IN THE BRISTOL COUNTY COURT L00BS 071

Mary-Ann Stojalowski Claimant

v

Bristol City Council Defendant

Judgment

1. This is a hearing to determine the appropriate allocation of a claim brought by the claimant, Mrs. Stojalowski, against her landlord, Bristol City Council ('the council'), in respect of the disrepair of her property 158 Broadlands Drive, Bristol. The council submits that it should be allocated into the small claim track, the claimant that it should be allocated to the fast track.

2. The motivation behind each submission is said to be the proper and efficient use of court and other resources to determine the claim. Behind the submissions lies the question of costs. There are a number of these or similar claims that have been brought before this Court. The council wishes to litigate them in a regime where the litigation would be marked by a relatively low costs bill. The claimant wishes to be represented, and to be able to charge the council accordingly.

3. The parties appeared before DDJ Cowan on 21 November 2024. He adjourned the hearing to me, for the purpose that I might if possible in determining it give guidance to local judges faced with the same issues.

4. The representation before me today (as it was before DDJ Cowan) is that Mr. Neil Smith, solicitor advocate, of True Solicitors LLP of Newcastle-upon-Tyne represents the claimant, and Mr. Iain Wightwick, counsel, instructed by Bristol

City Council Legal Services Department, represents the council. I am grateful to them both for their submissions in writing and orally.

5. The history to the claim, which I take from the pleadings, the Allocation Questionnaires and the various witness statements filed, namely that of Seibah Bibi, for Defendant dated 24 April 2024; Ben Robinson for the claimant dated 24 May 2024; Rob Brown for the Defendant dated 16 July 2024; the claimant dated 15 November 2024 and Sabrina Jefferies for the Defendant dated 19 November and 4 December 2024, is as follows. The claimant was granted a Secure Tenancy of 158 Broadlands Drive, Bristol by the council on 23 December 2021[1]. The tenancy is of a ground floor two bedroomed flat within a property of 1950s construction. It contained amongst other obligations a covenant by the landlord to maintain the interior and exterior structure of the property. It is common ground that (whether by reason of the express covenant or the implied covenant under the Landlord and Tenant Act 1985) the obligation to repair is the same, and is the standard repairing obligation imposed on a landlord when letting a dwelling for residential occupation.

6. There is a disagreement as to when the claimant notified the council of damp and mould in the property, but it appears to have been by June 2022 at the latest. On 28 July 2023 the claimant's solicitors wrote to the council asserting various items of disrepair the most significant of which was an active water leak to the main bedroom causing the skirting board to rot. There were also complaints of damp and mould (second bedroom, toilet, kitchen) asbestos to the main bedroom, the balcony doors not being water tight; a broken bathroom window and defective cladding to the exterior gable end. It valued the cost of repairs, which it set out expressly to be the open market cost at £1,431.68 inclusive of VAT. The cost of the repairs to the main bedroom, said to be £725.38 were essentially the cost of investigation; it reserved the cost of remedial works. There was also a list of

[1] Sabrina Jefferies in her first witness statement states that the secure tenancy was granted on 11 May 2015.The tenancy documentation produced refers to a commencement date of 23 December 2021. For present purposes the difference is not material.

Additional Items which appear to have been referred to the surveyor on inspection being the reinstatement of passive ventilation, damaged bath panel, faulty extractor fan and damp penetration to the hallway store from what was said to be a leaking waste/supply, remedies to which were costed at £1,323.23 inclusive of VAT.

7. Besides the allegation of breach of the repairing obligation the letter also asserted a breach of the obligation to provide a property that is fit for human habitation. The basis for this allegation was the same as the asserted allegations of disrepair, namely the presence of damp and mould. The letter also informed the council that the claimant's solicitors were acting under a Conditional Fee Agreement.

8. When the council received the letter of claim it decided that this triggered its Internal Complaints Procedure ('ICP'), which is in two stages[2]. The council contended that the property was out of repair as at the date of the letter; but denied that the council had refused or failed to carry out work of repair. Work was to be, and was, carried out. The property was inspected by Mr. Rob Brown of the council in November 2023. He produced an 'ICP Stage 1' decision which partially upheld the complaint of disrepair and offered £833.90 compensation to the claimant. The claimant had to the right to escalate the complaint to stage 2 if dissatisfied with the response. His conclusion was that the main bedroom had a damp patch in a corner. There were no recent (post March 2023 when work was carried out) reports of water access through the balcony doors. Such asbestos as was *in situ* was safe. Damp in the second bedroom was caused by the blocking of the airflow to trickle vents, as was the case with damp in the toilet. The defect to the bathroom window had not previously been reported to the council. There was no damp in the kitchen. The defective cladding had been reported in September 2022. He specifically said this:

> "As explained during my inspection, the damp within the main bedroom could have a number of causes. As part of the works listed below, I will

[2] The document I have been supplied with was published 28 June 2024. It is Version 2.000.

cover all works which should correct the damp. Unfortunately some o the works cannot be carried out until the weather improves in spring."

The 'works listed below' were:

Window operation in bathroom

Repairs to end elevation of external cladding

Diversion of rainwater pipe which discharges close the to property.

9. The claim was issued on 23 January 2024. The particulars of claim sought by way of relief damages, interest and 'an order for specific performance requiring the council to carry out 'the works set out above'. The claim form sought 'an order for specific performance of the repairs'; 'Cost of the repairs or other work exceeding £1,000' and 'Damages exceeding £1,000 but not exceeding £5,000'. It had appended to it the surveyor's report from Mr. John Lloyd MRICS dated 23 September 2023. The report alleged seven 'areas of concern' and contained a Scott Schedule of 'Proposed Reinstatement Work'. The Schedule set out the proposed work and valued it on what was said to be the open market cost of the work.

10. The defence was served on 20 March 2024. It contended that the council had complied with its contractual and statutory duties to repair and carry out the works in a reasonably timely manner and with due care and skill, and denied that the premises were unfit for human habitation. It relied on Mr. Brown's report ('Appendix 1') and Appendix 2, which was the entirety of its call log relating to the tenant's complaints in respect of the property. As far as the main bedroom was concerned the defence pleads that 'it will be necessary to drill approximately 30cm into the concrete of the floor slab in Bedroom 1 in order to ascertain whether there are any leaks in any pipework below, in a trench approximately 2m long.' In respect of the balcony doors it states that remedial work was completed by 30 June 2023. The bathroom window needed a new handle which was 'to be fitted' as at November 2023.

11. Loss and damage ‘other than that referred to in the Stage 1 response’ was not admitted. The offer of £833.90 compensation was however pleaded to be ‘not in dispute for the purposes of this claim’. It is wholly opaque from the pleading whether the council admits a breach or loss flowing from it. Mr. Wightwick’s stance at the hearing was that the council admitted neither, but that in valuing the claim I should deduct the £833.90 offered as compensation.

12. The claimant has served a reply which takes issue with numerous allegations made in the defence. As such it appears to be unnecessary.

13. Both the particulars of claim and defence are lengthy documents, unjustifiably so. Although the particulars of claim are expressed to be settled by counsel, it gives the appearance of being full of material designed to justify the bringing of litigation and to head off any suggestion that litigation of itself is inappropriate, or that allocation to the small claims track is appropriate, and to that extent boilerplate drafting rather than bespoke. In that respect it has similarities with PPI claims.

14. The defence is prolix and at one point submits that the claim for specific performance is made in bad faith and ought to be struck out, and literally suggests that the court should instigate an inquiry as to whether the claimant and/or her lawyers have knowingly signed an untrue statement of truth and therefore acted in contempt of court. That was an improper allegation that should not have been made. Putting these matters to one side, it is clear to me that the pleadings show the parties girding up for a dispute as to allocation.

15. On 9 April 2024 the court sent the parties Notice of Proposed Allocation to the small claims track. The council in its N180 Directions Questionnaire agreed with the allocation, but also applied to stay the claim for Part 2 of its ICP to be applied. It asked for permission to use the expert evidence from its internal building surveyor, who I assume to be Mr. Brown.

16. The claimant sought allocation otherwise than to the small claims track, relying on CPR 26.6(1)(b)(3) and the dispute between the parties' experts as to both liability and quantum. It sought permission to ask questions of the council's expert. As a fall-back, if the case was allocated to the small claims track, she asked for an order that her standard costs be paid up to the date that the actionable repairs described in the particulars of claim were fully completed, in accordance with Birmingham City Council v Lee [2008] EWCA Civ 891.

17. On 8 May 2024 DJ Taylor, without a hearing, stayed the claim for three months for the application of Stage 2 of the council's ICP. The claimant applied to set aside that stay and DJ Gibson dismissed that application on 30 July 2024. That stay expired on 30 October 2024. Settlement not having been reached, the allocation and directions hearing was listed before DDJ Cowan and subsequently adjourned to me.

18. To take up the question of the extent of the remedial works in fact, in April 2024 Ms. Seibah Bibi said that the work to be done, insofar as it concerned the main bedroom, was:

> "3) Dig exploratory mini trench in area just outside bed 1 but still internal. Purpose is to finally find cause of damp within bed 1.
>
> 4) Once cause of damp is located, carry out remedial works.
>
> 5) Dig external 'soakaway' within external lawned area. Purpose, to drain rainwater away from the flat."

Ms Bibi said that Mr. Brown expected the work to be completed by 27 April 2024, and the works to external cladding had been completed. Mr. Brown's witness statement in July 2024 said that moisture readings had improved significantly. He had agreed with the claimant that the council would provide a liquid membrane of water proofing with would create a 'belt and braces' approach to water penetration to the master bedroom. The work would be completed in August 2024. The claimant's witness statement from November 2024 maintains that her bedroom is still damp; mould appears in the bathroom and the ceiling is now defective; and the trickle vents have been blocked. Ms Jefferies' witness

statement of 19 November 2024 contended that all necessary work had been carried out save that to the main bedroom. In September it was noted that the contractor was having difficulty identifying the source of the water ingress. In October more investigations took place. In November the council planned to carry out more investigative work, scheduled for 27 November. That investigation appears to have revealed a failure of the damp proof course and damp proof membrane. Ms Jefferies opined that the remedial works would be completed by February 2025. The works to the bathroom neared completion on 3 December 2024.

19. The claimant contends that the value of the claim is in excess of £1,000, as is the cost of the claimed repair. On either basis the claim should normally be allocated to the fast track – CPR 26.9(1)(b). In the present case the council has been in breach of its repairing obligations since January 2022 and remains so. An award of specific performance is likely. Damages will exceed £2,000. Expert evidence will be required from both parties, Disclosure will be necessary. The matter is personally important to the claimant and it is important that the council, a substantial social landlord, is publicly held to account

20. The council does not shy away from a submission that the fiscal consequences of allocation to the fast track would be contrary to the public interest. It notes that in 2023/4 the cost of meeting disrepair claims rose by 75% over the previous year, and is likely to double in 2024/5. It is presently facing 230 live claims, having received 34 since 1 October 2024. More specifically it asserts that during the internal complaints procedure that has taken place in part in parallel with the litigation it has acknowledged that the Claimant is entitled to compensation for the council's failure to remedy the disrepair, and offered £833.90; and that in considering the value of the claim that sum should be deducted from whatever other sum is claimed. As far as the claim for specific performance is concerned Mr. Wightwick contends that the court will not grant specific performance against a local authority landlord that is seeking to carry out its contractual obligations.

21. The purpose of allocation is to ensure that a claim receives from the court and as between the parties the legal approach and facilities suitable to deal with it justly. Justice here requires the parties to have the ability to deploy appropriate resources to the resolution of the dispute. In order to administratively deal with the variety of cases in the County Court, they are allocated to tracks (Small, Fast, Intermediate and Multi) which stipulate how they will be dealt with and the possible costs consequences of each. The significance of the small claims track unlike the fast track is that in general no costs are awarded save for unreasonable behaviour (CPR 27.14) although a sum is allowable for advice and assistance where a claim for specific performance is brought (CPR 27.14(2)(b)); the procedure is relatively Informal (CPR 27.8), the parties are usually unrepresented and the hearing should not take longer than 3 hours. Fast Track cases by contrast should not take more than a day (CPR 26.9(6)(a), and fixed costs are recoverable.

22. The relevant CPR provisions are as follows:

> 26.9.—(1) The small claims track is the normal track for—
>
> .....
>
> (b) any claim which includes a claim by a tenant of residential premises against a landlord where—
>
> (i) the tenant is seeking an order requiring the landlord to carry out repairs or other work to the premises (whether or not the tenant is also seeking some other remedy);
>
> (ii) the cost of the repairs or other work to the premises is estimated to be not more than £1,000; and
>
> (iii) the value of any other claim for damages is not more than £1,000;
>
> .....
>
> (5) Subject to paragraphs (6) and (10), the fast track is the normal track for any claim—
>
> (a) for which the small claims track is not the normal track; and
>
> (b)which—

(i)is a claim for monetary relief, the value of which is not more than £25,000; or

(ii) is or includes a claim for non-monetary relief and—

(aa) if the claim includes a claim for monetary relief, the value of the claim for monetary relief is not more than £25,000;

(bb) the claim meets the criteria in paragraph (6)(a) and (b); and

(cc) the court is satisfied that it is in the interests of justice for it to be allocated to the fast track.

(6) The fast track is the normal track for the claims referred to in paragraph (5) only if the court considers that—

(a) the trial is likely to last for no longer than one day; and

(b) oral expert evidence at trial is likely to be limited to—

(i) one expert per party in relation to any expert field; and

(ii) expert evidence in two expert fields.

.....

26.12.—(1) In considering whether to allocate a claim to the normal track for that claim under rules 26.9, 26.10 or 26.11, the court shall have regard to the matters mentioned in rule 26.13(1).

26.13.—(1) When deciding the track for a claim, the matters to which the court shall have regard include—

(a) the financial value, if any, of the claim;

(b) the nature of the remedy sought;

(c) the likely complexity of the facts, law or evidence;

(d) the number of parties or likely parties;

(e) the value of any counterclaim or additional claim and the complexity of any matters relating to it;

(f) the amount of oral evidence which may be required;

(g) the importance of the claim to persons who are not parties to the proceedings;

(h) the views expressed by the parties; and

(i) the circumstances of the parties.

.....

Assignment within the fast track

26.15. .... the complexity band to which a claim will normally be assigned in the fast track is set out in Table 1.

Table 1

...

Complexity band 3

....

(d) housing disrepair claims; ....

23. Allocation is a two-stage process. The first stage is to identify the 'normal' track for the case, working upwards from the small claims track. The second stage is then to consider allocation overall in the light of the matters set out in CPR 26.13. The identification of the normal track for the case is not conclusive, but it gives rise to a presumption that the case will be listed on that track.

24. Applying CPR 26.9, the requirements of CPR 26.9 (1)(b) are, on their literal wording, made out. This is a claim brought by a residential tenant against her landlord. The claimant is seeking an order of specific performance, which is (in this case) an order that the landlord carry out repairs to the premises. As I have noted above, the council contends that the court will not grant an order for the specific performance of its repairing covenant against a social landlord or local authority where that body is willing to, and doings its best to, carry out repairs. I do not consider that that is necessarily so. The grant of an order of specific performance is a discretionary matter for the court. It may be that, at trial, a court will consider that an order for specific performance is unnecessary or inappropriate. But at this stage the court is considering whether that is a remedy that the claimant is seeking. It is plain both from the Particulars of Claim and the claimant's witness statement that she is seeking that remedy. In order to succeed on this part of the argument the Council would have to show, as indeed it argues,

that the claim for specific performance should be struck out. If the work had been done after issue but before allocation, then matters would be different. But here they have not been done, and the problem remains. That is not the position here; the defect continues.

25. Mr. Wightwick was not able to point me to authority that a contracting party, local authority or otherwise, who is trying but failing to perform his contractual obligation is immune from an application or order for specific performance. He says that no court would make an order in circumstances that might lead to committal proceedings for failure to act in compliance with the order. There appears to me to be authority to the contrary – see Parker v Camden LBC [1986] Ch 162 (Sir John Donaldson MR at 175-6; Browne-Wilkinson LJ at 177B; Mustill LJ at 179) where the Court of Appeal contemplated making a mandatory interlocutory injunction against a local authority to restore functioning heating. As the court noted, a failure to comply with such an order does not necessarily lead to punishment by way of committal or fine. A court may make an order that the claimant is at liberty to do the work and charge the landlord.

26. The council next submits that specific performance is an adjunct to a proven breach of an obligation; that it has always sought to do its reasonable best, and that therefore it is not in breach of its obligation to repair. It maintains that it is entitled to select the means of remedying the breach that is in its own interest. Whilst as a principle that is correct (see Dame Margaret Hungerford Charity v Beazeley [1993] 2 EGLR 143), that does not however mean that the council cannot be in breach if it continually investigates the disrepair but does not cure it. Putting to one side the issue as to whether performance of such quality is good compliance with a standard repairing covenant, and I express no views on that, the simple fact is that the claimant asserts a continuing breach, and the matter is not sufficiently plain to be resolved now.

27. The council then challenges the stated cost of the works. It asserts that Mr. Lloyd's report is now dated; that Mr. Brown has provided evidence that many of the

defects are cured; and that the council will be relying on contractors that are economical. They say the cost of the works to them is likely to be less than £1,000.

28. I agree that as at allocation the court should ordinarily be considering the cost of work yet to be done. Allocation is a forward-looking process. A tenant's claim for dilapidations, where specific performance is sought, wants the factual disrepair to be remedied. To the extent that it has been remedied that fact is no longer in issue between the parties. The court should consider the dispute as between the parties as it exists at the time of allocation. This may mean that if the landlord has, between issue and allocation, rendered the work the subject of the specific performance claim relatively trivial in cost, para (b)(ii) will not be satisfied.

29. In most cases however the court will not have an up-dated costing of the work before it. It will have to do the best it can on the evidence that it has. Para (b)(ii) refers to an 'estimate' of costs. This may be on the basis of an appended expert schedule (as here) or by an assertion in a pleading. Where circumstances have changed then the court will have to rely on its own judgment. The purpose behind a requirement of cost is to exclude from the fast track the sort of minor claims that are or should be easily remediable. That in itself is a question-begging formulation. Here, disputes as to broken windows, ill-fitting bath panels or blocked trickle vents would clearly fall into that category. I would not consider that a persistent leak into the main bedroom of a two bedroomed flat would fall into that category unless the cause of the disrepair was evident. The works that appear to be necessary in this case are works to the structure of the building (excavation and the reinstallation of a damp proof course), and to a degree open-ended as there is no agreement or certainty as to the extent of the works needed, or whether the present diagnosis is correct. The cost of the works on the open market is likely to be more than £1,000.

30. The council next says that the cost of the works is likely to be less than £1,000 because it will use its own contractors. Mr. Wightwick refers me to the decision of District Judge Haisley in Jalili v Bury Council (2021) in the Manchester County

Court. That case concerned a claim issued under Part 8 for costs, works to remedy disrepair having been carried out, where the landlord council argued that had a claim been issued it would have been allocated to the small claims track. The parties' experts had differed in their assessment of the costs of the works, the council's expert having valued the work on the basis that they were carried out by the in-house team. It is implied, but not stated, that the labour costs were therefore marginal. The learned judge concluded that as any notional order for specific performance would have required Bury to carry out the works, the work would not be put to open market tender, and therefore the relevant value of the work was the cost to the landlord council.

31. I do not consider that this decision is of assistance here. First, the council has not adduced its own estimate of costs. There is some evidence (in Appendix 2) of the cost of work done, but not of the cost of work yet to be done. Mr. Brown's report does not cost out the works he says have been done, or are to be done. Secondly, the evidence appears to indicate that the council is using external contractors, so the in house marginal cost basis would not apply. Thirdly, Jalili is a decision in a costs-only application where the work had been done, although I appreciate the issues are very similar. Fourthly, if necessary, I consider that Jalili was wrongly decided. The purpose of para (b)(ii) is to provide an objective yardstick of cost for the purposes of allocation. It cannot be right that it should vary according to the economies of the particular defendant. 'Cost' here must refer to the no doubt local but open market cost of carrying out the works.

32. Turning next to the issue of the value of the claim for damages, the two issues are the value of the claim as a whole, and whether the offer to pay £833.90 is material. The value of the claim set out in the claim form limits the damages to £5,000.

33. General damages in respect of this sort of disrepair to residential accommodation may be calculated as a lump sum, or as a percentage of the rent payable, or as a combination of the two (see Khan v Mehmood [2022] HLR 34). The rent as at January 2024 was £100.47 per week. The loss claimed is substantially for loss of

amenity, with a small unparticularised claim for cleaning equipment. The claim in the case will start from the expiry of a reasonable period of time from the first notification of the disrepair to the council. The rent accruing from, for example, November 2022 to January 2024, 26 months, is approximately £11,200. A 10% discount on the rent for that period would be more than £1,000. However the 'value' of the claim is not the court's assessment of what the claimant may receive at trial; it is the value of that which the claimant claims. Where there is a range of possible recovery, the value of the claim should be taken to be at the upper end of the possible recovery. That is significantly more than £1,000.

34. As to whether the £833.90 should be deducted from that value, I consider that although the matter could have been pleaded more clearly by the council, the council's stance is that the claimant is not entitled to damages (because there is it asserts no breach of obligation) but that if it is in breach, then this is a deductible sum in assessing damages. The offer was not made on condition that the claim was settled, but was made because of the matters relied upon by the claimant in this claim. In considering the value of the claim the court is assessing the benefit that may accrue to the claimant from the continuation of the litigation.

35. Where a defendant has made an open offer, which the court considers will certainly remain available at trial, what is being argued over is in truth the value of the claim over and above the sum offered. I would stress that the court must be certain of this, as otherwise it would be open to a defendant to make an offer for the tactical purpose of reducing the value of the claim below an allocation threshold, and then fail to honour the offer. CPR 26.13(2)(a) states that when assessing the value of a claim the court should disregard 'any amount not in dispute', which is an appropriate way of describing the sum offered, because it is an admission as to quantum if liability is established. Indeed, in the present case the claimant could it seems to me take the money offered now and continue with the litigation for the balance claimed. On the facts of this case, I both view the offer as a conditional admission of quantum of liability as to £833.90, and I am certain that the council will make that payment in any event. It should therefore

be taken into account and deducted when assessing the value of the claim on allocation.

36. But even with that deduction, I am satisfied that the value of the claim in this case exceeds £1,000. For these reasons I consider that the 'normal' track for this case would not be the small claims track.

37. The second stage of the process is to consider whether the normal track is the fast track. The requirements for this finding are set out in CPR 26.9(5). With the possible exception of CPR 26.9(5)(cc) the requirements are all satisfied, which will usually be the case in a residential housing disrepair case where the small claims track is not the normal track. So although the claim includes a claim for non-money relief it also includes a claim for money relief but for less than £25,000; the claim is not likely to last more than a day, and the expert evidence is in less than two fields and oral evidence will be limit to one expert per party in relation to any expert field. Sub-paragraph (cc) excludes cases from the fast track where the court is not satisfied that it is in the interests of justice for it to be so allocated.

38. The third stage is to consider the matter generally under CPR 26.13. The 'interests of justice' test may lead to a case being allocated to any other track. In the present case there is no suggestion that this should be listed as an intermediate or multi track case. The question is whether, notwithstanding the fast track being the normal track, it should be allocated to the small claims track, having regard to those matters.

39. The first point to note is that CPR 26.13(1)(a) and (b) refer to matters, the financial value of the claim and the nature of the remedy sought, that reflect the issues considered under the 'normal' allocation. Where the value of the claim is close to the stipulated boundary for the allocation it would follow that the likelihood of allocating the case to the neighbouring track may be greater than otherwise.

40. The value of the claim in terms of general damages I would assess as being up to £2,000, allowing for the deduction of £833.99.

41. The relief claimed is specific performance, and whether such an order is likely to be made will probably depend on the work (if any) outstanding by trial. Mr. Wightwick submitted that the claimant has a good remedy in damages. Given the history of this case there is a realistic prospect of specific performance being ordered if the water leak has not been rectified by the trial date.

42. The likely oral evidence of fact in the claim will come from the claimant herself. The council's evidence of complaint, which is relevant to the issue of reasonable notice to do the works, will be contained in Appendix 2. This issue, and the issue of general damages would tend to indicate that a small claims track trial would be more appropriate.

43. As to expert evidence, each party presently has an expert, and there is presently scope for disagreement.

44. The claimant's Directions Questionnaire states that they will call one witness, and that the Expert (who I understand to be the one witness referred to), is described as 'the Defendant's internal building surveyor'. The claimant's Directions Questionnaire states that only the claimant will give evidence at the hearing, but that the claimant will rely on Mr. Lloyd's report.

45. It may be, given that Mr. Lloyd inspected the premises in September in 2023 and that work has been carried out, that the claimant and the council will agree as to what needs to be done. But that is speculation at present. I would think it likely that the parties would be directed to either agree the position, or to have a joint expert's report, but there is a possibility that each will be required. At present, given that the works to be done are not agreed, the court should allocate on the basis that expert evidence will be required, and that it may be oral evidence. If the

parties cannot agree the position on repair they may need to make an application for oral expert evidence to be heard.

46. The amount of oral evidence which may be required (and I note that the rules refer to evidence that 'may', not 'will' be required) is such that the time estimate for the case may be more than three hours, and that cross examination may be required.

47. The views expressed by the parties are clear and contradictory. The council wishes this to be allocated to the small claims track; the Claimant to the fast track.

48. The circumstances of the parties are each material. Mr. Smith accepted that the position of the council that litigation, not specifically this case but the general increase in housing disrepair claims in recent years and months, is a relevant matter that the court can take into account under CPR 26.13(1)(i).

49. The council's evidence is that the increase in housing repair cases has had a very adverse effect on the running of the council. Ms. Jefferies has given evidence that open claims have increased from 158 pending in November 2023 to 203 in March 2024 and 217 at the end of April. There are presently 230 open claims. The legal cost of dealing with housing condition claims has increased from £370,000 in 2022/23 to £701,000 in 2023/24, and budgeted to £1,351,000 in 2024/25. Ms Jefferies commented that: It must be noted that this money could be put to much better use by using it to repair the properties instead of for high litigation fees [to be incurred[3]]'. The work is said to be relentless, and that is worsening the turnover of officers dealing with such claims.

50. Mr. Wightwick also relied on the presence of the ICP as an alternative to litigation; and the asserted failure of the claimant to engage through the two stages of the ICP.

[3] The wording is slightly different; this is my understanding of it.

51. The failure of the claimant to engage with ICP (if this is correct) is not a matter that is pertinent to allocation. If a litigant does not engage with appropriate Alternative Dispute Resolution ('ADR'), then the other party may apply for an appropriate stay for the process to be worked through. That is what happened in this case, and the court directed accordingly. If a party still considers that the process has not been carried out and should be further proceeded with, than a further application may be made. That has not occurred in this case and hence the matter has proceeded to allocation. If a party has wrongly refused to entertain ADR, then that is a matter that the court can and will take into account in determining and assessing costs at the conclusion of the case.

52. The broader argument is I think this. The scheme for funding litigation in the fast track is such that specialised solicitors who deal with similar claims in bulk can make significant sums of money in fees by acting for tenants who have disrepair claims, usually funded on a CFA backed by after the event insurance. This is similar to the model used by solicitors acting for other multiple individual claimants in for example PPI or motor finance claims. The difficulty with this type of claim is that what is sought is not simply monetary compensation (although that is a not insignificant part of it) but actual performance of obligations where the resources of local authorities as housing providers is necessarily limited, and where the claims appear to multiply as fast as they can be generated by word processor. In these circumstances there may be a policy benefit in slowing down the claims by requiring them to go through the ICP as well as in reducing the litigation costs that come from a finite pot of money.

53. The difficulty with this argument is that a stay can be sought where the litigation is premature, but where a stay has been granted or is not sought, that is no longer material; the claimant is entitled to proceed with her case. Allocating the case to the small claims track where the claim is, considered on its own merits, appropriate for allocating to the fast track, would in my view be wrong. If claims such as those should not be subject to the fast track costs regime or not subject to litigation, then that is a matter for Parliament or the Rules Committee to deal

with. There is an argument that it is only the availability of legal assistance by such means that confers a timeous remedy on those without means who need it. That is not for me.

54. I therefore conclude that the effect of allocation on the housing function of the defendant council is not a matter that should ordinarily have weight in respect of an allocation decision.

55. My decision applying CPR 26.13 is that this claim should be allocated to the fast track, Band 3.

56. I have been asked to consider further directions should I allocate this to the fast track. I direct that:
    (1) Standard disclosure to be given by both parties by 9 January 2025 with requests for inspection or copies to be made by 16 January 2025
    (2) The parties are to exchange witness statement of fact that they rely on by 6 February 2025
    (3) The parties are to seek to agree a joint statement of existing disrepair to the demised premises (if any is alleged to remain) by 6 February 2025.
    (4) List for a hearing with a time estimate of 1 day on the first available date after 31 March 2025
    (5) Not less than 7 days before the date fixed for the trial the defendant will, having liaised with the claimant, file a trial bundle agreed if possible.
    (6) Not less than three days before the hearing the parties will exchange and file skeleton arguments with the court.

57. As I have handed this judgment down as a reserved judgment, I direct that the parties shall agree an order if possible dealing with all consequential matters by 19 December 2024. If the parties are unable to agree an order this matter will be listed for a hearing of any consequential matter by Teams on the first available date thereafter. I adjourn any application for permission to appeal or for the

extension of time for applying to the High Court for permission to appeal to such further hearing.

HHJ Blohm KC
11.12.24