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RESIDENTIAL PROPERTY TRIBUNAL

LEASEHOLD VALUATION TRIBUNAL

Reference: LVT/0034/09/16

In the Matter of number 137A New Road, Skewen, Swansea, SA10 6HL

And in the matter of an Application under section 168(4) of the Commonhold and Leasehold Reform Act 2002

TRIBUNAL	**Mr Timothy Walsh (Chairman)** **Mr Paul Lucas (Surveyor)** **Mrs Carole Calvin-Thomas**
APPLICANT	**Mr Ian Whitehead-Ross**
RESPONDENT	**Ms Mandy Bowen**

REASONS FOR THE DECISION OF THE LEASEHOLD VALUATION TRIBUNAL

The Decision in Summary

1. For the reasons given below the Tribunal has reached the conclusion that the Respondent has breached a covenant or condition in her lease of the premises at number 137A New Road, Skewen, Swansea, SA10 6HL. More particularly:

   (I) Contrary to Clause 3(2) of the Lease the Respondent has failed to pay a sum equal to one half of the insurance premiums paid by the Applicant under Clause 4(2) of the Lease for the years 2014, 2015 and 2016.

   (II) Contrary to Clause 3(3) of the Lease the Respondent has failed to keep the exterior walls of the Premises in tenantable repair.

   (III) Contrary to Clause 3(6) of the Lease the Respondent has failed to paint the exterior of the Premises for in excess of three years.

   (IV) Also contrary to Clause 3(6) of the Lease the Respondent has failed to keep in repair, and replace when necessary, the guttering and pipes

installed and used for the purpose of draining away water and soil from only the Premises.

(V) Contrary to Clause 3(7) of the Lease the Respondent has previously failed to permit the Applicant, upon giving prior written notice, to enter upon and examine the condition of the Premises.

Representation

2. The Applicant, Mr Ian Whitehead-Ross, retains Messrs Douglas Jones Mercer Solicitors to act for him and at the hearing he was represented by Ms Catherine Collins of counsel.

3. The Respondent, Ms Mandy Bowen, appeared in person; she represented herself at the hearing but was assisted by a Mr Kevin Morgan.

The Statutory Provisions

4. This is an application made under section 168(4) of the Commonhold and Leasehold Reform Act 2002 ("the Act"). The application (hereafter "the Application") was dated 25 August 2016 and was received by the Tribunal on 31 August 2016.

5. Section 168(4) of the Act provides as follows:

"A landlord under a long lease of a dwelling may make an application to a leasehold valuation tribunal for a determination that a breach of a covenant or condition in the lease has occurred".

6. A determination under section 168(4) is sought because section 168(1) of the Act provides that a landlord under a long lease of a dwelling may not serve a notice under section 146(1) of the Law of Property Act 1925 in respect of a breach by a tenant of a covenant or condition in a lease unless subsection 168(2) is satisfied. Subsection 168(2) is only satisfied if: (a) it has been finally determined on an application under subsection 168(4) that a breach has occurred, or (b) the tenant has admitted the breach, or (c) a court in any proceedings, or an arbital tribunal in proceedings pursuant to a post-dispute arbitration agreement, has finally determined that a breach has occurred. As neither 168(2)(b) or (c) were satisfied here, the landlord applicant accordingly seeks to satisfy section 168(2)(a) by obtaining a determination under section 168(4).

7. A notice under section 146 of the Law of Property Act 1925 is itself a precondition to the enforceability of a right of re-entry or forfeiture under any

proviso or stipulation in a lease for a breach of any covenant or condition in that lease other than for non-payment of rent (see section 146(11)). Section 146 generally stipulates the requirements of a notice. The jurisdiction of this Tribunal is confined to the narrow issue of whether or not a breach of a covenant or condition in the material lease has occurred. The question of whether any future section 146 notice is valid, the question of whether the landlord is entitled to forfeit the lease and the question of whether the tenant would be entitled to relief from forfeiture are not before us. This Tribunal has no jurisdiction to decide on forfeiture issues other than whether there has been a breach or breaches of the lease.

The Application and the Lease

8. By a Lease ("the Lease") dated 3 December 1990 between Brian Richards and Kenneth Graham Williams (both as landlord) and Kenneth George Bowden and Mandy Bowden (as lessees) the premises known as number 137A New Road, Skewen, Swansea, SA10 6HL ("the Premises") were demised for a term of 99 years from the date of the Lease. The Lessees paid a premium of £27,000.

9. Bowden was the Respondent's married name and Mr Kenneth Bowden was formerly her husband. Following their separation, the Respondent became the sole registered proprietor of the Premises on 16 March 1999. The leasehold interest in the premises is registered at HM Land Registry under title number WA575969.

10. The recitals to the Lease record that the freehold property known as number 137 New Road had been converted into a first floor flat and a ground floor shop and store (the latter being land retained by the Lessors). Mr Brian Richards was the Applicant's immediate predecessor in title. The Applicant became the owner of the freehold reversion and the ground floor premises (collectively "the Property") on 24 June 2014. The freehold of the Property is registered at HM Land Registry under title number CYM620903.

11. The Lease qualifies as a long lease for the purpose of section 168 of the Act (this is the combined effect of section 76 and section 169 of the Act). The Premises, being a private residence, are also a dwelling as defined in the Act.

12. The parcels clause is at Clause 1 of the Lease and is in the following terms:

"1. The Lessor hereby demises unto the Lessee ALL THAT the upper flat coloured red and ground floor entrance hall coloured green together with the right to use the flat roof coloured blue at the rear of the retained property

(hereafter together called the Upper Flat) now known as 137a New Road Skewen...".

13. The Application alleges that there have been breaches of the tenant's covenants contained in Clause 3 of the Lease, the material parts of which provide as follows:

"3. The Lessee hereby covenants with the Lessor as follows:-

(1) To pay the reserved rent on the days and the manner aforesaid.
(2) To pay all existing and future rates taxes and assessments and outgoings whether parliamentary local or otherwise now or hereafter imposed or charged upon the Upper Flat and any part thereof or on the Lessor or the Lessee in respect thereof PROVIDED ALWAYS that where any such outgoings are charges upon the retained property and the Upper Flat without apportionment the Lessee shall be liable to pay 50% only of such outgoings and the Lessor shall keep the Lessee indemnified against the payment of the remaining 50% and further to contribute towards the insurance premiums payable under Clause 4(2) hereof a sum equal to one half of such premiums such contribution to be paid on demand.
(3) To keep the interior of the Upper Flat and every part thereof in tenantable repair throughout the term hereby granted and it is hereby declared and agreed there is included in this covenant as repairable by the Lessee (including replacement whenever such shall be necessary) the ceiling and floors of [and] in the Upper Flat and the joists or beams on which the said floors are laid there are also included in this covenant the exterior walls and the roof and windows of the Upper Flat.
(4) Not to do anything which would diminish the protection of the retained property to cause damage to the flat roof of the retained property and in the event of any damage being caused thereto to make good the same forthwith.
(5) …
(6) To paint regularly all paintwork in the case of the exterior at least once in every three years and to keep in repair and replace when necessary all cisterns pipes wires ducts radiators and other things installed for the purpose of supplying water (cold or hot) gas electricity central heating or for the purpose of draining away water soil or for allowing the escape of steam or other deleterious matter from the Upper Flat in so far as such things are installed and used only for the purposes of the Upper Flat and for the purposes of such repairs the Lessee and his workmen shall have access to such pipes wires ducts and other things where they are in or upon or under the retained property upon proper notice being given to the occupier of the retained property the Lessee making good without delay any damage done to the retained property in carrying out such repairs.

(7) To permit the Lessor and his duly authorised agents with or without workmen and others upon giving previous written notice in writing at reasonable times to enter upon and examine the condition of the Upper Flat and thereupon the Lessor may serve upon the Lessee notice in writing specifying any repairs necessary to be done and require the Lessee forthwith to execute the same and if the Lessee shall not within one month after the service of such notice proceed diligently with the execution of such repairs then to permit the Lessor to enter upon the Upper Flat and execute such repairs and the cost thereof shall be a debt due to the Lessor from the Lessee and be forthwith recoverable by action…"

The Alleged Breaches

14. The Application particularises seven alleged breaches of Clause 3 of the Lease listed (a) though to (g) (although the alleged breach at (g) is a repeated breach of that particularised at (f)). The allegations are, broadly, as follows:

(a) Clause 3(1): It was alleged that the Respondent had failed to pay the ground rent. At the hearing, however, the Applicant expressly withdrew that limb of the Application on the basis that it fell outside the jurisdiction of this Tribunal on an application under section 168. On that basis, we accordingly make no findings or determination in respect of that alleged breach of the Lease.

(b) Clause 3(2): It is alleged that the Respondent has repeatedly failed to pay demands for the insurance contributions prescribed by Clause 3(2). The Respondent admits that she has paid nothing towards the insurance. The thrust of her defence to this claim is her assertion that the insurance premiums to which she was being asked to contribute were not confined to matters for which she should be making a contribution.

(c) Clauses 3(3) and 3(4): It is common ground that the flat roof above the retained property is, or was, used as a roof terrace by the Respondent and is now in a state of disrepair. In this decision we shall refer to that roof neutrally as "the Roof Terrace". The Applicant asserts that the Roof Terrace was demised as part of the Premises and so falls within the repair covenant in Clause 3(3). In the alternative, it is alleged that the Respondent has caused the Roof Terrace to be in its current condition and has failed to remedy that condition in breach of Clause 3(4). There is a significant dispute between the parties as to the proper construction of the leasehold covenants and as to who was responsible for works to replace the Roof Terrace that undoubtedly were undertaken by the Applicant's predecessor in title, Mr. Richards, after he sold the freehold to the Applicant. It is also asserted that the exterior of the Premises generally is in disrepair.

(d) Clause 3(6): The Applicant asserts that the Respondent has failed to paint the exterior of the Premises within the last 3 years.
(e) Clause 3(6): It is also alleged that the Respondent has failed to repair, and replace when necessary, the pipes and ducts installed for the draining away of water and soil etc. – the Application erroneously refers to Clause 3(7) in relation to this complaint but nothing turns on that small error since it was plain that Clause 3(6) was in fact being relied on.
(f) Clause 3(7): The Applicant complains that the Respondent has failed to accord him access to inspect the Premises.

The Premises

Location and character

15. This Tribunal inspected the Property, including the Premises and the retained land of the Applicant, on 15 December 2016. We were admitted to the Premises by the Respondent who also consented to the Applicant and his legal representatives inspecting the Premises.

16. As indicated in the parcels clause of the Lease, the Premises comprise a first floor self-contained flat and the Property is a two storey mid-terraced building set within the community of Skewen. Skewen is located on the outskirts of the town of Neath and is approximately 6½ miles from the city of Swansea. The Property faces approximately north-west and fronts onto the public highway known as New Road which is a busy main road. New Road itself incorporates a range of residential flats and houses together with a number of community buildings, shops and offices.

17. The retained ground floor of the Applicant's freehold property (known as 137 New Road) is a self-contained office unit used for educational training purposes; it comprises an office reception, rear office, rear porch, staff kitchen area with adjacent w.c. and a rear storeroom. To the rear, beyond the store, is an enclosed garden area utilised only by, and with, the Applicant's ground floor premises.

18. The Property appears to be constructed of a mixture of dressed stone and rendered brick or block construction under a slate main roof. The single storey rear storeroom is an extension of the main ground floor premises. The Roof Terrace is located above that store and has a flat mineral felt roof. The Premises have single glazed windows throughout and a pair of double sealed French doors which open out onto the Roof Terrace at the rear. We were told that there have always been doors out on to the terrace although the existing French doors appear to date from around the year 2000. The Roof Terrace itself is enclosed by walls.

Accommodation (137A New Road)

19. The Premises have a self-contained ground floor access door adjacent to the office window display of the retained premises where they front on to New Road. That door opens into an enclosed entrance hall with a private staircase that leads up to the first floor accommodation which is accessed via a landing area.

20. The Premises' accommodation incudes a rear sitting room which has an attractive fireplace, coved ceiling, radiator and the aforementioned French doors which provide access to the Roof Terrace with its six course block boundary wall on all sides. There is also a kitchen/breakfast room with a radiator and a wall mounted central heating boiler and a bathroom with a pedestal hand basin, low flush w.c., panelled bath and radiator. Both rooms each have a single glazed window. There are three further rooms. Namely the principal bedroom and a second bedroom both of which each have one radiator and one single glazed window. From the second bedroom there is access into a further room with no separate access, currently utilised as a third bedroom. That too has a radiator and sash window; it looks out on to New Road. There is no external accommodation or amenity area other than the use of the Roof Terrace.

21. All main services appear to be connected to the Property and the Premises benefit from a gas fired central heating system.

The Condition of the Premises on Inspection

22. In general, the internal accommodation of the Premises was in reasonable decorative order although the Tribunal noted a number of defects which included: missing skirting board to the south-eastern wall of the kitchen and a small section of defective ceiling area where an internal dividing wall had been shortened; the wall mounted boiler flue was faulty; there was slight condensation dampness noted in the north-eastern corner of the rear sitting room; there were several cracks in the porcelain hand basin of the bathroom. Also, some of the windows did not close easily.

23. More relevant to the present application was the condition of the exterior. The Tribunal noted significant defects in the slate roof and this was particularly evident to the rear where several slates had slipped from the roof covering.

24. The general guttering and downpipes are in poor condition with several sections either corroding or, indeed, missing whilst the external rendering to the north-eastern and south-eastern elevations at first floor level was marked

or damaged in a manner that served to highlight the defective areas. This was particularly apparent around the French door lintel at first floor level.

25. The Tribunal noted that there was an obvious and serious problem with all types of drainage from this property including surface water draining via the Roof Terrace, the aforementioned defective guttering and the downpipes, whilst waste water from the first floor bathroom and kitchen drained to a blocked ground floor gulley and foul water from the Premises drains through an external soil pipe which is cracked and corroded with a hole at its base.

26. The felt roof covering to the Roof Terrace is ineffective and the Tribunal identified significant evidence of rainwater penetration into the rear ground floor storeroom of the retained part of the Property. There was also evidence of damp penetration in parts of the wood panelled section of the staff kitchen area and dampness was noted in the lower levels of sections of the walls of the rear office on the ground floor.

The evidence and background generally

27. In support of his application the Applicant filed a witness statement dated 20 September 2016 to which were exhibited a number of documents including relevant correspondence and a report from a Mr Malcolm Cronin, a chartered building surveyor, which was dated 11 May 2016; that report was expressed to document his opinion of the condition of the Premises following an inspection on 3 May 2016. At the hearing we also heard oral evidence from the Applicant personally.

28. The Respondent relied upon an unsigned letter dated 25 October 2016 the contents of which she confirmed to be true to the best of her knowledge; she augmented that evidence at the hearing and in the course of submissions.

29. The chronology of events as it emerged from the foregoing evidence is as follows.

30. The Respondent has lived in the Premises since she purchased them with her then husband 26 years ago. In 1990 the freehold owners were the aforementioned Mr Gareth Williams and Mr Brian Richards. We were not told anything about Mr Williams and, for all practical purposes, it appears that Mr Richards alone acted as the landlord. We were told, and accept, that the Respondent's husband dealt with M. Richards at the time of the purchase. The Respondent volunteered that she has known Mr Richards' "since childhood" but denied that they were close friends. She described Mr Richards as something of a "jack of all trades". Initially, he ran his business known as "the Wood Shop" from the retained premises and during

that period the Respondent would see him on an almost daily basis. The Wood Shop is a business specialising in joinery.

31. As explained above, in around 1998 the Respondent separated from her husband and in 1999 she became the sole owner of the Premises. She has remained in occupation of the Premises throughout that time.

32. Mr Richards moved the Wood Shop to alternative premises in around 2001 and he currently operates out of number 130 New Road which is just a short distance from the Property.

33. From 2001, until his sale of the Property to the Applicant on 24 June 2014, Mr Richards let the ground floor to a succession of businesses. It was the Applicant's evidence that he took a 12 month lease of the ground floor of the Property from Mr Richards in May 2013 and has been in occupation for the succeeding three and a half years.

34. It would appear that Mr Richards and the Respondent co-existed without friction. Her evidence, which was unchallenged, was that Mr Richards did not demand the ground rent nor any contribution to the insurance of the Property. To use the Respondent's words, the Lease "never came out of the envelope" and no demands were made of the Respondent generally in relation to the leasehold covenants.

35. The Respondent's recollection was that the Roof Terrace had been felted in 1990 and then re-felted by Mr Richards in around 2000 which would, of course, be consistent with Mr Richards' decision to let out the ground floor of the Property shortly thereafter. Her evidence was that there were no further works to the Roof Terrace, and there was no issue with the condition of that roof, in the succeeding years up to 2013. That evidence is, to some extent, consistent with the Applicant's evidence that he initially complained that the roof was leaking in late 2013.

36. For her part, the Respondent states that from 1990 she and her family used the Roof Terrace "on a daily basis" and that it was "in effect our patio and has been used as such". She asserts that her use of the Roof Terrace in this way had been "without a single problem" until the Applicant raised issues in 2013 although elsewhere in correspondence (set out in detail later in this decision) the Respondent has said that Mr. Richards informed her of leaks in 2012.

37. The Applicant claims that the Respondent's historic use of the Roof Terrace would have caused damage to the roof and that the resulting water ingress therefore places her in breach of the terms of the Lease. In particular, the Applicant pointed to the expert's opinion that use of the Roof Terrace by the

Respondent was a likely cause of damage. The difficulty with this assertion in relation to the initial leaks identified in 2012 or 2013 is that, by then, the felt covering of the Roof Terrace had not been renewed for around 12 or 13 years and there is no evidence that issues with the roof had been raised before. As the expert observed in his report, a good quality, well specified and well laid three-ply felt roof covering has an expected life expectancy of 10 to 15 years. The expert does state that water ingress has been occurring for "a good number of years" but does not say more precisely when this was likely to have commenced and there is no evidence of complaints of leaks before 2012. That is the earliest date that the Respondent gives in a letter dated 11 August 2015. In 2012, however, the roof covering might have been expected to fail through normal wear over the passage of time. Moreover, it was the Applicant's evidence that in the latter half of 2013, leaks were confined to "two or three places".

38. In terms of the chronology, the Applicant has disclosed (since the hearing) a report that he obtained in relation to the condition of the Property in December 2013. That report was prepared by a Mr Simon Davies MRICS who was a chartered building surveyor with Messrs Astleys. The report is dated 10 December 2013 and was prepared following an inspection on 4 December 2013. It states that it was sought: *"…for the purpose of advising…on the condition of the exterior of the property and the ground floor thereto, including advice on any further investigation or repair works necessary"*. In preparing his report, Mr Davies did not inspect the interior of the Premises or the surface of the Roof Terrace.

39. The report of Mr Davies identifies a great many problems with the Property and these are particularised in tabular form in an accompanying Record of Condition at Appendix A of that report. At paragraph 3.11 of the report, problems with drainage and the fittings are identified. In relation to the Roof Terrace, Mr Davies notes that it is of timber construction and at paragraph 3.3.6 adds that: *"…The roof is clearly allowing problems of water ingress and whilst we have not been able to inspect the roof covering, it is thought likely that this will be at or near the end of its useful life. It is likely that the roof covering is in need of at least immediate repair if not immediate replacement…"*. The report then goes on to express misgivings about the parapet walls around the Roof Terrace and laments the probable absence of a damp proof course. Although Mr Davies states that he had not been able to inspect timbers of the first floor or roof structures, at paragraph 3.5.3 he does state that: *"We have not identified any problems of timber decay…to visible timbers within the ground floor"*.

40. At paragraph 3.11.12 the report adds: *"…We have not inspected the condition of the flat roof or the drainage gully thereto, but there appears to be a problem*

to the roof, indicated by the damp visible to the ceilings beneath". At paragraph 7.1 of the Record of Condition Mr Davies again documents what he describes as clear "*evidence of water ingress causing damp and damage in lobby and storage room below".* His accompanying recommendation is to *"Inspect and repair or more likely renew roof covering. In conjunction inspect condition of roof structure and repair or replace as necessary."*

41. It is noteworthy that the December inspection did not identify serious structural problems with the supporting timbers of the Roof Terrace resulting from damp ingress. Although Mr Davies did not have access to the surface of the Roof Terrace he did have access to the store beneath. The report does, however, corroborate the fact that damp ingress was a problem at that time.

42. The Applicant complained to Mr Richards about the leak into the storeroom beneath the Roof Terrace in late 2013 at which point he was still a tenant of Mr. Richards. It was common ground that Mr Richards stated that he would undertake some remedial work and that he did thereafter undertake some work which included fixing chipboard to the underside of the joists in the storeroom (being those beneath the Roof Terrace) and placing wooden decking on the surface of the Roof Terrace. It is common ground that those remedial works were undertaken in early 2014 and were inadequate to address the underlying problem of water ingress from the Roof Terrace.

43. When writing to the Applicant's solicitors on 11 August 2015 the Respondent said of these works that Mr Richards had *"had the roof re-felted prior to your client purchasing the property, he also placed suspended decking on top"*. If the Roof Terrace was given a renewed felt covering in early 2014, however, this did not cure the problem but nor could that be the Respondent's fault given that Mr Richards was the landlord and had also provided wooden decking which was presumably intended to protect the felt beneath. Moreover, the initial 2014 works by Mr Richards appear to have been undertaken at the Applicant's request when he too was a tenant.

44. Amongst the late disclosure provided by the Applicant are a number of letters from early 2014 which predate, but relate to, the Applicant's purchase of the freehold reversion. The Applicant instructed Howells solicitors and Mr Richards instructed Hutchinson Thomas in respect of the transaction.

45. On 12 February 2014 Howells wrote to Hutchinson Thomas expressing the Applicant's disappointment that Mr Richards had not returned to him *"with regard to the works that need to be carried out at [the Property]"*. That was met with a reply stating that *"the property is sold to your client "as seen""*. In a written submission for the Applicant from Ms Collins, dated 16 January 2017, she asserts that this correspondence confirms that Mr Richards did not intend

to do any work to the Property to progress the sale. Whilst this is evidently true insofar as it reflects Mr Richards' attitude in February 2014 it rather ignores that fact that he did carry out some remedial works in early 2014.

46. The Applicant did, of course, proceed to complete the purchase of the Property in June 2014 and after acquiring the freehold reversion he wrote to Mr Richards on 15 July 2014. That letter reads:

> *"Dear Brian,*
>
> *I have advised Mandy at 137a New Road that I am looking to convert the back storage area of my recently purchase[d] ground floor premises immediately under her roof garden into an additional classroom. However, I am unable to get the builders in to do this until her leaking garden roof is rectified.*
>
> *When Mandy told me the Workshop carried out the work I suggested she get them back to redo it given she claimed the work was completed in the last couple of years. As you will be aware the problem has got worse as the plasterboard ceiling panels became waterlogged and fell in over Easter. All the Woodshop did was fix new plasterboard to the internal storeroom ceiling to cover the rotten beams, which evidently will not stop the water coming in. If this is not resolved, her entire roof garden risks caving in if these rotten beams give way.*
>
> *Whilst I acknowledge it is Mandy's responsibility for rectifying this problem, I advised her I would also write to you since the Woodshop carried out the work; it presumably would have some guarantee and should not be leaking after such a short period of life…"*

47. The letter then concludes: *"Please can you kindly confirm what action the Woodshop is taking to rectify this for Mandy?"*. If Mr Richards replied to that letter, his response has not been disclosed to this Tribunal.

48. The Applicant wrote to the Respondent in similar terms on 18 July 2014:

> *"…I am looking to convert the back storage area immediately under your roof garden into an additional classroom. However, I am unable to get the builders in [to] do this until your leaking garden roof is rectified.*
>
> *When you told me the Woodshop carried out the work I suggested you get them back to redo it given the work was completed in the last*

couple of years. As you will be aware the problem has got worse as the plasterboard ceiling panels became waterlogged and fell in over Easter. All the Woodshop did was fix new plasterboard to the internal storeroom ceiling to cover the rotten beams, which evidently will not stop water coming in. If this is not resolved, your entire roof garden risks caving in if these rotten beams give way.

Whilst you are responsible for rectifying this problem, I am sympathetic the workmanship from the Woodshop is not to an acceptable standard. I want to support you in chasing the Woodshop to get this poor workmanship rectified…"

49. The letter concludes by referring to an email to Mr Richards sent on the same day but we were not provided with a copy of that email.

50. Whilst the Applicant seeks to blame the Respondent for the inadequate repairs undertaken by Mr Richards there is no evidence that the works undertaken in early 2014, or before, were undertaken by Mr Richards on the Respondent's behalf. On the contrary, as he was the landlord for both parties it seems far more likely, and we find, that he undertook that work as landlord rather than as agent for the Respondent.

51. The Applicant's letter of 18 July 2014 also included a demand for ground rent and a request that the Respondent pay one third of the £161.97 insurance policy premium for the Property.

52. In his statement, the Applicant relates that he had a conversation with the Respondent on 19 July 2014 during which he was told that the Wood Shop had carried out work to the Roof Terrace. It is clear from the antecedent correspondence, however, that the Applicant knew that Mr Richards had undertaken work prior to any such discussion with the Respondent and that the Applicant had been informed personally by M. Richards that he would undertake remedial work.

53. On 7 September 2014 the Applicant again wrote to the Respondent. That letter includes the following passage:

"I spoke to Brian [Richards] in the Workshop about the problems with your roof garden at the end of July; he is happy to re-do it for you at no charge. All you need to do is contact him to arrange for the work to be done. Please can you contact him to arrange for this work to be done. Please can you contact him so it can be completed this month before the weather gets worse and the rain starts?"

54. What is particularly significant about this is that there was, in our view, what may be somewhat inelegantly described as a blurring of the position or responsibilities of the various parties. As we have found, when Mr Richards undertook unsatisfactory work before selling the freehold he very probably did so as landlord and not as agent for the Respondent. That work was unsatisfactory and having sold the freehold of the Property to the Applicant (or, perhaps more accurately, *despite* having sold the freehold) he was prevailed upon to "re-do" the work at no charge following a conversation with the new landlord (i.e. the Applicant) who asked the Respondent (his tenant) to contact his predecessor in title.

55. The Applicant's letter of 7 September 2014 is also relevant to other issues as he goes on to complain that the "*down pipe for sewage*" was getting worse with corrosion. He also complained that the ground floor room beneath the Premises' bathroom had water marks on the ceiling indicative of water ingress form a leak above.

56. Almost six months elapsed before the Applicant wrote to the Respondent again on 23 February 2015. In that letter he once more raised the issue of the foul water down pipe and pointed out that it had still not been replaced. Evidently no further works had been undertaken to the Roof Terrace which was a source of frustration to the Applicant who had secured a potential European Regional Development Fund business grant to subsidise conversion of the storeroom. That could not proceed until the roof was fixed and he accordingly demanded that the Roof Terrace be replaced by 13 March 2015 in order to facilitate the drawing down of the grant.

57. The letter of 23 February 2015 also indicates that the Applicant had provided the Respondent with his bank details on 14 October 2014 in order to pay one third (rather than the one half prescribed) of the insurance premiums but no payment had been received.

58. The most significant development in relation to the Roof Terrace occurred in March and April 2015. At that point, Mr Richards returned and his contractors stripped off the Roof Terrace leaving the joists beneath exposed. We were shown photographs of the works in progress at that time with the exposed joists and the storeroom beneath. It was noteworthy that the condition of the internal walls of the storeroom visible in those photographs looked fundamentally sound and clean implying that water ingress had caused comparatively little damage or staining to the walls of the storeroom prior to the April 2015 repair (at least relative to that post-dating those works).

59. Various emails and letters were exhibited to the Applicant's statement explaining something of the background to these works but we would observe

that that correspondence was not complete. That notwithstanding, one of the complaints of the Applicant has been that the Respondent has permitted a dog to defecate on the Roof Terrace with the result that canine faecal matter is, the Applicant believes, running into the storeroom beneath the Roof Terrace within the general water ingress.

60. On 10 March 2015 the Applicant made a complaint to the local authority concerning his issues with the Roof Terrace. That complaint resulted in the involvement of a Mr Simon Evans, the Public Protection Officer with the Environmental Health section at Neath Port Talbot CBC. A letter from Mr Evans to the Applicant (dated 14 May 2015) documents his involvement and records that he visited the Property on 12 March 2015 and observed that the Roof Terrace was "letting in water in multiple locations". He expressed the view that there was a large quantity of dog faeces on the wooden decking of the Roof Terrace which was contaminating the water that leaked through to the storeroom beneath. Mr Evans wrote to the Respondent on 19 March 2015 and met with her on 26 March 2015 by which time the faeces had been cleared. The May 2015 letter adds that the Respondent *"…explained that Mr Richards, the previous owner of the building, had agreed to repair the flat roof within the next two weeks"*.

61. On 24 March 2015 Mr Evans had also emailed the Applicant to inform him that Ms Bowen had been required to remove the faeces and to inform the council as to how she was going to repair the roof although Mr Evans did observe that "a complicating factor" was the question of who, in fact, was responsible for the roof.

62. A further relevant email from Mr Evans to the Respondent followed on 27 March 2015:

> *"…I am glad to report that all dog faeces has been removed from the roof and Ms Bowen is to make arrangements to unblock the roof drainage that's overflowing into the front part of your storeroom.*
>
> *With regards to the roof itself, Ms Bowen fully acknowledges that the roof is leaking and that she has been nagging Mr Richards at the Wood Shop to repair it. She took my rather threatening letter to show him and he assured her it will be done next week – I understand it's a full roof replacement rather than a patch repair. I checked with your staff and someone accessed the rear through the shop to climb up and look at the roof two days before. I would recommend that you speak to Mr Richards on this matter yourself, as practically the only way the old roof can be removed and new materials brought in is through your property…"*

63. The Applicant emailed Mr Evans on 31 March 2015 and in that letter he relates that builders "*upon instruction of Ms Bowen*" had stripped off the existing roof exposing rotten beams. That email continues:

> *"…Brian Richards, who owns the Wood Shop, mentioned that it is going to cost Ms Bowen £500 to get in a specialist glass roofer…They have just finished for the day and will need to know how Ms Bowen wishes to proceed…"*

64. The Applicant then adds in his email that he does not wish to get involved or interfere in any arrangements that have been made.

65. The works were completed on 7 April 2015 and this is documented in a further email from the Applicant to Mr Evans in these terms:

> *"…The builders came back today and have put on a roof with a felt lining, which is not a full replacement. Brian Richards advised me that Ms Bowen is not willing to pay £500 to have the roof fibre glassed (he offered to cover £400 out of the £900 cost), so he believes the roof lining will probably only last for a couple of months once the dog starts running around on the felt and garden furniture is placed on it. It appears that what they have done is put an inadequate fix in place since Ms Bowen is not willing to pay to have it done properly. The builder said it is more likely to start leaking in a couple of months once the felt is worn out…"*

66. In a subsequent email from Mr Evans, dated 23 April 2015, he explained to the Applicant that *"now that the roof is watertight the Environmental Health section no longer have an enforcement remit…"*.

67. Matters did not, however, rest there. As Mr Evans' letter of 14 May 2015 explains, on 1 May 2015 the Applicant again complained to the local authority. According to that letter, the Applicant had apparently removed the damp affected ceiling beneath the Roof Terrace to reveal that rotted timber joists remained and there were new leaks. This prompted a further inspection by Mr Evans on 8 May 2015 which confirmed, among other things, that the timber roof joists were affected by rot and that there had been "crude attempts" at supporting those joists. Mr Evans' letter of May 2015 also records that when he attended on 8 May 2015 there was present on the Roof Terrace *"patio furniture and 20+ lumps of dog faeces"*. Ultimately, the condition of the roof resulted in the service of an Abatement Notice on the Applicant (as owner) on 23 October 2015 requiring that he take steps to

prevent water ingress. We understand that an Abatement Notice was also served on the Respondent.

68. In the intervening months between May and October 2015 the Applicant had instructed his present solicitors who had sent a detailed letter to the Respondent on 31 July 2015 prompting a reply dated 11 August 2015. That reply stated that the ground rent had never been paid. In relation to the insurance premiums it also stated that the Respondent had requested sight of the material insurance policies "*before handing over any money*" but that these had not been provided. That letter has already been partially summarised above but for completeness it stated as follows:

> *"With regard to the issue of the flat roof, I would like to point out in no uncertain terms that I have never instructed or employed Mr Richards/Woodshop to carry out any work to the flat roof or any other part of the property, paid or unpaid. Mr Richards informed me sometime in 2012 that the roof was leaking and he wished to carry out repairs, which he did, this repair failed to seal the leaks and he had the roof re-felted prior to your client purchasing the property, he also placed suspended decking on top, so there is only poor workmanship that has caused any further leaks, your client had informed me that the roof was leaking and it was Mr Richards who carried out the previous works of his own volition[.] I informed him of the problem.*
>
> *The saga of this roof has continued for nearly 4 years and at present the sub-standard repair that was carried out in April of this year has not only failed to cure the leak, but has left the roof unusable because it was obviously repaired by inexperienced people using sub-standard materials.*
>
> *I would like to point out that prior to 2012 I had used the roof terrace on a daily basis for 22 years without a problem…"* [emphasis added]

69. Further correspondence from the Applicant's solicitors followed which it is unnecessary to document in full. The salient points are as follows. On 10 September 2015 the Applicant's solicitors wrote asserting that he had previously provided evidence that the Property was insured in 2014/2015 and they enclosed a copy of the policy. In a further letter dated 24 March 2016 the Applicant's solicitors set out the terms of Clause 3(7) of the Lease and sought access "*within the next 7 days*".

70. On 3 May 2016 the Applicant's expert inspected the Premises. His report is signed and dated 11 May 2016. The Applicant's statement, at paragraph 20, states that he attended at the Premises with Mr Cronin on 28 July 2016 and that his solicitors "*had pre-warned Ms Bowen that we would be attending at*

the stated time and date within their letter of 20 July 2016. Despite allowing Mr Cronin into the Upper Flat, she refused to allow me access". As Mr Cronin's report makes plain that he had no access to the interior of the Premises in May 2016, the July attendance was presumably to allow him to finalise his report although no post May 2016 amended report was in the bundle.

71. There was a dispute of fact between the parties as to precisely what was said and by whom when the Applicant and the expert attended and sought access to the Premises although it is common ground that the expert was obviously allowed in. A letter dated 20 July 2016 does indeed indicate that the Applicant and a surveyor would attend on 28 July 2016 "*for the purposes of carrying out an inspection"* at 10 a.m. in accordance with Clause 3(7).

72. The Applicant's evidence in his statement, and repeated at the hearing, was that he was positively denied access to carry out the inspection. In her statement of 25 October 2016 the Respondent stated the following in reply:

> *"I would like to add that Mr Whitehead Ross and his surveyor [were] not refused entry to 137A New Road. [When they turned up it was suggested to them that because Mr Whitehead Ross['s] solicitors had stated that any contact was to be kept only via them that Mr Whitehead Ross should not enter the property at that time so [as] not to compromise his solicitors['] instructions which he agreed]. Mr Cronin…was invited in to carry out his duties."*

73. On the question of whether the Respondent denied the Applicant access on 28 July 2016 we unequivocally accept and prefer the evidence of the Applicant. We accept that the Respondent may very well have suggested that access was inappropriate now that solicitors were involved but in cross-examination she accepted that she had, practically, refused to allow the Applicant access. In the face of assertions by the Respondent that he should not enter, the Applicant could not be expected to insist on personal access. Having regard to his clear account, however, we accept his evidence that he was refused access. It was understandable that the Respondent might object to what she may have perceived as an invasion of her privacy by the Applicant but she did refuse access despite a prior written request.

74. In respect of the balance of the parties' evidence, despite initially giving evidence that she had not used the Roof Terrace at all after the April 2015 repair, the Respondent subsequently accepted, and we find, that she allowed her dog to use the Roof Terrace after that work. More particularly, we find that the Respondent's dog was allowed access to the terrace in April and May 2015 and that is corroborated by Mr Evans' letter documenting his inspection

on 8 May 2015. There is, however, no satisfactory evidence that that limited use of the Roof Terrace has caused material additional damage to the fabric of the roof. Indeed, on balance we reject the suggestion that use of the roof terrace since April 2015 has caused any material additional damage. Any use must have been minimal given that the underlying structural damage to the joists presents an obvious risk of collapse if the terrace had been the subject of heavy use after the decking was removed in the April 2015 repair. Further, the Applicant was complaining to the local authority about the repair and leaks within less than a month of the repair which corroborates the likelihood that the inadequacy of the repair allows ongoing water ingress rather than damage resulting from recent use of the Roof Terrace.

75. In relation to the various breaches, the other significant points or concessions that emerged from the Respondent's evidence included her acceptance that she has not contributed to the insurance premiums despite having previously seen the policy documents. The Applicant also gave evidence that the exterior of the Premises has not been painted during his three and a half year occupation of the Property and the Respondent accepted that this was the case.

The Expert Evidence

76. Reference has already been made above to the report of Mr Cronin. His report is expressed to include detailed findings at paragraph 4 (more particularly paragraphs 4.1.1 to 4.1.22). Stated very broadly they included the following:

    (I) Mr Cronin observed that the Roof Terrace had been renewed with what he regarded as a lightweight bitumen coated felt although his inspection "*did not reveal any surface damage such as holes, rips or cuts*" although the covering did have numerous undulations. The roof covering was noted to extend up the surrounding walls and to be "*dressed over*" with lead flashings which were described as "*somewhat dated [but] with no sign of damage or breaks*".

    (II) The rainwater gutters to the pitched roof over the rear of the Premises were noted to be in a "*very poor and dated condition*". Those gutters were supposed to discharge into rainwater downpipes to the rear of the Premises but one of the downpipes was not connected to the gutter with the result that the rainwater ran down the external walls and onto the Roof Terrace. More generally, the rainwater downpipes were all stated to be in a poor condition. Certain of the downpipes presently do not reach the ground or a gully pot but discharge into the air with the result that water runs down the masonry of the ground floor of the Property causing staining. Another downpipe located in the vicinity of the only soil pipe is supposed to discharge into a plastic hopper but the

pipe was severely corroded and the end falls short of the hopper so that water discharges onto the ground and render.

(III) The soil pipe running from the Premises to the ground was noted to be in a very poor condition with a hole close to ground level which appeared to be leeching effluent. There was also a vent to that pipe.

(IV) Mr Cronin noted damage and water staining to the ground floor storeroom and rear kitchen walls among other areas.

77. At paragraph 5 of his report Mr Cronin reached a number of conclusions including the following:

(i) The Roof Terrace covering "*appeared to be intact*" and it was not possible to determine the exact cause of the leaks to the roof although "*the most likely cause of this currently would be poor workmanship and detailing or use of inadequate materials, particularly at the flat roof rear wall, and parapet wall abutments…*".

(ii) Having noted the presence of two plastic sun loungers, a canvas and metal chair, a box of materials and a pet bowl Mr Cronin expressed the view that "*if the previous roof covering was being utilised in the same manner, there is a strong likelihood that this type of damage would have a serious impact on the wear and tear of the covering, eventually leading to leakage*". However, as noted above, Mr Cronin goes on to indicate that a good felt roof should have a life expectancy of between 10 and 15 years.

(iii) The joists were said to suffering with wet rot and the onset of dry rot with the ends said to be in a very poor and rotten condition. This prompted Mr Cronin to conclude that the damage was obviously the cause of water ingress over "*a good number of years*".

(iv) The rainwater gutters and downpipes and the soil and vent pipe were considered to be in a very poor condition which was said to be contributing to water induced damage to the Property although this was partially in conjunction with crudely formed drainage holes in the parapet walls of the Roof Terrace.

Discussion and Determination

The Roof Terrace - Clauses 3(3) and 3(4)

78. The principal complaint of the Applicant concerns the condition of the Roof Terrace and it is necessary, therefore, to consider the Applicant's primary submission that the Respondent covenanted to keep the Roof Terrace in repair under Clause 3(3) of the Lease.

79. The starting point is the leading modern authority on the construction of leasehold covenants. Namely, *Arnold v. Britton* [2015] 2 WLR 1593. As the

Supreme Court observed there, long residential leases are "*an exceptional species of contract*" causing their own interpretive problems. The applicable principles were summarised at paragraphs 15 to 23. At paragraph 23 the following was stated:

"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] AC 1101 at [14]. And it does so by focussing on the meaning of the relevant words…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."

80. Applying those principles, as a matter of construction we reject the Applicant's case that the fabric of Roof Terrace formed part of the demised premises so that the Clause 3(3) covenant to keep the Premises in tenantable repair extended to the roof of the storeroom and the terrace upon it.

81. In our view that contention is unsupportable. First, the parcels clause distinguishes between the demise of the flat and entrance hall on the one hand and the right to "*use the flat roof*" on the other. If the Roof Terrace itself was demised with the Premises the reference to "use of" of the terrace would be otiose. Secondly, the point is rendered still clearer by the language of Clause 3(4) which prohibits conduct which might cause "*damage to the flat roof of the retained property*". This makes it absolutely clear that the flat roof is excluded from the demise. Thirdly, Clause 3(4) itself would be pointless and redundant if Clause 3(3) extended to the Roof Terrace. If the tenant is obliged to keep the Roof Terrace in tenantable repair, an obligation to make good damage caused by the tenant such as that in Clause 3(4) is unnecessary.

82. In answer to these points the Respondent points out that whilst Clause 4(6) of the Lease includes a lessor's covenant to keep "*the retained property and every part thereof*" in tenantable repair that clause then adds *"…and it is hereby declared and agreed that there is included in this covenant as repairable by the Lessor…the ceiling and floors of and in the retained property and the joists or beams on which the said floors are laid. There is also included in this covenant the outer walls and the windows of the retained property".* The roof of the storeroom is not expressly mentioned and the Respondent contrasts this with Clause 3(3) which does provide that the tenant's covenant includes "*the roof of the Upper Flat*".

83. The answer to this point is threefold. First, Clause 4(6) expressly extends to "every part" of the retained premises. The identification of what is included is

accordingly not expressed to be exhaustive; it confirms what is included but that does not exclude parts of the retained premises not so listed. Indeed, one can well see how reference to a roof in Clause 4(6) might have been apt to confuse. Secondly, the contrast with Clause 3(3) is misplaced. As a matter of sensible construction, the Roof Terrace is not the roof of the Upper Flat; it is the roof of the storeroom. Thirdly, and most importantly, the authorities make plain that the construction of the Lease requires a consideration of the terms of the Lease in their entirety. When Clause 4(6) is read with the parcels clause and Clause 3(4) the suggestion that the Roof Terrace is not part of the retained property becomes untenable for the reasons already provided.

84. A necessary consequence of the foregoing is that the Respondent has only breached the Lease by reason of the condition of the Roof Terrace if she has failed to make good damage to the retained property caused by her doing something which diminished the protection of the retained property and caused damage to the Roof Terrace. This raises a number of factual questions. First, were the leaks into the Applicant's storeroom prior to the April 2015 repair caused by the Respondent's failure to make good damage that she had caused? Secondly, is the Respondent responsible for the condition of the Roof Terrace resulting from Mr Richards' repair? Thirdly, has leaking subsequent to that repair been caused by the Respondent's post April 2015 use?

85. We do not accept that the Applicant has surmounted the evidential burden upon him to establish that any part of the current condition of the Roof Terrace and the underlying structural timbers results from actions of the Respondent which have diminished the protection of the retained property or caused damage to the flat roof of the Roof Terrace. We make that finding for the following reasons.

86. In relation to historic use pre-dating the Applicant's ownership of Property we find as follows:

    (I) We accept the unchallenged evidence of Mr Cronin that the felt covering of the Roof Terrace, if of good quality, should last for about 10 to 15 years. The Respondent's evidence that the roof was re-felted in 2000 and that there were no complaints of any leaks before 2012 was not seriously challenged. That evidence indicates that such use as was made of the roof did not materially accelerate the degradation of the felt covering.

    (II) Set against the foregoing evidence is Mr Cronin's 2016 report and, in particular, his observation that damage to the timber joists appeared to result from water ingress which was not a recent problem and had probably been ongoing for a number of years. Allied to this was his opinion that use of the roof as a roof terrace with garden furniture and a dog suggested that the Respondent's use of the Roof Terrace was the "main cause" of the roof's failure. We do accept that the Respondent used the Roof Terrace as though a patio area and that it is entirely possible that such use would damage a felt covering over time.

Nonetheless, the fact remains that there is no evidence of any complaint of water ingress at any time before 2012 when the roof covering was reaching the end of its natural life. Mr Richards was not called to gainsay the Respondent's evidence in this regard. Moreover, there is no satisfactory evidence that damage to the roof timbers predated 2012. Mr Cronin simply refers to a "good number of years" but his report dates from 2016. The 2013 report is also inconclusive at best. By December 2013 the deterioration in the roof covering was causing damage to the storeroom but timber decay is not positively identified even at that point. On balance, therefore, we are unable to find that the deterioration in the condition of the underlying timber structure predated 2012 nor, therefore, the point in time at which the roof covering would have required renewal in any event.

(III) Between 2012 and 2014 Mr Richards, as landlord, was aware that the Roof Terrace was leaking. He did not allege that the cause of the leakage was the Respondent's use of the Roof Terrace. Rather, he undertook works to the roof which may have involved some re-felting and certainly involved the placing of decking on the Roof Terrace. It cannot, in our view, be sensibly alleged that Mr Richards' works before he sold the freehold reversion were undertaken as agent for the Respondent. It is inherently more probable, and we find, that he undertook those works in his capacity as the freehold owner of the Roof Terrace.

(IV) We find, and indeed it is apparently common ground, that the remedial works to the Roof Terrace undertaken by Mr Richards before he sold the Property to the Applicant were wholly inadequate. We find that the cause of any deterioration in the structural fabric and timbers of the roof after those works was not the Respondent's inappropriate use of the Roof Terrace in a way that would "diminish the protection" of the retained property, it was the underlying inadequacy of the works and attendant impropriety of laying timber decking on an inadequate foundation.

87. We also reject the Applicant's case that the Respondent is responsible for the condition of the roof resulting from Mr Richards' works of renewal in April 2015.

88. In correspondence the Applicant was characterising the need for those works as the Respondent's responsibility and we acknowledge that the Respondent was said to be "nagging" Mr Richards to do the work in March 2015, by which time he had ceased to be responsible for the Property having sold it. This rather begs the question of why Mr Richards would do the works if not instructed by the Respondent. In our view, however, it is telling that on 15 July 2014 the Applicant was proactively pressing Mr Richards' Woodshop to remedy the poor repair that had previously been undertaken on the basis that they should guarantee the earlier work, albeit on behalf of the Respondent. Still more telling, in our view, is the letter of 7 September 2014

in which the Applicant states that he had negotiated for Mr Richards to "*re-do [the roof] for you [the Respondent] at no charge"*.

89. The tenor of this correspondence is that the Applicant regarded the Roof Terrace as the Respondent's responsibility but it was he, not the Respondent, who negotiated for Mr Richards to undertake remedial works. Whilst the Applicant did not consider the works as his responsibility, it does not follow that the Respondent's acquiescence in those works renders her liable for any inadequacy in them. The Respondent facilitated access and chased Mr Richards when threatened with enforcement action. To that extent she certainly engaged with Mr Richards to secure the work that the Applicant had negotiated. Nonetheless, we accept that she did not employ him. Mr Richards' involvement was arranged as a result of the Applicant's efforts and it was clear from evidence that the Respondent gave about her limited means that she could not afford such works. This is corroborated by the email correspondence confirming that she refused to pay anything at all for the April roof works. Moreover, as we have found, on a proper construction of the Lease the Applicant is responsible for the repair of the Roof Terrace unless Clause 3(4) is engaged. In the circumstances, we find that Mr Richards attended and undertook the works following discussions with the Applicant and by reason of acquiescence and encouragement by the Respondent but not as agent for, or employee of, the Respondent.

90. Finally, both for the reasons already given and based on the report of Mr Cronin, we reject any suggestion that use of the Roof Terrace by the Respondent since April 2015 has caused material damage to retained property. The expert's report simply does not support any finding that the roof covering has been significantly affected by use since April 2015. On the contrary, it is inconsistent with such a submission since the roof covering was intact when inspected in May 2016 and at paragraph 5.2.1 of his report the expert blames the current leaks on poor workmanship.

91. We would add that, whilst the Applicant may be disappointed by the foregoing determination, it necessarily follows from the correct construction of the Lease that he is entitled to undertake the works to the Roof Terrace that are necessary to facilitate his longstanding aspiration to convert the storeroom into a classroom.

The Insurance Premiums - Clause 3(2) of the Lease

92. Under Clause 3(2) of the Lease the Respondent must contribute a sum equal to one half of the insurance premiums payable under Clause 4(2). Under that clause the Applicant must insure the Property and Premises "*against loss or damage by fire and the usual risks covered by a comprehensive policy*". It is the Applicant's case that he has paid those premiums and supporting documentation was included in the bundle which confirmed that he had. The Respondent does not dispute that the Applicant has insured the Property nor that he has paid the premiums and demanded a contribution. The Respondent did, however, take issue with whether the policies properly covered the Premises and were confined to premiums for the insurance

required under Clause 4(2). She asserted that the premiums included an element of cost for insurance cover for the Applicant's business and that the Property and Premises were misdescribed in the policy documentation. The former complaint arose because the policies include employer's liability cover of £10m and public liability cover of £2m.

93. The Applicant's evidence was that he uses an insurance broker called Severn Bay Corporate Solutions Limited (a fact confirmed by the policy documents) and that the policies he has taken out were the cheapest available. In June 2015 the annual policy premium was, for example, £162.96. He also stated that the policy included limited employer's and public liability cover as standard. We accept the Applicant's evidence to this effect because it was corroborated by his further evidence that he pays a separate premium for full and comprehensive employer's liability cover.

94. With regard to the description of the Property in the policy schedule (e.g. 100% brick wall, and 80%/20% tile and concrete roof) we note that the description of the Property may not be wholly accurate but such discrepancy as there is would not, in our view, invalidate the policy nor affect the premium.

95. In the circumstances, we determine that the Applicant's demands for a contribution to the insurance premiums did not require the Respondent to contribute more than was appropriate by reason of the combined effect of Clauses 3(2) and 4(2) of the lease. Clause 4(2) requires that those contributions are paid on demand. A demand was made on, among other occasions, 20 July 2016, for the premiums for 2014, 2015 and 2016 and the bundle contained corroborative policy documents for those final two years whilst the Respondent accepted that she had now seen the relevant policy documentation generally. We accordingly determine that the Respondent has breached the Lease covenants by not making the payments for all three of those years.

96. There is, however, an issue in relation to this element of the application. By virtue of section 169(7) of the 2002 Act it is provided that:

"Nothing in section 168 affects the service of a notice under section 146(1) of the Law of Property Act 1925 in respect of a failure to pay-
(a) a service charge (within the meaning of section 18(1) of the 1985 Act), or
(b) an administration charge (within the meaning of Part I of Schedule 11 to this Act)."

97. It follows that an application under section 168 is <u>not</u> concerned with any failure to pay service charges. The definition of service charges in section 18 of the <u>Landlord and Tenant Act 1985</u> includes *"…an amount payable by a tenant of a dwelling as part of or in addition to the rent - (a) which is payable, directly or indirectly for…insurance… and (b) the whole or part of which varies or may vary according to the relevant costs"*.

98. Applications concerned with a breach of covenant for non-payment of service charges should instead be made under section 81 of the Housing Act 1996 which provides that:

"81(1) A landlord may not, in relation to premises let as a dwelling, exercise a right of re-entry or forfeiture for failure [by a tenant to pay a service charge or administration charge] unless –
(a) it is finally determined by (or on appeal from) a leasehold valuation tribunal or by a court or by an arbital tribunal in proceedings pursuant to a post-dispute arbitration agreement that the amount of the service charge or administration charge is payable by him, or
(b) the tenant has admitted that it is so payable"

99. It must follow that, in relation to service charges, the appropriate application to be made is that under section 27A of the Landlord and Tenant Act 1985 for a determination whether a service charge is payable and, if it is, by whom to whom and in what amount.

100. In *Barbara Helen Glass v. Claire McCready* (LRX/122/2008), however, Judge Huskinson (at paragraph 16) indicated that if an application had erroneously been made under section 168(4) when it should have been made under section 81 of the Housing Act 1996 (and, therefore, presumably section 27A of the 1985 Act) the Leasehold Valuation Tribunal should still deal with the matter and would not lack jurisdiction. We proceed on that basis.

The Exterior of the Premises - Clauses 3(3) and 3(6)

101. Although curiously worded, as a matter of construction Clause 3(3) clearly imposes an obligation upon the Respondent to keep the exterior walls and roof of the Premises in tenantable repair. It was apparent from the Tribunal's inspection together with the report of Mr. Cronin that the external walls and roof are not in tenantable repair and when giving evidence the Respondent conceded that this was so. More particularly, the render to the exterior of the premises is in an extremely poor condition. It is cracked and stained and, in places, is missing altogether. This is most apparent in the area of the lintel above the French doors.

102. Under clause 3(6) the Respondent must also paint the external paintwork of the Premises at least once every three years. The Applicant gave evidence that he has occupied the Property for over three years and that this work has never been undertaken. The present condition of the Premises is consistent with that evidence and when asked about this the Respondent accepted that the Premises had not been painted for at least 5 years.

103. It follows that the Respondent's leasehold obligations in clauses 3(3) and 3(6) have been breached.

The Pipework - Clause 3(6)

104. Under Clause 3(6) the Respondent must keep in repair, and replace when necessary, all of the pipes and guttering which are used exclusively with or by the Premises. From the report of Mr Cronin and this Tribunal's inspection it is clear that the Respondent has breached this covenant.

105. A summary of our findings as to the condition of the pipework has already been provided. Stated shortly, the position is as follows. The soil and vent pipe serves the Premises alone but is corroded and has a visible hole that would allow effluent to escape. This has clearly been present for a considerable time and was identified as an issue in Mr Cronin's report. The rainwater gutters to the Premises are in a very poor condition and are supposed to discharge into downpipes but one of these is not connected to the guttering and staining evidences that this causes the rainwater to simply run down the external wall. Certain of the downpipes also discharge into the air rather than a gully pot. Again, this causes staining and damage where the water runs down the exterior of the Property. A metal downpipe in the vicinity of the soil and vent pipe should discharge rainwater from the Premises' guttering into a plastic hopper which in turn discharges into a plastic pipe but the metal pipe is corroded and the end of the pipe falls short of the hopper so that rainwater instead discharges in a way that causes further staining to the wall of the Property. All of these pipes are the sole responsibility of the Respondent but are in disrepair and require renewal.

Clause 3(7) - Access

106. The Respondent is required to permit the Applicant, at reasonable times, to enter upon and inspect the Premises after receipt of prior written notice. We find, and the Respondent accepts, that she was given written notice to allow the Applicant access to the Premises on 20 July 2016. The Respondent has facilitated access by Mr Cronin and permitted the Applicant access with this Tribunal. Nonetheless, in view of our findings concerning the visit of the Applicant and Mr Cronin on 20 July 2016 we are bound to determine that the Respondent did breach Clause 3(7). We find that she did refuse the Applicant access on that occasion notwithstanding the required prior written notice. Whether the County Court would regard that breach as in any way material now that access has been provided is not a matter for this Tribunal.

Summary and Order

107. In view of the foregoing we accordingly determine that the Respondent has breached certain of the covenants or conditions in her Lease but not in all respects alleged by the Applicant; we accordingly make the following order:

ORDER

Pursuant to section 168 of the Commonhold and Leasehold Reform Act 2002 the Leasehold Valuation Tribunal determines that the Respondent has breached a covenant or condition in the Respondent's lease of the premises

at number 137A New Road, Skewen, Swansea ("the Premises"). More particularly:

(i) Contrary to Clause 3(2) of the Lease the Respondent has failed to pay a sum equal to one half of the insurance premiums paid by the Applicant under Clause 4(2) of the Lease for the years 2014, 2015 and 2016.

(ii) Contrary to Clause 3(3) of the Lease the Respondent has failed to keep the exterior walls of the Premises in tenantable repair.

(iii) Contrary to Clause 3(6) of the Lease the Respondent has failed to paint the exterior of the Premises for in excess of three years.

(iv) Also contrary to Clause 3(6) of the Lease the Respondent has failed to keep in repair, and replace when necessary, the guttering and pipes installed and used for the purpose of draining away water and soil from only the Premises.

(v) Contrary to Clause 3(7) of the Lease the Respondent has previously failed to permit the Applicant, upon giving prior written notice, to enter upon and examine the condition of the Premises.

DATED this 9th day of February 2017

CHAIRMAN