 July 2021. The Respondent replied asking for alternative dates for any inspection, saying he agreed and understood the work must be carried out and he was working towards a start date. The solicitors replied cancelling the inspection since no works had been carried out, asking whether the Respondent admitted breach of clause 6.3 and asking for a schedule of works. In cross-examination, the Respondent confirmed he had agreed works needed to be carried out but observed that even the windows with broken sash cords and locks

(replaced between September and November 2021) were still fully functioning.

16. On 20 August 2021, the Respondent provided an update, explaining the fire door had been ordered, the Applicants' surveyor had confirmed the kitchen window did not need to be replaced, the sash windows had been cleaned and decorated and all opened and closed as they should, the cooker hood provided kitchen extraction and the bathroom window provided bathroom ventilation. The Applicants' solicitors replied asking for further details, accepting that the kitchen window did not need to be replaced "*at this stage*" and dealing with other matters, including a new proposed refurbishment of the walkway in the common parts. Having previously suggested inspection in October, they proposed inspection in September. When the Respondent queried this, they suggested dates in early October. When the Respondent provided more information about the works he had carried out and proposed, the solicitors sent a three-page letter demanding more information, including six questions about Morgan Property Maintenance (the name given by the Respondent when asked who would carry out the work). The Respondent replied on the same day (15 September 2021), saying he could confirm when all the works had been completed, but no answer or further warning appears to have been provided. On 5 November 2021, the Applicants' solicitors informed the Respondent that they had made their application to the tribunal under s.168(4).

17. On 11 November 2021, the Respondent confirmed the required works had been completed. On 20 November 2021, the solicitors sent their demand for administration charges of £10,965.86. This relied on clause 6.13 of the lease and alleged that the Respondent had breached clauses 6.3 and 6.9(a) in that he had: "*…failed to keep the property in good and substantial repair, delayed and obfuscated the attempts of your Landlords to obtain access within a reasonable period of time and; thereafter failed to carry out repairs, despite notice of requirement for the same; and notwithstanding your assertions that the repairs had been completed.*" After a question from the Respondent, who had invited another inspection, the solicitors replied on 22 November 2021 that the Applicants had carried out an external visual inspection of the windows which made it clear that the required works had not been completed. On 8 December 2021, they provided a copy of their application to the tribunal to determine payability of the demand for administration charges. Solicitors briefly instructed by the Respondent asked for copies of the documents in the tribunal proceedings and those were provided on 22 December 2021.

Lease

18. The definition of the "*Premises*" refers to Part 2 of Schedule 1, which specifically includes:

> "*…5. the inner half severed medially of the internal non-load bearing walls dividing the Premises from other parts of the Building*
>
> *6. the doors and windows and the door frames and window frames and the glass therein…*".

19. The "*Building Common Parts*" include the "*Structure*" (which includes the roofs, floors and external walls) and any "*Conduits*" (which include all pipes, gutters and other conducting media). The "*Building Common Parts Services*" include cleansing and repairing those parts (paragraph 1 of Part B of Part 1 of Schedule 6) and cleaning the outside of the windows of the Flats (paragraph 6 of that Part B).

20. In clause 6.3(a), the Tenant covenants with the Landlord: "*…to keep the Premises in good and substantial repair and condition…*".

21. In clause 6.9(a), the Tenant covenants to permit the Landlord to, amongst other things, "*…enter upon the Premises for the purpose of ascertaining that the covenants and conditions of this Lease have been observed and performed…*" and "*…view the state of repair and condition of the Premises…*".

22. In clause 6.12, the Tenant covenants to: "*…pay to the Landlord on a full indemnity basis all costs fees charges disbursements and expenses properly incurred by the Landlord in relation to or incidental to…*" specified matters, including preparation and service of a notice under s.146 of the 1925 Act or incurred by or in contemplation of proceedings under s.146 or 147 of that Act.

23. In clause 6.13, the Tenant covenants to indemnify the Landlord against (amongst other things): "*…all damage … losses costs expenses actions demands proceedings claims and liabilities made against or suffered or incurred by the Landlord arising directly or indirectly out of: … (b) … any breach of non-observance by the Tenant of the covenants conditions or other provisions of this Lease …*".

24. In paragraph 1 of Part A of Part 1 of Schedule 6, the Landlord covenants to use all reasonable endeavours to perform the Building Common Parts Services.

25. The Respondent argued that the window frames, or the external parts of them, were not included in the "*Premises*". His understanding was that he was responsible for all interior repairs and the landlords were responsible for all exterior repairs. Miss Green referred to the well-known principles of contractual interpretation described by Lord Neuberger in Arnold v Britton [2015] A.C. 1619, including the need to focus on the objective meaning of the relevant words in their documentary, factual and commercial context.

26. We accept Miss Green's submissions that the entirety of the wooden window frames, exterior and interior, are included in the "*Premises*" as defined in the lease. That includes the wooden window sills, because in this case they are part of the "*window frames*". We are referring here only to the small wooden sills which form part of the window frames and are contained inside the window aperture in the external walls, not the larger sills (which appear to be stone) under the wooden sills, which extend beyond the window aperture and are obviously part of the Structure.

27. This interpretation follows the ordinary meaning of the words used in Schedule 1. It is how the wording in the lease would objectively be understood. As Miss Green pointed out, if only the interior of the window frames were included, the lease would have said so. The lease made it clear in paragraph 5 of Part 2 of Schedule 1 (set out above) that only the inner half of neighbouring interior non-load-bearing walls were included. The specific obligation on the Landlord to clean the outside of the windows, as one of the Building Common Parts Services (para. 6), would probably be unnecessary if those windows were not included in the Premises, because the Landlord would already have covenanted (para. 1 of the Building Common Parts Services) to cleanse and repair them as part of the Building Common Parts.

Windows

28. The surveyor's report from the inspection on 15 April 2021 was produced, for the Applicants, giving a general report about the entire building. As such, it was not the ideal document to use to tell the Respondent what he was being asked to do.

29. Most of the relevant section in the report is headed "INTERIOR", describing each window in turn. For these proceedings, the Applicants assigned letters to the relevant windows, which were all single-glazed. The kitchen window ("A") was said to be of satisfactory condition but potentially "*non-compliant*" because it should provide 30 minutes' fire resistance. Mr Bullen had subsequently confirmed to the Respondent (when the Respondent wrote to him directly to ask) that this window was not a repair issue; it did not need to be replaced by the Respondent. The bathroom window ("B") is a timber sash window and was said to be poor (mould to the frame, poor decorative order, with broken locks and sash cords). The next small window ("C") was in satisfactory condition. The main bedroom window ("D") was a timber sash window said to be poor (rot to sill and poor decorative order, repairs required). The front windows ("E", a bay with three windows, and "F") were timber sash windows said to be fair/poor (mould and condensation to frame and some minor rot to beads). All of these windows are on the first floor. The only window complained of in the second-floor roof space ("G") was described in the report as a timber sash window, but is actually a basic fixed window with a narrow tilt-opening pane at the top.

30. The next part of the report is headed "EXTERIOR" and lists a large number of items (various different roof areas, walls and gutters). This section of the report ends with the windows, saying these are poor (window facing into first-floor opening being generally in poor decorative order, with "extensive" rot to "most" sills at the very least). It says a complete overhaul of timber windows was required by a sash specialist, including timber repairs and redecoration, and some sash cords also required replacement, saying that given all this it was likely to be more cost-effective to replace the units.

31. Mr Burton had produced a supplemental letter of 15 June 2021 saying that not rectifying the faults identified in the report would have the potential to cause a significant reduction in the value of the building if left unaddressed for a prolonged period of time. Mr Bullen produced a brief report dated 15 October 2021 explaining that Mr Burton had left the practice for personal reasons. In this report, Mr Bullen noted from his external inspection on 20 September 2021 that the windows in the semi-enclosed well [B and D] remained in a very neglected state of repair. Mr Bullen also produced a further report dated 28 February 2022 referring to the background and saying that, having been given internal access for inspection on 2 February 2022, some of the recommended works had been dealt with: "*…ie various sash cords and internal paintwork to window frames have been carried out to a fair standard…*" but: "*…the major external works remain untouched and in my opinion continued failure to address these problems is likely to lead to an increase of the already evident dampness issues and have an adverse effect on the long term structural condition of the building*."

32. Miss Green confirmed that windows A and C were not in issue and it was accepted that the interior window repair works had been carried out to a fair standard. Windows B, D, E, F and G were said to be in disrepair. Miss Green confirmed at the hearing that the Applicants were primarily seeking our determination of the breaches as at the time of our inspection that morning. They sought determination of historical breaches only if we were not satisfied that the Respondent remained in breach.

Review

33. As noted above, clause 6.3(a) requires good and substantial repair and condition. It is long established that, in line with this wording, repair is a question of substantial (not perfect) repair, taking into account the age, character and locality of the building. We accept Mr Bullen's opinion that the building was probably constructed in the early 1900s. It is a residential building, having been converted from mixed use, with a light well in the middle of the first floor. It faces out onto Trafalgar Road with access from a minor road at the rear. It is near the sea front at Great Yarmouth.

34. Are the Premises, or what would make the Premises, reasonably fit for a reasonably minded tenant of the type who would be likely to take them? When we asked Mr Bullen, he immediately accepted that the main windows at the front (E and F) were in fair condition for this building, not in disrepair. He said that:

a) B and D (the bathroom window and the main bedroom window) were in poor repair and were probably the original sash windows. He said they were not particularly visible, since they face out into the light well which can only be seen from inside the building. He said the rotten areas could be cut out and new timber spliced in, or the sash windows could be replaced like-for-like. He said he would replace them with "plastic" (uPVC) windows. He thought that would probably be better and more economical. These windows were not visible from Trafalgar Road, the building was not listed and he believed it was not in a conservation area; and

b) G (the window in the second-floor roof space), which he had seen only from the outside using a ladder from the light well, was a cheap top-opening window with no character whatsoever. He said it was a timber softwood frame, with rotten areas in the sill and the bottom of the jambs. He thought it would be cheapest and simplest to replace this window.

35. We generally accept Mr Bullen's evidence, which was consistent with our inspection. Window B is in mild disrepair in that the external wooden sill is exposed by cracked and weathered paint and needs to be repaired or treated and painted. Window D is in disrepair in that the external wooden sill is rotten and needs to be repaired or replaced. Window G is in disrepair in that the external sill and the bottom of the jambs have rotten areas, so these need to be repaired or replaced. We are not satisfied that any other areas of these windows are in disrepair, or that any of the other windows are in disrepair.

36. We asked whether the landlord had contributed to any of this disrepair, referring to the Applicants' evidence of lack of repair by the previous landlord and the assertions made by Mr Bannell in his letter of 3 February 2020 (and subsequently) about the gutters. We accept Mr Bullen's evidence that such disrepair would not have contributed to the disrepair of window G because there is no gutter above that window. We pointed out that the gutters above windows B and D appeared to have been replaced recently. Mr Bullen said that if the gutters had been overflowing for a long time and the water was spilling over the windows, that would have aggravated the problem, but the root cause of the disrepair was failure to maintain the window frames. The Respondent had also alleged failure to clean the exterior of the windows, but we are not satisfied that any such failure caused or aggravated the relevant disrepair.

37. In view of the Applicants' evidence about historic disrepair of the building, the advice in Mr Burton's report about the other areas of the building and the assertions by Phillip Bannell that the gutters had been blocked for many years and had caused other disrepair, we are satisfied that water probably overflowed the gutters and probably would have aggravated the problem by running over the sills of windows B and D. However, we accept Mr Bullen's evidence that this would only have aggravated the problem caused by failure to keep the surface of the window sills in repair. The light well is relatively enclosed, but is still exposed to the elements and near the sea. We accept Miss Green's submission that, even if the Respondent has a cause of action against the landlords in respect of the historic disrepair, he remains liable to repair the relevant window frames as part of the Premises under clause 6.3(a).

38. The Respondent made it clear that, if we found repair of the exterior of the window frames was his responsibility, he would accept that and carry out repair works as soon as possible. He said he had not wanted to carry out the works if they were not part of his lease, Barclays having never asked for anything like this in the past and the Applicants having sought wrongly to say he was responsible for the gutters. He had been on furlough during the pandemic and now had a second (part-time) job as well as his main job. He would have to borrow money from family members to carry out repair work. The Applicants said they would like the work to be carried out as soon as possible but acknowledged the difficulties the Respondent would have and agreed six months from the date of our decision would be reasonable. They said they did not want this to take longer, given the potential risks referred to by their surveyor (although, in view of the very limited disrepair we have found, we doubt these are risks at all). The Applicants said they could not afford to carry out the works and recharge them to the Respondent under the lease provisions for this.

Administration charges (£10,965.86)

39. The Applicants relied on clause 6.13, or alternatively 6.12, of the lease. We asked about the claim in the demand for the Applicants' own time. This was claimed at £8.98 per hour (the national living wage), asserting that Phillip Bannell had spent 50 hours (£445.50) and Andrew Bannell had spent 60 hours (£588.06). Mr Bannell confirmed in his witness statement that he and his brother had spent this time dealing with the Respondent. We asked whether these claims fell within either clause. Miss Green submitted they were "*losses*" under clause 6.13.

40. We are not satisfied by the evidence produced by the Applicants that any such "*losses*" are payable to them under clause 6.13. This is a general indemnity clause. There was no record of the time spent by the Applicants or what they had spent it doing. They will have spent some time in 2021 inspecting the Premises and instructing their solicitors,

but they visit the buildings from time to time as landlords and specified the times they would inspect. Mr Bannell said that he buys, renovates and lets out property with his brother to give him an income or supplement his pension. There was no real evidence that the Applicants had been unable to earn any specified amounts of money or lost any opportunity, or suffered any other losses (apart from the specific expenses allowed below) as a direct or indirect result of the relevant breaches.

41. All the other costs claimed by the Applicants in their demand on 20 November 2021 for £10,965.86 were within the scope of the contractual indemnity in clause 6.13 because of the breach or non-observance of clauses 6.3(a) (as determined above in relation to exterior areas of windows B, D and G, and in relation to minor disrepair of the interior of windows B and D between 15 April and September 2021 in that sash cords and window locks were broken, as Miss Green submitted) and 6.9(a) of the lease (in relation to the delays in giving access when demanded in 2021, again as Miss Green submitted). However, for the same reasons, the relevant costs are all variable administration charges as defined in paragraph 1 of Schedule 11 to the 2002 Act. By paragraph 2, a variable administration charge is payable only to the extent that the amount of the charge is reasonable. As Miss Green pointed out, this is not an assessment of costs on the standard basis under the civil procedure rules. These are contractual costs payable under the clause(s) identified, so there is no separate requirement of proportionality, only of reasonableness.

42. The Respondent did not dispute the Applicant's personal postage charges of £31.17. We are satisfied that their disputed charges of £29.90 for photographs and £74 for diesel were incurred and reasonable. The surveyor's costs were £600 including VAT for the report from 15 April 2021 and £180 including VAT for the supplemental report on 15 October 2021. When we asked, Mr Bannell accepted that the first report had been for the entire building; he proposed that the Respondent should pay half the cost. We are satisfied that it was reasonable to seek advice from a surveyor and, looking at the overall contents of the report, the sum of £300 is reasonable and payable by the Respondent. As Miss Green pointed out, the subsequent report in October 2021 was prepared solely to inspect (externally) the windows in the Respondent's flat. We are satisfied that the fee of £180 was reasonable to inspect, check on the progress of the works and produce the report.

43. The rest (the bulk) of the administration charges demanded are legal fees of £9,017.23 of the Applicants' solicitor, Lawrence Talbot of Proprietary Rights Ltd. The relevant invoices are summarised below. The initial invoices were wrongly dated 2020; we have referred below to 2021 to avoid confusion. All the invoices state the solicitors are not registered for VAT. Apart from the initial fixed fees, costs were charged at £220 per hour (or £110 per hour for time spent on letters or e-mails

received) with a 25% discount (i.e. a net full rate of £165 per hour). For simplicity, we show below the time recorded for letters or e-mails received as half the time at the full rate. All the invoices have a general narrative indicating that they include: "*conference, research, study and drafting; correspondence, postage, telephone charges, photocopying and general care and control*".

Invoice	**Expenses (£)**	**Costs (£)**	**Description (extracts)**
1 March 2021	9 Land Registry fee	340	Advice, fixed fee
1 March 2021 (second invoice)		340	Detailed letter to Respondent, fixed fee
8 March 2021	3.98 postage	1,320	4 to 8 March 2021; 8 units correspondence, 15 units telephone and 57 units on documents
17 March 2021		1,724.25	9 to 17 March 2021 "*…in particular in relation to detailed advice in respect of an application for an injunction for access and forfeiture generally*"; 7.5 units correspondence, 38 units telephone and 59 units on documents
31 March 2021		750.75	Fixed fee; no breakdown provided (but equivalent to 45.5 units)
4 June 2021		569.25	18 to 31 March 2021 "*…in particular in relation to detailed advice in respect of application of provisions of lease to repairs to walkway*"; 3.5 units correspondence, 9 units telephone and 22 units on documents
23 September 2021		2,285.25	5 June to 23 September 2021; 18.5 units correspondence, 54 units telephone and 66 units on documents
10 January 2022	£200 tribunal application fees	2,079	[24 September to 10 January 2022; 23 units correspondence, 26 units telephone, 77 units on documents]

44. These invoices total £9,408.50, more than the £9,017.23 demanded, because when the administration charge demand was made some of the costs in the last invoice had not yet been incurred. The £9,017.23 would be over 546 units (i.e. over 54 hours) if charged at £165 per hour.

45. Mr Bannell said he needed to go to a firm of solicitors who specialise in acting for residential landlords because the Respondent had been abusive and aggressive to the managing agents. It appears to us that the Respondent had in some of his correspondence in 2020 been difficult or failed to understand the arrangements under the lease, but that is not uncommon and will not have been helped by the early attempts to blame him for the gutters (which we consider further below). On the evidence produced, we are not satisfied that the Respondent had been abusive or aggressive. We accept his evidence that he had never met the managing agents (Tarrants) and had spoken to them by telephone only briefly. Miss Green submitted that it had been reasonable to instruct solicitors and accepted there had been an abundance of correspondence but argued the Respondent had been evasive and it was understandable that the Applicants wanted to understand what works were being done and who would be doing them.

46. We accept that it was reasonable to instruct solicitors. However, our assessment is that most of the legal costs included in the demand were unreasonable. Our description above of the background correspondence is not exhaustive, but we have considered all the correspondence and other evidence produced to us. We have not seen a substantial part of the work done because understandably the solicitors' advice to and other correspondence with the Applicants was not disclosed. Some of the costs were reasonable because there were some breaches and the Respondent took an unwisely argumentative approach in some respects, not understanding that the landlord was entitled to collect service charges from leaseholders even if the previous landlord had not and relying on an understanding that he was only responsible for the interior of his flat. It was reasonable to take initial advice on options to enforce the right to access for inspection. However, a more constructive approach should have been taken than simply demanding access on a specified date within a short period of time. If it had been, internal access would probably have been given by agreement, as it was in April after the requests in March 2021, then offered again but declined later in 2021, and then given again in February 2022. Similarly, the suggestions from the surveyors that long-term damage might be caused if the windows were not repaired for a prolonged period (while doubtful), support the Applicants' wish to press the Respondent to carry out repair work within a reasonable time, since it appears that advice had been given to them.

47. However, the correspondence from Mr Bannell in 2020 attempting to blame the Respondent for the failures by the previous landlord to

clear/repair the gutters gave the Respondent reasonable cause for suspicion about the demands from March 2021 for work on the windows. At the hearing, Mr Bannell argued it was only reasonable for the Respondent to have cleared the gutters himself, since he had access to the light well from his windows, saying that if Mr Bannell had been the tenant and seen things growing out of the gutters he would have removed them. He could not explain why he had repeatedly told the leaseholder that he was liable for clearing the gutters when that was plainly the responsibility of the landlord under the lease.

48. Further, the approach in the correspondence from the Applicants' solicitors was confusing. That correspondence used a survey report which referred to major to minor potential items across the entire building and gave a detailed breakdown of issues with the interior and then a list of issues with the exterior. It did not make it clear enough that the Respondent was being asked to repair the exterior as well as the interior of the windows and window sills. It used wording which, if anything, suggested the Applicants would be dealing with the exterior of the windows (indicating that the Applicants had dealt with or would be dealing with the various problems with the exterior identified in the report). In our assessment, that made it reasonable for the Respondent to initially deal only with the interior repairs, thinking the Applicants would be dealing with the exterior, and so wasted part of the time and costs of the further correspondence about this.

49. Further, the Applicants' solicitors no doubt acted only on instructions, but their correspondence was lengthy and frequent, writing as if the repair of the windows was extremely urgent and as if the Respondent was a litigation lawyer, not a private individual who had repeatedly explained that his resources were very limited (having already informed the Applicants that he had been on furlough during the pandemic) and plainly did not understand the position he was in. Much was said about the reference to "Morgan Property Maintenance", as if the Respondent had been being flippant when he was asked who would be carrying out the repair work, but we accept the simple evidence of the Respondent that this is the trading name used by his father. On more than one occasion, the Applicants wrote with only a few days' notice of a proposed inspection, causing unnecessary debate and eventual offer of a sensible range of dates and agreement of dates. We raised this at the hearing, asking why a reasonable and co-operative approach had not been taken. Mr Bannell asked whether solicitors ever tried to keep costs down. He said he simply wanted the Respondent to take responsibility for repairing what he was responsible for. He told us that he had paid all the invoices for the legal costs and said he did not think they were reasonable. He then told us what he meant by that was that the Respondent had asked him not to knock on his door or otherwise contact him directly, but only through solicitors, so he had been obliged to incur legal costs.

50. Further, it is likely that much of the costs were not incurred in connection with the very limited breaches it was reasonable to pursue. The Applicants should have asked their expert or themselves the simple question of which amongst the minor and unrelated matters identified in the detailed report from the building surveyor were actual disrepair for which the Respondent was responsible under his lease. When we asked Mr Bullen at the hearing, he immediately confirmed the limited ways in which only windows B, D and G were in disrepair and confirmed the other alleged issues were not disrepair. Ultimately, in line with that evidence, we have found only very limited instances of previous (internal) and current (external) disrepair in relation to the matters alleged by the Applicants in their pre-action correspondence. Further, parts of the costs relate to matters referred to in the invoices which had no connection, direct or indirect, with the relevant breaches, referring to proposed new service charges in relation to the hallway and provisions of the lease in relation to those.

51. Based on the evidence produced to us, our assessment is that the maximum reasonable amount of time spent at £165 per hour for the legal work done until and including 20 November 2021 was 15 hours (150 units), the sum of £2,475. The Land Registry fees of £9 are reasonable and payable in addition. The solicitors' postage costs of £3.98 are not reasonable because our assessment of the reasonable legal costs includes any postage costs incurred by the solicitors. Accordingly, in our assessment, the total administration charges payable by the Respondent to the Applicants under clause 6.13 of the lease in respect of the costs demanded on 20 November 2021 are in the sum of £3,099.07, comprised of the sums determined above and summarised in the following table.

Item	**Claimed (£)**	**Assessed (£)**
Legal costs	9,017.23	2,475 costs 9 Land Registry fee
Applicants' time	1,033.56	Nil
Surveyor's first report	600	300
Surveyor's second report	180	180
Travel (diesel)	74	74
Photographs	29.90	29.90
Postage	31.17	31.17
Total	10,965.86	3,099.07

Applications under section 20C and paragraph 5A

52. We have decided that it is just and equitable to make an order under section 20C of the 1985 Act. We consider that, following Kensquare Limited v Boakye [2021] EWCA Civ 1725 (to which Miss Green referred), the costs of these proceedings cannot be recovered through the service charge because they do not fall within any of the relevant paragraphs of Schedule 6 to the lease, and it would be better to avoid any potential argument about that in future. Even if we are wrong about that, we consider it just and equitable to make the order under section 20C because this has been a specific dispute between the parties, in which the Applicants rely on a contractual indemnity from the Respondent for their costs. Further, these proceedings have resulted in determinations of substantially fewer and more minor breaches than were being alleged by the Applicants even at the hearing (apparently without having adequately consulted their own expert), as noted above, and reduction of the pre-action administration charges to less than 30% of those demanded. If the Applicants seek to recover any of the costs of these proceedings from the other leaseholders through the service charge, those other leaseholders could make their own applications under section 20C of the 1985 Act.

53. As to the application under paragraph 5A of Schedule 11 to the 2002 Act, we have been given no information about what costs have been incurred in these proceedings (apart from the balance included in the invoice to the Applicants in January 2022). Accordingly, we consider that we should not make an order under paragraph 5A at this stage because there is no identified administration charge for it to bite on; paragraph 5A provides for an order reducing or extinguishing: "*…a particular administration charge….*".

54. If the parties are unable to agree the amount which is reasonable and payable by the Respondent to the Applicants for their costs of these proceedings:

    a) either party could make a new application to the tribunal under paragraph 5 of Schedule 11 to the 2002 Act to determine the amount reasonable and payable for litigation costs; and

    b) the Respondent could make a fresh application to the tribunal under paragraph 5A of Schedule 11 to the 2002 Act to seek an order reducing or extinguishing his liability to pay the costs of these proceedings (and any such further proceedings).

55. However, the parties are encouraged to endeavour to take a more reasonable approach, reach agreement and move on from this unfortunate dispute without further litigation and further costs.

Name: Judge David Wyatt **Date:** 28 June 2022

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

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

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

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

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

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).