Claim No. CHY09015

IN THE CENTRAL LONDON COUNTY COURT
CHANCERY LIST

(1) MS JO GAVIN
(2) MS CHANTAL CRACY

Claimants

and

COMMUNITY HOUSING ASSOCIATION LIMITED

Defendant

SUBMISSIONS ON LIABILITY ON BEHALF OF CLAIMANTS

Background

1. As the Court is aware, the claim relates to alleged defects in 2 properties (referred to together as "the properties"):

   (a) 104 Cromer Street, London WC1 ("104" and sometimes referred to as "the gallery" or "Scarlet Maguire"), which was demised to Jo Gavin by Community Housing Association Limited ("CHA") by a lease dated 8 June 2000 for a term of 6 years [**A/39**]; and

   (b) 106/108 Cromer Street, London WC1 ("106/108" and sometimes referred to as "106" or "Spaceshift"), which was demised to Jo Gavin and Chantal Cracy initially by a lease dated 8 April 2004 for a term of 2 years [**C1/1/35**]. A new lease dated 17 March 2005 was then granted for a term expiring on 7 April 2014 [**A/40**].

2. The trial started on 13 July 2010 and was initially scheduled to last for 2 weeks. The Court has heard opening submissions and the factual evidence. The Court has not heard oral evidence from the building surveyors, but their reports are in the trial bundles and it was agreed that the Court should read these. It was also agreed that the Court should read the report of Mr Parrett, an expert on damp instructed by the Cs in order to thoroughly survey the properties and narrow down any disagreements between the first two building surveyors instructed by each party. The purpose of these submissions is to deal with the question of liability with regards to specific defects in relation to the properties in advance of a further hearing due to commence on 20 September 2010. At the further hearing the Court is to deal with the remaining issues such as (but not limited to) quantum and the claim by CHA for repossession of the 104 premises.

3. The submissions made on behalf of D were served on the Cs prior to the filing of their own submissions. As a consequence the Cs have endeavoured to follow a similar order to D's submissions. Specific reference to the submissions made on behalf of D has been included in Cs submissions as and when seemed relevant; when such reference is made it is referred to as "ZB/page number/paragraph number". At the July hearing Ms Flores (JF) was not able to challenge the evidence presented by Ms Bhaloo (ZB) while she was giving evidence in the witness box other than from memory; the task of finding evidence in a timely manner was rendered more difficult due to the fact that a single copy of the trial files were only provided to Cs a few days before trial and that the order of the evidence disclosed by D had been changed by D's solicitors compared to their original order. Therefore further evidence of facts relating to specific defects has also been included in these submissions in the form of tables and throughout the text of the submissions itself.

4. These submissions should be read in conjunction with the skeleton argument filed on behalf of Cs prior to the trial since the matters set out in the skeleton argument are not repeated in full here.

5. As the Court is aware, the thrust of the Cs' claims is that various defects, in particular water ingress, in and around the properties have caused their business to be interrupted such that they have suffered very significant financial losses. They also allege that the demised premises fail to comply with Building Regulations in that there is a lack of ventilation in 106.

6. The claim made by the Cs relates to the following incidents or defects:

(a) A leak from a soil stack pipe coming from the residential flats into the ground floor and basement of 104;
(b) A leak from a soil stack into the basement and ground floor of 106;
(c) A flood from a residential flat through the ceiling of 104 onto the ground floor and staircase;
(d) Water ingress from pavement lights outside 106 into the basement of 106;
(e) Water ingress into the electricity room outside Cs' demise;
(f) Alleged defects in respect of the communal fire escape;
(g) Lack of air bricks in the basement walls of 106.

7. It is incongruous that Ms Bhaloo chooses in her written submissions to quote some of J Greene's words to undermine JF's personality, when during the trial hearing Ms Bhaloo suggested to JF that J Greene was saying "all sorts of things" and was "obviously fighting your corner". Those comments were made by Ms Bhaloo in

reference to some of the evidence submitted by JF where J Greene explains to the maintenance staff that 1. CHA has to repair the leak from the roof lights as it was caused by a defect in the structure (**D1/126**); 2. a leak to a soil stack pipe is an absolute emergency to deal with before it becomes an Environmental Health issue (**D1/130**); 3. it is CHA' responsibility to ensure repairs as necessary are carried out to the residential parts to ensure no damage is caused to the commercial units (**D1/152a-152b**). It is worth noting that on the other hand what Ms Bhaloo chooses to quote from J Greene in her submissions comes from an unsigned witness statement that was made on behalf of the Public Liability insurers for D at a time where D was evidently trying to cover things up. So what Ms Bhaloo is in fact demonstrating by her selective choice of certain quotes by J Greene, while swiftly rejecting others, is that depending on how a certain situation is chosen to be highlighted the perception of the truth can be significantly influenced. Emphasizing one side and reducing/omitting the other side is, like exaggeration, a way of distorting the truth. When faced with estimating the rights or wrongs of such an act, one would first need to know if the distortion is consciously intended or whether it is the sincere expression of a personal perception (which may itself be distorted in the first place) and where it is clearly intended, one would have to look at the possible motives behind the mindfulness of it.

8. When JF sent that hand-written note to C Natt in July 2006 (**B2/2/145**), Cs'situation had gone from bad to worse since the start of the insurance claim in August 2005, there was no sign of any compensation for the past losses of Cs and at the same time new defects were being found in the building thus making the running of their businesses even more difficult on a day-to-day basis and both Cs were subsequently under a lot of stress. JF was under the impression that the only way forward was to find a way to co-

operate with the Landlord, a powerful organisation whose some of the charitable aims seemed to be close to the ones of her children rights association NN/YP. Her letter was certainly in her mind a call for co-operation and simultaneously an attempt to receive compensation of business losses by means that she believed CHA may have had, instead of going via insurers who on one hand were trying to blame CHA and on the other hand did not give much hope as to the rapidity in which this could be handled. JF marked her letter "Totally private for Chris only" thus implying that she wanted to hear his initial views as to the various ideas she had jotted down in that note. The reference to a possible "exchange" of tenant upstairs was linked to the fact that the insurers were trying to put the blame on the damage to the ceiling being caused by this tenant and at that time Cs did not know that the layout of the flats upstairs did not concur with the insurers finding; JF's brother incidentally himself suffers from mental health problems and since housing is often allocated on specific grounds, she put the two together without meaning any harm. However awkwardly expressed JF's letter may be, Ms Bhaloo once again makes it sound worse than it is, e.g. in quoting the total £49,000 settlement figure first then re-quoting other figures that are already part of it.

9. With regards to Ms Bhaloo's allegation that JF has been "telling untruths", it is denied on all grounds. In fact it is submitted that for most parts the numerous statements of accounts made by Cs with regards to events occurring throughout the period relating to this claim concur with one another and also for most parts with the evidence given by JF at the trial hearing. When a mistake was made, whether because dates were not checked thoroughly at the time of writing such or such email or letter, or whether because memory had enough time to be blurred between the incident and the time it had to be remembered, mistakes have been admitted and rectified as and

when they became apparent to Cs. With regards to the extent of the damages, the period of time over which the incidents happened and the amount of Cs' financial losses, this claim has, since its start, been supported by figures that Cs believe are true and evidence has been provided by both parties to clarify any facts that were disputed. The one example used by Ms Bhaloo to support her allegation that JF was telling untruths at the hearing is relating to the dates alleged around the 106 stack pipe incident: there was an argument at to whether the beginning of February could be assimilated to the end of January and as to whether the end of the repair meant the repair to stack or the final repairs to casings.

10. JF's evidence at the hearing proved to be as reliable as it could be, given the number of years relating to this claim and the large amount of information to remember. Based on the above argument, it is submitted that Ms Bhaloo has no reasonable grounds in her request for dismissing JF's as a reliable witness.

11. Where the evidence of D conflicts with the evidence adduced on behalf of the D, it is submitted the Cs' evidence should be preferred. The Court has heard the witnesses and will have to assess their reliability and credibility based on the manner in which they gave evidence. It is submitted that where the evidence of the parties conflicts, the evidence adduced on behalf of the Cs should be preferred for, inter alia, the following reasons:

    (a) Throughout the July hearing but particularly when cross-examining JF, which happened to take place for the majority of the time allocated to the hearing, ZB was clearly using carefully selected evidence in order to give an overview of the situation to the advantage of D. Although this approach may be the required one when defending a case, it meant that on many

occasions a distorted view of the situation was given, with no fair chance given to JF to challenge the evidence without the files at hand. For example, when bringing up evidence relating to official complaints made by Cs with regards to the fire escape and the electricity room, ZB mostly referred to the letters of reply from D, as opposed to the letters of complaints from Cs, thus conveniently making it sound like D were actively dealing with the issues complained about, when in fact evidence coming from the letters from Cs clearly demonstrates that those issues were continuously left unresolved, that answers given were incorrect, that action promised was not followed up and most importantly that the timescale involved (which is highlighted in Cs letters) was beyond reasonableness. Reference to evidence supporting the above is made further in these submissions under the headings of the defects in question.

(b) The Court will no doubt remember that several documents were found to be missing from the trial files when JF made her opening submissions and referred to evidence disclosed by D at an earlier stage in the proceedings. In addition it was found that some of the documents initially provided by Cs had been either poorly reproduced (for example **C2/3/14:** Camden New Journal article and **C2/2/99-100:** Original Architect floor plans for 106) and/or truncated (**D1/11:** Architect Plans of Cromer House frontage).

(c) At the hearing His Honour Judge Cowell (HHJC) clearly expressed his disappointment about the fact that the Witness Statements for D appeared to have been written by solicitors and that for most parts they were just a repeat of the information displayed in the exhibits and simply put together by solicitors, as opposed to witness statements written from the

point of view of the witnesses containing what they could personally remember. When it came to the time for D's witnesses to give evidence it was further made clear at least on one occasion (in the case of Richard Ukheleigbe (RU)) that the person who wrote witness statements had not checked the facts with the witness.

(d) A majority of the witnesses giving evidence on behalf of D then clearly appeared to attempt to hide the truth. More details about the last two points are given in the part of these submissions that deals with specific incidents/defects.

The leases

12. The landlord's only covenants are covenants for quiet enjoyment (*clause 7(1)*) and a covenant to insure (*clause 7(2)*).

7(1) That the Tenant shall have quiet enjoyment of the Demised Premises against the Landlord and all persons claiming title through the Landlord

7(2) To insure the Demised Premises and the Development in an insurance office of good repute or at Lloyds against the Insured risks and in the event of the Demised Premises being destroyed or damaged by any of the Insured Risks the Landlord shall with all convenient speed (subject to the availability of all necessary labour and materials and the obtaining of all necessary permissions) lay out and apply in rebuilding repairing or otherwise reinstating the Demised premises all monies received by virtue of such insurance other than monies received in respect of loss of rent Provided that the Landlord

shall be under no liability to the Tenant hereunder if the insurance money under any policy of insurance effected by the Landlord shall be wholly or partially irrecoverable in the circumstances set out in 5(22) above Provided always that the Landlord shall not be under any obligation to insure any fixtures or fittings installed by the Tenant which have become part of the Demised Premises unless the Tenant shall have notified the Landlord in writing of such installation and the Landlord has agreed with the Tenant at the cost of the Tenant to effect the insurance thereof and provided further that the covenant by the Landlord as to reinstatement shall be satisfied if the Landlord provides in the premises so reinstated accommodation as convenient and commodious as is practicable but not necessarily identical to the Demised Premises as the same existed prior to such damage or destruction and provided further that if any competent authority shall lawfully refuse permission for or otherwise lawfully prevent any rebuilding or reinstatement of the Demised Premises or any rebuilding or reinstatement shall be otherwise impossible impractical or frustrated all relevant insurance monies (so far as not laid out aforesaid) shall be receivable by the Landlord for its own use and benefit absolutely

13. Although D is submitting that the leases contain a comprehensive code for the parties' obligations and it has also indeed been noted that the repair obligations falling on the tenant's side are numerous and precise, it is submitted that it is equally important, and crucial to a proper analysis of the issues, to note that there is no such thing as an expressed obligation to repair the structure of the premises put on either party in the leases.

14. This falls back to the Definitions of the “Demised Premises” in the leases *(Clause 1(2)*

1(2) The expression "the Demised Premises" shall include inter alia where the context so admits for the purposes of obligation as well as grant:-

(a) the internal plaster covering the exterior and interior loadbearing walls

(b) all non-loadbearing walls

(c) the coverings of the ceilings

(d) the coverings of the floors and the boards and screed of such floors

(e) all shop fronts and display cases all fascias all windows and window frames all doors and door frames

(f) all conduits within and exclusively serving the Demised Premises up to the point of connection with the common or public system

(g) all fixtures and fittings and plant equipment and machinery in the nature of the Landlords' fixtures including if applicable all escalators all heating air conditioning and ventilating equipment and all electrical and mechanical installations and other plant equipment and machinery within and exclusively serving the Demised Premises

(h) all sprinkler systems and fire detection and prevention equipment fire fighting equipment and hoses within the Demised Premises

(i) the toilet accommodation within the Demised Premises including all sanitary equipment and other apparatus therein

(j) all additions alterations and improvements to the Demised Premises made at any time

15. Reference is made to the structure of the premises in the tenants covenant relating to waste and alterations (*Clause 5(5)*), inter alia:

(a) Not to commit any waste to the Demised Premises nor to erect any new buildings or structures thereon nor make any structural alterations or additions thereto

16. Another reference to the structure of the premises is in the tenants covenant to give RIGHT OF ENTRY FOR INSPECTION ETC *(clause 5(12))* inter alia:

(c) To permit the Landlord and Tenants and occupiers of the Development and those authorised by them at any time upon not less than forty eight hours prior notice (except in case of emergency) to enter upon the Demised Premises:-

(i) to comply with covenants contained in other leases of adjoining property

(ii) to examine decorate repair and rebuild the structure of the Demised Premises or any adjoining or neighbouring property

(iv) for the purpose of inspecting repairing renewing connecting to cleansing altering or constructing conduits in over upon or under the Demised Premises

(v) to measure the Demised Premises

(vi) for any other reasonable purpose Subject to the person or person exercising such right making good all damage thereby occasioned to the Demised Premises

17. While the leases of both properties may at first seem to have been drafted along the exact same lines, it is important to note that differences occur between the two leases and it is submitted that this is significant for the purpose of this claim.

18. Part 2 of the leases relates to the rights that are granted by the landlord to the tenant in relation to the demise and premises. The attention of the Court is firstly brought to the rights granted to the tenant in the 104 lease:

2(1) the right of free passage and running of water and soil in and through the sewers drains and channels upon through or under adjacent premises of the Landlord and uninterrupted use of all gas electric telephone and other pipes wires and cables upon through or under adjacent premises of the Landlord

2(2) the right (but only so far as the Landlord is able to grant the same) to use an area of the surface of the pavement immediately adjoining the shop front of the Demised Premises and extending the full width of the Demised Premises and being one and a half metres in depth (measured form the said shopfront) for the display of flowers Subject to such regulations as may be made by or on behalf of the Landlord from time to time

2(3) the right of subjacent and lateral support and shelter and protection from the elements for the demised Premises

2(4) a right of exit in case of fire (or other emergency) only over the fire escape passages/courtyard ("the Fire Escape Areas") leading from the Demised Premises Subject to such regulations as may be made by or on behalf of the Landlord from time to time

19. The part relating to the rights granted by the Landlord is also in the lease of 106. The Court is asked to make a note of the differences

existing in Clauses 2(2) and 2(4) in comparison to the same clauses in the 104 lease:

2(1) the right of free passage and running of water and soil in and through the sewers drains and channels upon through or under adjacent premises of the Landlord and uninterrupted use of all gas electric telephone and other pipes wires and cables upon through or under adjacent premises of the Landlord

2(2) Subject to such regulations as may be made by or on behalf of the Landlord from time to time

2(3) The right of subjacent and lateral support and shelter and protection from the elements for the demised Premises

2(4) The right (but only if and so far as the Landlord is able to grant the same) to place table and chairs on the pavement area in front of the Demised Premises for use during business hours by customers of the Tenant's business carried on at the Demised Premises Provided that public rights of way are not obstructed or affected

20. Another clause which is subject to a variation between the two leases is the last clause of the tenant covenants, *Clause 5(26)*. Here is first the extract from the 104 lease:

5(26) <u>TO PAY TOWARDS COSTS OF MAINTENANCE OF FIRE ESCAPE AREAS</u>

To pay a fair proportion (to be determined by the Landlord's Surveyor) of the costs incurred (or intended to be incurred) by the Landlord in respect of the lighting cleaning and maintenance of the Fire Escape Areas

21. Now for the 106 lease:

> 5(26) TO PAY LANDLORD'S COSTS
>
> To pay the Landlord's solicitors legal costs plus VAT in connection with the preparation and grant of this lease

22. Further submissions are made in relation to those Clauses under the specific sections dealing with each defect/incident. It may be important to note that on two occasions clauses relating to the existence of a fire escape have been modified in the 106 lease in such a way that the number of clauses and sub-clauses remains identical to those contained in the 104 lease.

23. The floor plans contained in the two leases differ significantly in their design and the information contained. The floor plans of the 104 premises (**A/39/312-313**) are dated January 2000 and were created by Livingstone Design Group (architects for D at the time of the refurbishment of the Hillview Estate, within which the two properties are located). The floor plans of the 106 premises (**A/40**/no page no.) are undated and were presumably created by the former tenants. In both cases D's seal of applied and they are signed by Mick Sweeney, CEO for D.

24. It is important to note that D knew of the nature of C's business activities in the premises at all times including before the time of the grant of the lease for 106: this included the activities of the businesses known as Scarlet Maguire and Spaceshift as well as the social enterprise NNYP.

25. The leases also contain a cesser of rent provision:

6(3) CESSER OF RENT

If the Demised Premises or any part thereof shall be destroyed or so damaged by fire or any other risk for which the Landlord is indemnified under the insurance of the Demises Premises so as to be unfit for occupation or use then unless the insurance of the Demised Premises shall have been vitiated by the act neglect default or omission of the Tenant the rent hereby reserved or a fair and just proportion thereof according to the nature and extent of the damage sustained shall be suspended and cease to be payable until the Demised Premises or damaged portion thereof shall have been reinstated or made fit for occupation or until the third anniversary of such destruction or damage whichever shall be the sooner

Insurance

26. These submissions deal with the Insurance issue first before moving on to deal with the specific defects/incidents alleged. The subject of an implied obligation in relation to retained parts is dealt with at the end because it seemed there was a need for all facts to be fully submitted before moving on to dealing with the subject of an implied obligation.

27. In relation to insurance, Cs' case is that where the premises suffered physical damage it was covered as an insured risk Cs always notified D promptly. However it is submitted that on one occasion at least D did not notify the insurers as it claims, that when D claims that the insurers were notified it was not done with reasonable speed and that D did not show reasonable care and/or made reasonable steps in assisting the insurers with the prompt processing of the claims (further submissions are made under each heading relating to individual incidents).

28. The landlord covenant relating to the obligation to insure ought to imply the necessity for D to respect the conditions which apply to the insurance policy it holds, such as, inter alia, the duty to prevent loss damage or accidents or the avoidance by D of misrepresentation mis-description or non-disclosure in any material particular that would render the policy void (see **C4/18**).

29. With regards to Cs' outstanding claim for business interruption with the liability insurers, it has to be noted that even if this claim may not be the subject of D's obligation under the leases, the claim for business interruption was handled (by the same insurers) as a direct consequence of the material damage claim, which itself is the subject of D's obligation in the lease. D's unreasonable delays and acts of omission in terms of responding to the insurers' requests, have had direct consequences on both the claim for physical damage and the claim for business interruption (see further details below). It is submitted that the fact that the business interruption claim was delayed and remains to date not processed is a direct consequence of D's unreasonable actions with regards to D's obligations to insure. this has had further consequences on other matters that are also the subject of this claim, such as those leading to the final dispute between Cs and D in 2008 and presented by JF in her opening submissions during the trial.

30. There is no doubt that D "dragged its feet" from the start and this is evidenced in details in the submissions under the heading relating to the defects to the ceiling/floor 104 section below. It has to be noted that D dragged its feet specifically on the physical damage claim on at least two separate occasions: first with the ceiling in the period starting from June 05, then with the floor for a period which is being submitted by Cs as technically starting at the same time as the

ceiling and culminated in May-June 2008 when D did not reply to the insurers at all.

31. Regarding the correlative duty on the tenant's part, necessary information was certainly provided with all speed and care by the Cs with regards to any material damage claim made and with regards to the associated claim for business interruption. Cs took all reasonable steps to provide the necessary information with all speed, simply because it was in their interest.

32. A summary of the chronology of events covered by JF in her opening submissions is given here: the original claim forms completed by the Cs contained details of each incident claimed for, with description of physical damage to the properties as well as details of financial losses incurred as a result. Further details including photographic evidence followed through an extensive correspondence with Mr Hines, the loss adjuster employed by UKU, building and property owner's liability (POL) insurers for D, in order to deal with *both* sides of the claim. Mr Hines had clear difficulties in getting any information from D on the other hand.

33. In his preliminary report of 27/10/05, right after the visit to the 104 premises by Jessee Cooper, Mr Hines writes: "We have interviewed Mr Coster /…/ he himself has never visited the affected premises. CHA were unable to identify any surveyor still in their employ who had an involvement" (**D1/302**).

34. Meanwhile Cs have paid for the costs of the repairs themselves and are waiting for the insurers to pay them back. The physical damage claim was delayed because of the reluctant-ness of D, the policy holder, to provide any information.

35. Eventually Cs receive a cheque in January 2006 from the insurers to refund their repair costs to the physical damage. However the whole claim is still being delayed by D as it is only in April 2006 that Alan Hines is eventually able to interview RU (**D2/393**) and complete his report.

36. Following the release of this report, it is now clear from the evidence disclosed that UKU insurers decided they were not going to cover D for the rest of the claim as they found D and his staff to be at fault. A letter was sent on 28/04/06 from Farr Plc, D's insurance brokers, to RSA, liability insurers for D in which they state "You will see that POL Insurers, UKU, /…/ have recently advised that, reviewing the Loss Adjuster reports, they are not satisfied that the losses mentioned by the Claimant have arisen from the defects. They feel that the losses seem to have arisen because Community or their employees failed to remedy the leaks within a reasonable period of time". (**D2/407**)

37. As a result of UKU refusing to provide cover, Farr Plc, the brokers, tried to pass on the claim from one insurance to the other: if UKU (building insurance, with additional cover for property owner's liability) could not cover, perhaps RSA (public liability insurers for D) would?

38. Meanwhile Cs are left in the dark as to why their claim is not being processed. They write to D on 3 July 06 to summarise their situation and attempt to resolve the matter (**D2/489-490**). On 24 July 2006 Cs receive a letter from RSA informing them that RSA has now taken over the claim and that they should take up to three months to investigate. Over the same period, two new leaks have started affecting Cs premises: one in the electricity room and one through

the pavement lights at 106 and the fire escape is still unusable. JF sends her hand-written note to C Natt shortly after on 27 July 2006.

39. By December 2006, Cs have had no news from RSA and have appointed their own loss adjuster, Alan Harris, to help them handle the claim with the insurers (**C4/205**). Cs' cash flow projection and business plans are forwarded to the insurers (**C4/196**) in February 07.

40. It appears from the documents disclosed by D that the insurers were once again delayed by D's reluctance in meeting their requests for information: on 31 July 06 a representative from RSA had arranged a meeting with Richard Ukheleigbe (RU) and J Greene, but as none of them was able to attend RSA subsequently made requests for specific information to be provided by them; by November 06, RSA writes to D to complain that none of this information has yet been forwarded; and the same again in January 07 (**D3/664-665**)

41. In March 07 D's insurance brokers write in an email to D: "RSA have confirmed that their investigations into liability have been concluded and have asked us to make you aware that, if they do accept this as a Public Liability claim, there may still be an issue with indemnifying Community in this respect. They have yet to make a final decision on indemnity but they feel that your failure to address the ongoing problem within a reasonable time means that you may be in breach of Conditions 2A & 2B in their wording" and further explains that due to the insurers's awareness of the series of leaks that keep occurring "clearly it is a concern that this problem may still not have been resolved after such a long time" (**D3/669**).

42. The insurance conditions 2A & 2B referred to by the insurers as possibly breached by D are: "The insured at his own expense shall

A) take reasonable precautions to prevent any circumstances or to cease any activity which may give rise to liability under this Policy and to maintain all buildings furnishings ways works machinery plants and vehicles in a sound condition B) as soon as possible after discovery cause any defect or danger to be made good or remedied and in the meantime shall cause such additional precautions to be taken as the circumstances may require"

43. D is clearly concerned as an email from Chris Natt (shows) on 8/08/07:" I am concerned that we could finish up in Court with a very poor defence unless either our insurers meet the claim or we negotiate a settlement" (**D3/672**)

44. During the period between March and June 07, further delays occur as to whether either of the insurers RSA or UKU (both of whom having seemed to put the blame on D) will accept to cover the claim and both RSA and D are seeking legal advice and views while RSA indicates that they are reserving the claim £100,000 (**D3/696**)

45. On 6 July 2007, RSA's solicitors (Plexus Law) write to UKU to suggest "taking a joint approach to tackling the Claimants as to the quantum of their claims" (**D3/710**)

46. It is important to note that meanwhile Cs are not aware of any of this internal correspondence between D & the insurers. Their loss adjuster has met with a representative from RSA in March (**C4/194**) and August 07 and any further information available has been sent to the insurers shortly after (**C4/181; C4/161)**

47. From then on Plexus Law solicitors take over and eventually write to Cs' loss adjuster on 27 Nov 07 demanding clarification of the losses following the Pre-Action Protocol for Construction and engineering

Disputes (**C4/163**). Alan Harris replies on 6 Dec 07 by giving a detailed account of the progress of the claim and adds "We dispute any lack of supporting information", "All we have ever asked of your Principals is that they accept liability under the terms to which this policy is in place" (**C4/153-154**). A series of letters is exchanged between the solicitors and Cs' loss adjusters as to the disagreement but to no avail (**C4/141-152**)

48. By March 08 Cs have decided to get the last four years of their accounts put in order and audited for the two businesses in order to comply with the demands of the solicitors since their loss adjuster seems to be facing a wall; these will be completed by August 08 and sent forward to Alan Harris on 2 Sept 08 (**C4/90**).

49. Meanwhile a new series of problems with the building have occurred, including the floor of the 104 premises needing replacement from Jan 08 and new leaks to the electricity room and pavement lights at 106 in May 2008. Details of this are submitted separately under the relevant headings.

50. Once again with the floor of 104 D dragged their feet for as long as they could with regards to effecting an insurance claim that should have been a straight-forward claim for physical damage to the premises as a direct consequence of the ceiling flood (see under ceiling/floor 104 for details). When the insurance brokers asked D to send them the report and photographs taken by D's surveyor in January 2008 they did not get any reply to their email (**D3/831**). Instead D tried to blackmail JF into fixing the floor herself.

51. It is submitted that D as the landlord and the policy holder of the insurance owed Cs a duty of care in its dealings with the insurance company, whether it was with UKU or with RSA. It was

foreseeable that any failure to inform and adhere to the contractual requirements of the insurance policy by D would impact upon any recovery which could be made for the benefit of Cs under the contract of insurance.

52. D acted carelessly in breach of duty and caused loss to C which was foreseeable. D was negligent and is liable for C's losses including loss of profit.

Specific incidents/defects

Stack Pipe 104
Reference:

- **Item no. 2 in Cs' schedule-1**
- **D's Submission on Liability pp.19-22, paragraphs 32-35, 40-43**
- **Appendix A to D's Submission on Liability**

Claimants dates	Defendant's suggested dates	Further evidence from Cs further supporting their case and/or counteracting D's suggestions when a dispute arose.
Discovered beginning September 04	14/09/04	- Zia Bhaloo (ZB) referred to **E1/4/218**, para 4.2.25: to demonstrate the leak was *discovered* "4 days before the end of Tamsyn's show". - **I1/171-172**: shows the above quote was a mistake made by the 2nd Claimant Chantal Cracy (CC); that mistake was then rectified by Jo Flores (JF) to have been in fact "half-way through the show", which is the beginning of September 2004. - **C1/198**: Tamsyn Salt's exhibition - 13 Aug to 18 Sept 04
Reported 14/09/04	- 15/10/04 - January 05 "another" leak to stack pipe	- Cs' case is that "4 days before the end of the show" (see 2 first references above) is when the leak was in fact *reported* - **C1/174**: Oct 04 telephone calls record summary from C to Jaquie Greene (JG) (7 calls), CHA (6 calls) & RU's mobile no (1 call). - **C1/200**: Andrea Rossi's exhibition – 1 Oct to 13 Nov 2004 - **C1/182**, first 2 para: Aug 05 claim form for
September leak	September leak	

stopped with repair to stack pipe on or around 31/01/05. Final repair to duct casings 03/02/05 agreed	stopped on 14/10/04 – when a leak in Flat 3 was stopped January leak repairs done between 31/01/05 and 03/02/05	insurance - "the leak happened half way through an exhibition by Tamsyn Salt" […] "Andrea Rossi'show was next /…/we had to buy a 7ft rubber plant to hide the mess on the wall but you could not disguise the smell" […] "on 13 Nov we closed the gallery until the works were completed. This took 3 months with the stack pipe being eventually re-boxed 3 days before the following show" - **C1/169**: Dec 04 telephone calls record summary from C to JG (5 calls &13 sms) & CHA (2) - **C1/164**: Jan 05 telephone calls records from C to JG (3 calls & 2 sms), CHA (4) & RU (3 calls & 4 sms) - **C1/181**: record of Cs' diary entries RU (7 entries) & JG (1) January 05 - **C1/202-204**: Kumiko Shimizu's exhibition details – 10 Feb to 26 Mar 2005 - **C1/181**: record of Cs' diary entries FWA 3/2/05 - **C1/128**: summary of leak attached to letter sent to C Natt & J Greene on 3/7/06 – "the casing downstairs in the fire exit corridor was also replaced as it was saturated" - **C1/191**,4th para: letter from JF to C Natt 18/05/05 giving Cs' account of events (although it was disputed at trial and now rectified that 6 months actually meant 5, ie from beg of Sept 04 to beg of Feb 05) - **C1/186**,1st para: 06/04/06 email from insurers' loss adjuster Alan Hines after he has interviewed RU – "further enquiries revealed a crack on the foul water stack pipe […] the defective section was cut out and renewed"

53. When RU was questioned by HH Judge Cowell it became apparent that RU's replies were not supporting his written statement of facts (**B1/13/45-52**). For example RU said that after not being able to view flat 3 in the first instance, he went again to flat 3, before 05/05/04, and noticed tiles damage, whereas RU's witness statement reports (in para 6) that he "could not gain access to the flat until 5 May 2004"; RU then said that the tenant confirmed that the plumber came and tiling was done on 5/5/04, whereas the written statement

version is (in para 8) "As I understand there were problems with regard to the tenant in gaining access to the flat. The job order was therefore reissued on 18 August 2004 to FWA, who attended on 23 august 2004 /…/ completed the wall tiling on 14 October 2004". When prompted to the difference in accounts, RU replied that the tenant had told him the job was done on 5/5/04 and that he then heard something different from another source.

54. A further example of RU this time contradicting his own words while giving evidence is when he first explained that it was the call centre that informed him of the leak in the shop below flat 3 in January 2005 then later said that it was the tenant of flat 3 who told him that there was a leak in the shop.

55. Regarding the "pin hole" version of account given in RU's witness statement, it must first be noted that this contradicts the information contained in the 6/4/06 email from Alan Hines's, loss adjuster for D's insurers, after he had interviewed RU (**C1/186**, 1st para) "further enquiries revealed a crack on the foul water stack pipe […] the defective section was cut out and renewed". RU maintained while giving evidence that only a pin hole was discovered on the pipe, that the pipe was wet but that there was no smell, that it was simply a stack pipe for water, not a waste stack pipe. Then he said that maybe someone put a nail through it and that it went through the pipe. ZB further suggests in her written submission (ZB/20/35) that JF's evidence was that she did hang pictures in that location. There is no such record in Cs notes from trial and it is believed and submitted that there has been misinterpretation on the occasion. During the trial JF referred to a photograph (**G1/4/12**) showing the casing of the stack pipe (although taken at a later date in October 2005, one can see the triangular section of casing on the right hand-side of the rear wall); the awkward shape of the casing at the top and the narrowness

at the bottom have to be noted as evidence that the hanging of any picture in that location would be extremely unlikely. Beside for a nail to pierce the pipe, it would have to be a very long nail in order to go through the mdf board, the rock wool insulation and finally the pipe. It would also need to be a very thin nail, in order for the pipe to be neatly pierced with a pin hole, as opposed to a thick nail that would most likely have the effect of cracking the pipe. The only nails ever used in the gallery by Cs were standard brass picture nails, no longer than 1 inch. JF also gave evidence that a tall rubber plant had to be placed in that corner by Cs so as to hide the unsightly stains to casing in November 04, but that the smell itself could not be disguised, that it caused much embarrassment to Cs and that the next exhibition had to be postponed as a result.

56. The floor plans of the flats above the gallery show that both the bath and WC of flat 3 are located right above the stack pipe casing in the shop so not only does it seem logical that this is indeed a soil or waste stack pipe, but there is no doubt coming from both Claimant's memories that this is the case. There is numerous evidence of the Claimants' case in the various statements of accounts they had to provide since not only to D but to the insurers; further evidence given by JF at trial confirmed that the smell, the extent of the damage gradually growing on the casing and the sight of the (visibly cracked) pipe once the casing was open were caused by a leaking waste stack pipe, or as Mr Hines put it, a "foul water stack pipe", not just water escaping from a pin hole with no smell for just a few days.

57. When RU was asked by JF whether he remembered putting a hammer through the casing, he first denied it then remembered that yes he did, in order to break in the casing and access the pipe, he said. This was brought up by JF in order to demonstrate how saturated the casing was by that point – you could put a hammer

through it (in one go) – something that could not happen in simply 5 days of water leaking through a hole as thin as a pin. The fact that the casing in the basement underneath also had to be replaced (C1/128) is a further indication of the extent of the leak.

58. It is also important to note that if the information contained in RU's witness statement was to be relied upon, it would appear that a leak reported in April 2004 affecting the 104 premises was traced back a few days later by RU to have been caused by loose tiles around the bath of the flat situated above (flat 3) and that the repair to the tiles were completed on 14 October 2004 (5 ½ months later!). If this was the case, it would indicate negligence to some extent on behalf of D in effecting prompt repairs to their residential property while being in the knowledge that this was affecting the commercial premises below. D's case, according to the evidence given in RU's witness statement, seems to be that the reason it took so long was because the contractors could not gain access to the tenant's flat.

59. John Mason (JM), a residential tenant of D and former head of the residents' association, was called to the witness box on the third day of trial and questioned about his view of the way residential repairs were taking place in the building: he explained that after having to deal with many problems relating to drains and sewage pipes following the refurbishment of the Estate completed in 1999 by D he noticed some improvement in the recent years, particularly in the system used by D to record the tenants' calls for repairs. He also told the Court about how recently he was left to experience a period of ten days during winter time without hot water or central heating. He further added that this was particularly difficult as he was invalid at the time (he had just had a hip replacement operation). In this situation it is clear that the blame for the delays cannot be put on the tenant in not allowing access to his flat (JM could not move).

Although not relating to Cs' premises in this particular case, it is submitted that this example is just another valid example demonstrating the lack of care taken by D in remedying repairs within its housing stock.

60. While cross-examining JF, ZB based most of her suggestions upon RU's witness statement to suggest that Cs' telephone call to RU on 15/10/04 was the first report of the leak to stack pipe and that because a leak was fixed on 14 October 2004 in flat 3 above the gallery, it was assumed that the leak to stack pipe (alleged by D to have been reported the day after for the first time) was also stopped by that action. ZB further suggested that a new leak was reported by Cs in January 05 and was also fixed without delay, once again basing her story upon RU's statement of facts.

61. ZB refers to the same January 2005 report of a leak in her written submissions on liability (ZB/19/33). However she fails to mention the other events: no mention suddenly of the October 2004 report nor of the April 2004 report of a leak to stack pipe by Cs as alleged by RU in his statement.

62. In her written submission ZB states that it is notoriously difficult to trace the source of water ingress. In the April 2004 instance, it did not seem difficult: according to RU the source was quickly found as early as 5/5/04, but it is only due to the lack of access given to the tenant's flat that the repair was delayed until October 2004.

63. ZB mentions (ZB/21/42) a "limited duty to take reasonable care to see that the condition of the retained part does not cause damage to the demised premises"; is it reasonable to decide that a damage reported in the ground floor shop in April 2004 (and supposedly caused by a leak coming from the flat above) does not require

checking when it is again reported on 15/10/04 on the grounds that the leak from the flat above has just been fixed the day before (but despite the fact that this leak has presumably been going on unattended for 5 ½ months)? Would it not be more reasonable instead to go and check the amount of damage presumably resulting from those months of unattended leak? RU's words were that JF called him on 15 October 04 to report a leak to stack pipe, which he knew had been fixed by the repair to flat 3 the day before. So presumably he decided there was no need to check or worry. It is submitted that the evidence given by RU on this occasion does not show any reasonable care.

64. The sad thing is that this whole scenario of events, as adopted by Ms Bhaloo in her submissions, is actually very far from the truth. It would actually be tempting for the Cs to adopt some of the false accounts given in RU's witness statement and/or evidence to use it to their own advantage as it would prove utter negligence on behalf of D. However the truth has to be said: there was indeed a leak to the stack pipe itself in April 2004 on the ground floor of the gallery but it was promptly repaired by D's contractor FWA and therefore Cs have never complained about it. The loose tiles in flat 3 may have been left unattended for months but this in itself had no noticeable adverse effect on the shop below. A new leak occurred on the stack pipe, which as stated all along by Cs, was noticed early September 2004 and reported on 14/09/04 as the damage was growing and they had previous experience of a leak in that same location.

65. Their initial report and further complaints were simply ignored by D. Presumably because RU had (wrongly) assumed that this was coming from a leak in flat 3 that, although left unattended for months, was then (in September) just about to be repaired (attended on 23 August, but the wall was wet, rebooked for 11 October,

repaired on 14 October). It is submitted that this whole series of delays to the repair to flat 3, despite not affecting the shop below, is nevertheless a show of negligence. It is further submitted that RU's assumption and his consequential lack of action with regards to the damage reported in 104 was certainly not the demonstration of reasonable care being taken, as alleged by ZB in her submission. This in fact led to months of stress for the Cs and rapidly caused havoc in their business.

66. RU only reluctantly conceded to come and observe the damage as late as 31 January 2005 after numerous telephone calls were made by Cs (see reference quoted in the table above); the leak to stack pipe and the resulting damage to casing on the ground floor and in the basement were eventually repaired early February 2005.

67. ZB states in her Defence and Counterclaim that an insurance claim was made for this (as part of the August 2005 insurance claim made by Cs for the ceiling and other outstanding repairs).

68. In fact the outstanding repairs included in that claim were repairs of damage caused by the leaks to glass bricks (**C1/137-139**) and stack pipe in 106 (**C1/271-276**), not in 104 (see **C1/326**: email from JF to Alan Hines on 12/12/05 detailing works and quote numbers by Streamline). The repair to stack pipe and duct casing were completed in February 2005 by the Defendant's contractors so they were not included in the August 2005 claim, contrary to what ZB alleged in her Defence; she suggested the same again on the first day of trial when Cs attempted to get their request for further disclosure heard (item 1(g) in that instance); finally in her submissions on liability, ZB writes once again (ZB/22/43): "In relation to the stack pipe leaks, insurance claims were made in August 2005".

69. In fact there was no need for the Cs, who were asked to add outstanding repairs to their claim, to include the 104 stack pipe because this repair was not outstanding. At the time of the leak to the stack pipe at 104, Cs had actually not been made aware by D that such a leak ought to have prompted the insurers to be notified. D had not mentioned insurance for previous leaks (previous leaks to stack pipe at 104 and through the pavement lights at 106) but more significantly D had dealt with those leaks through their reactive maintenance team and the use of external contractors.

70. So it is fair to say that Cs were originally led to believe that this was the correct way for D to handle repairs of such a nature. It is only following the flooding of 104 in the Summer of 2005, that D asked Cs to complete an insurance claim form. With hindsight, the defect detailed above was to a common pipe of the building serving the residential flats above, so was clearly under the responsibility and care of D for remedying whether or not it was covered as an insured risk; both the area subject to the defect and the required action were entirely under D's control and whether D ought to have dealt with it via their insurance or via their own repair team, it ought to have been in either case a reasonably prompt action. In the event they did neither in a prompt way.

71. ZB has also submitted that from looking at the length of time taken by the insurance to process the August 2005 claim it is clear that the damage would have remained un-repaired longer if it was processed by the insurance than if it was actually left un-repaired for by D's repair team. It is submitted that this argument is not valid because it was made clear to Cs that the reason the August 2005 claim took so long was because the amount of the material damage claim was over £5,000 and an investigation by a loss adjuster was needed (**D1/257**).

72. The August claim took from August 2005 to January 2006 for the money paid by Cs to be refunded. The 104 stack pipe leak was left unattended by D from mid September 04 to early February 05, which is approximately the same time. However being a much smaller problem, it is reasonable to expect that this could have been processed by the insurance without any complication as described above.

73. The excess for a single incident in commercial properties is £100. According to RU's notes (**B2/5/187**) the cost for repair to stack pipe was £433.73 (although it is unclear if this includes final works to make good the area). It is submitted that the reasonable way for D to handle this incident would have been:

- Firstly, to promptly and properly investigate the damage, i.e. by having either their internal repair team or one of their contractors opening the casing of the stack pipe to check the state of the pipe (this is an even more so reasonable expectation considering that a similar incident had occurred in April 04)
- Simultaneously or shortly after to notify their insurers of a potential claim
- Lastly, to promptly organise the repair to stack pipe and consequential damage to duct casing, which could either be by way of getting a quote for repair and sending it for approval to their insurers or, in what could be described as more practical considering the existing setup, by having the repair carried out by the external contractors employed by D on a regular basis (e.g. FWA) and claiming recovery of the costs from their insurance.

74. Both stack pipes in question in this claim are communal pipes to the building serving residential flats above the premises and are under D's responsibility. Defects did not precede grant, they were adopted and continued by D's failure to remedy to the defect with reasonable

speed and care. Responsibility for consequential damage stems from the responsibility for the original defect. This caused nuisance to Cs with terrible smells and physical damage to the premises.

75. Insurance was not effected at all and/or not effected with reasonable speed (see details for each stack pipe). As submitted under the insurance section, D acted carelessly in breach of the duty of care it owed to Cs in its dealings with the insurance company duty and caused loss to Cs which was foreseeable. D was negligent and is liable for Cs losses including loss of profit.

76. It is further submitted that through its action as described above, D is also in breach of the covenant for quiet enjoyment.

Stack Pipe 106
Reference:

- **Item no. 3 in Cs' schedule-1**
- **D's Submission on Liability pp.20-22, paragraphs 36-43**
- **Appendix B to D's Submission on Liability**

Claimants dates	Defendant's suggested dates	Further evidence from Cs further supporting their case and/or counteracting D's suggestions when a dispute arose.
Discovered 07/02/05	Agreed	
Reported 07/02/05	28/2/05	- **C1/254** (20/2/06 mail from JF to A Hines - 2nd para up from bottom of page): "I immediately told Richard about the problem. It took him /…/ three weeks with me constantly calling and leaving messages on his answerphone to finally get back to me and inform me that he had fixed a leak upstairs above the shop and that "it should all be ok now"." - **B2/5/184**: 02/03/05 - Flat 1 - Job no.118811 - FWA - "Remedy bad leak from bathroom ceiling". - **C1/126** (letter sent by Cs to CHA directors on 3/07/06): "by February Jaquie Greene was

		informed about the leak and asked us to keep notes of the situation as we had had previous trouble with maintenance being very slow"
Repair to stack pipe 27/04/05 Incomplete repair to duct casings on both floors & ceiling in basement bathroom 02/06/05 Final repairs paid for by Cs completed on 14 & 15/10/05 Cheque from insurers refunding Cs 20/01/06	25 & 26/04/05 ~~(agreed)~~ Decorating to basement 02/06/05 (agreed) Ground floor access panel replaced 02/06/05 (disputed) Works completed Oct 05 (agreed)	- **C1/241**: Mar 05 telephone calls records from C to JG (8 calls & 5 sms) & RU (8 calls & 2 sms) - **C1/234**: Apr 05 telephone calls records from C to JG (7 calls & 1 sms), RU (12 calls & 4 sms), CHA (1 call) & FWA (17 calls) - **C1/228**: May 05 telephone calls records from C to JG (7 calls), CHA (2) & FWA (7) - **G1/10/77-86**: photographs of 106 stack pipe leak - With regards to the date the leak to stack pipe was stopped, telephone records at **C1/237** show that 3 telephone calls to FWA and 2 to J Greene were still made by Cs on 27/04/05. The information related by JF in **C1/255** "The leak, thanks to the help of Jaqui Greene (who went ballistic at CHA) was eventually fixed later that day" does confirm the 27/04/05 as the date of repair to the stack pipe itself, not 26/04/05 as alleged by D. - Re dates of repair to ground floor access panel: **D1/158** (last sentence of top para): "To this day the chipboard casing on the ground floor has not been put back to its former state" (19/08/05) - **C3/4/20**: note in diary (05/09/05): "redecorate ceiling glassbrick leak and seal – same in bathroom - MDF boxing on ground floor + check plumbing" - **G1/10/84**: photographs dated 14/10/05 showing ground floor access panel open and no skirting board.

77. On day 3 of trial while JF was being cross-examined by ZB a debate occurred around when the leak to stack pipe was reported: ZB suggested the first record of report is 28/02/05 from looking at the diaries entries (typed summary) in **C1/252** and confirming with tel bill in **C1/248**. JF referred to the same tel bill **C1/247** showing that a telephone call was made to J Greene on 15/02/05, the same diary summary **C1/252** showing that a note to ring RU was made on 14/02/05 and to the original photocopies of the diaries entries in

C3/4/34 showing note 07/02/05 note saying "ring CHA re leak in bathroom". ZB disagreed and stated it could have been a note to call, not necessarily a note that the call was made on that day.

78. It must be noted that like many other telephone bills that were lost in the time elapsed between the events and the court proceedings, the first four pages of the February telephone bill were not found by Cs, ie the records shown only start on 13th Feb instead of 1st Feb. The limited telephone records therefore cannot be strictly interpreted as the only records of calls made by Cs. Telephone calls were also made from the landline from which Cs have no records for this period. Although it is true to say that one cannot tell from the diary pages whether a call was made on the day it was noted to be made, the evidence overall confirms that many calls had to be made until a first visit took place. Further evidence as quoted in more details in the table above (**C1/254, B2/5/184** & **C1/126**) concurs with supporting the fact that although JF reported the leak to RU on that date, RU did not get back to her until after a leak to the bathroom of the flat above the shop was repaired on 02/03/05 (approximately three weeks later, as reported by JF in her email to A Hines, **C1/254**).

79. This is also consistent with the recent behaviour of RU with regards to the stack pipe leak at 104: once again RU is assuming that a leak in the ground floor shop has to be coming from the flat above and therefore does not bother to inspect the reported damage in the shop.

80. This tendency to assume was also confirmed at trial during RU's cross examination: while visiting the 106 premises in April 2005, RU's witness statement reports that he noticed the casing around the stack pipe was damp; when asked by HH Judge Cowell whether he

thought of looking at the stack pipe, RU answered: "no I thought it was probably the previous leak from flat 1".

81. In any case it is interesting to note that the leak to flat 1 in question is described as "Remedy bad leak from bathroom ceiling" (**B2/5/184**); if this is a leak on the ceiling of the flat above the shop, how could this only affect the ceiling of the basement of the shop, two floors down, without any damage in between, i.e. in flat 1 itself or the ground floor? Would a leak to the ceiling of flat 1 not be likely to come from even further up? There are no further details available from the work orders about this leak but it is submitted that RU's various assumptions as regards to the origins of leaks cannot be seen as reasonable.

82. With regards to the date the leak to stack pipe was reported, it is therefore submitted that it was indeed reported to D on 07/02/05.

83. RU once again contradicted his own evidence at trial, saying first that he came back to the shop a few days after his 08/04/05 visit, then that he "didn't go back after raising the order of 08/04/05".

84. RU's witness statement clearly appeared once again to be made up from selected pieces of evidence gathered and linked to one another from a remote point of view in order to enfold a scenario attempting to demonstrate that there were three different reports of damage to the stack pipe casing, which each time would have been remedied straight away by D.

85. Cs made numerous written reports of the particularly revolting situation around the leak that occurred to the stack pipe at 106 and because sight, smell and physical contact have left a mark, the memory of it is still very clear in their minds. "The leak and the

consequent overwhelming smell" were reported to C Natt in a 18/05/05 letter by Cs (**C1/265**, top para).

86. More details about the smell, the flies, the "nine-foot long log of excrement" and the fact that the damage to stack pipe was located on the ground floor of the shop were given by Cs in the 19/08/05 property claim form for the insurance (**D1/157-158** starting from last para of p.157). Then an email to A Hines from JF on 20/02/06 says it all (**C1/254-255**): "The leak in fact did not stop so I phoned Richard a few days later and informed him that the whole place was starting to smell really bad and the damp stain was growing" […] "He took a pencil from the tool box and marked the ceiling around the leak stain which was now dark and about 2ft wide he did the same with the walls beside the plasterboard pipe casing which was swollen and had mould growing out of it" […] "two days later the smell was dreadful, then brown stuff started to grow on the ceiling and flies started appearing" […] (several days later)"I said to the plumber/…/could he and I at least open up the casing/…/he agreed/…/By now it was a 9ft log of excrement and urine that had accumulated. The smell was unbearable and the plaster was so soft with damp you could have taken it down with your hands. Wearing gloves we filled up half a dozen bin bags" […] (several days later) "I walked in the following day to find the whole floor covered in sewage" […] "it turned out after all that trouble that it was in fact a cracked stack pipe at ground floor level in our shop" […] "The next day I was ill with what looked like a skin allergic reaction and covered from head to toe in a bad rash". **G1/10/84** (top photograph) shows the section of stack pipe that was repaired.

87. RU's evidence was that the leak to stack pipe was traced back to a bath trap leaking from the flat above and that with regards to the damage observed around the casing of the stack pipe and on the

bathroom ceiling in the basement of 106 during his visit of 08/04/05, there was no bad smell, just a damp smell, further supporting his oral evidence by saying that flies can be attracted to damp stains and that to him this was clearly not caused by waste, only water. The similarity between this evidence by RU and the evidence he gave with regards to the other stack pipe leak at 104 has to be noted.

88. Although there is one main difference: this time with the 106 stack pipe, photographs were taken by Cs. It is submitted that it is sufficient to look closely at the photographs located in **G1/10/82** to conclude on the truth of the matter: when looking at the top end of the revealed stack pipe, on the right hand-side, one can clearly see remains of brown solid waste still attached to the pipe.

89. With regards to the dates of repairs to stack pipe, it is submitted that the stack pipe itself was repaired on 27/04/05. It is agreed that some partial works to make good the damaged area in the basement bathroom were done on 2/06/05. It is submitted that whether the ground floor access panel was replaced on 02/06/05 or at a later date, further works were in any case necessary to make good both the basement and ground floor areas damaged by the leak to stack pipe as these had been left unfinished on 02/06/05. It is agreed that those works were completed in October 2005 and it is submitted that this was done after 14/10/05 (see **G1/10/84**).

90. It is submitted that the planned works to install central heating were delayed due to the ongoing damage in the bathroom, which was caused by the leak to stack pipe reported on 07/02/05 and left unrepaired until 27/04/05. It is submitted that the cut of electricity supply that occurred on 14/02/05 bears no relevance to this.

91. Contrary to Ms Bhaloo's request in her written submission (ZB/21/39), it is asked that the evidence given by RU with regards to the damage caused by the leak to stack pipe at 106 is not accepted by the Court. It is submitted that from further evidence given by RU during the trial, nothing at all in RU's approach to handle repairs can be seen as reasonable.

92. It is agreed that the costs of the final repairs necessary to make good the damage caused by the stack pipe leak were claimed as part of the August 2005 claim made by Cs with D's insurers. The details of those works are showing in **C1/271-276**. It is however submitted that D never instigated an insurance claim for the repair to stack pipe, nor for the consequential repair works to the damage caused by that leak. Instead they simply asked Cs to add any outstanding repairs to their August 2005 claim for the ceiling at 104.

93. As JF put it in an email to C Natt on 2 September 2005: "I really cannot understand why we have previously been referred to residential repairs when we should have always been covered by building insurance" (**C2/2/140** 4th para down)

94. It is submitted that the leak was reported on 07/02/05; that it was stopped on 27/04/05; that the material damage caused by the leak was partially carried out on 02/06/05 and completed on 15/10/05.

95. It is submitted that the steps taken by D to trace the leak cannot be seen as reasonable, and further that this resulted in significant delays in remedying the leak. It is also submitted that once the leak was stopped, unreasonable delays occurred to remedy the damage caused by the leak and that this shows further negligence on the part of D.

96. At the time of the leak to stack pipe at 106, Cs were still not aware that such a leak ought to have prompted D to make a claim on their building insurance, for the same reasons as given in the case of the 104 stack pipe.

97. It is also submitted that the area subject to the defect and the required action were within the D's control and that whether D had decided to deal with the 106 stack pipe leak reported by Cs on 07/02/05 via their insurers or via their own repair team, it ought to have been a reasonably prompt action in either case. In the event they did neither in a prompt way.

98. It is suggested that a reasonable way for D to have handled this incident ought to have been the same action as suggested for the stack pipe at 104.

99. With regards to Ms Bhaloo's submissions with regards to the length of time for a claim to be processed and her comments on insurance excess, the submission made for the 104 stack pipe in reply to that point also applies to the 106 stack pipe.

100. It is further submitted that through its action as described above, D is also in breach of the covenant for quiet enjoyment.

Ceiling & Floor 104
Reference:

- **Item no. 4 in Cs' schedule-1**
- **D's Submission on Liability pp.23-25, paragraphs 44-53**
- **Appendix C to D's Submission on Liability**

Claimants dates	Defendant's suggested	Further evidence from Cs further supporting their case and/or counteracting D's suggestions

	dates	when a dispute arose.
Discovered 24/06/05	Agreed	
Reported 24/06/05	Agreed	
Leak stopped 24/06/05	Agreed	
Ceiling replaced 25/10/05	Agreed	
Cheque from insurance received 20/01/06	Agreed	
Floor damage reported early 2007	Disputed 07/01/08	Jim Gorman gave evidence in the witness box that he visited early 2007, 2 or 3 months after the leak in flat 3. "I was asked to look at the floor after a minor leak occurred in October 06". "Ms Gavin had contacted J Greene and C Natt about the floor coming up, she thought it might have been from the leak in 2006" + see below

101. Although the flood through the ceiling in the gallery at 104 is submitted by D (ZB/23/45) as an unforeseeable accident (and indeed Cs were under the same impression soon after the flood had occurred) it is fair to say that what caused it has not been agreed between parties.

102. It is submitted that RU's evidence on the matter is particularly suspicious. RU maintains that the water leak was coming from flat 2, which is at the front of the building, and that this was caused by a tap left open by the tenant; according to RU's version of accounts, it is the tenant's social worker who, when alerted by RU on the evening of Friday 24/06/05 (he was on his way home from work) that there had been a flood in the shop below, had entered the tenant's flat and "turned the tap off ".

103. JF's evidence at trial was that the flood had occurred sometime between the evening of Thursday 23/06/05 when the second claimant CC had left the gallery and the following morning when both Cs opened the shop and discovered it had been flooded.

104. It is important to note that when Cs discovered the gallery had been flooded, water was not pouring through the ceiling or running down the walls by that point, it was all over the floor, condensation was extreme and paint had already peeled off the walls; the flood had occurred but it was not still going on. It is therefore asked that RU's evidence on this matter is not accepted by the Court.

105. In any case the facts, undoubtedly supported by evidence, are that the flood affected very clearly the rear half of the gallery, which is underneath another flat, i.e. flat 3. The part of the ceiling that had to be replaced is indeed located in the rear half of the gallery and it was later confirmed by the damp expert surveyor that trace of water damage to the floor was mostly located at the back of the gallery, near the staircase.

106. It is further submitted that RU's resolute efforts to hide the truth can only indicate an attempt on behalf of D to avoid liability for the poor state of repair and maintenance of the residential flats above the shops.

107. With regards to flat 3, evidence shows that at least two further incidents of water ingress and lights tripping occurred at a later date in the same location on the ceiling of the gallery, which was also confirmed by Jim Gorman (JG) in his evidence at trial. JG stated about the lights tripping that he was "sure it was not due to the (October 2006) leak" (JG then added "I don't know").

108. The poor quality of the assumptions of RU with regards to tracing leaks have been commented upon earlier in these submissions with regards to stack pipes; this and the other evidence highlighted above lead us to submit that the 2005 flood to the gallery was indeed caused by the poor state of repair of the flat above, namely flat 3.

109. In relation to the flood at 104 it is agreed that it was reported by Cs on the day of discovery, i.e. 24/06/05. The chronology of events leading to D asking Cs to complete a form for the attention of their insurers has been established by the evidence. However it is submitted that the steps taken by D were not reasonably prompt and that in this instance D did not show reasonable care. The insurers ought to have been alerted immediately of a potential claim. Prompt and efficient investigation of the damage ought to have been carried out by D in the first place. D has a whole team of professionals in his employment and a property portfolio large enough for its team to be expected to have sufficient knowledge and experience of such incidents and of the correct procedure to follow. Instead the response by D's representatives can only be described as:

- slack: RU was satisfied that there was no further damage when he visited on 29/06/05 and saw Cs re-decorating – but he did not check the state of the ceiling any further than by looking at it from the ground perspective.
- slow: J Greene when alerted on 15/07/05 (**D1/140**) that serious damage had started to show (stains, dampness, warped pictures, may need to close, water may be stuck in ceiling) three weeks after the flood, simply suggested seal paint but did not send anyone to investigate any further. Cs then sent 2 further letters: one to Chris Natt on 3/08/05 (**D1/145**) mentioning mould growing from the ceiling and one to both C Natt and J Greene on 12/08/05 (**D1/147**) further alerting them of the rapidly growing damage in the gallery and requesting proper investigation of the ceiling.

- confused: JF submitted evidence at trial showing that there was utter confusion on behalf of D as to who amongst their staff should deal with Cs and the insurance Claim and to the type of cover in place (**D/149-150**; **D/1152-153**); also as to whether Cs ought to communicate with D or their insurers, which went on as late as 21/10/05 (**D/275-277**). Yes the draft of an insurance claim form filled in by Cs and sent to D for discussion was forwarded to the insurers on 15 August 2005 (**D/154**). But Cs' request on 11/08/05 (**D/152c**) to see a copy of the insurance policy prior to completing their claim was only answered by D on 9 September 2005 (**D/177**).

110. By that time, Cs had already called external contractors to submit quotes for repairs. It is important to note that D had still not sent in a surveyor to investigate the damage. Cs had to wait further for a response by the insurers as to whether the works could be carried out. It was only at the time when the works were carried out at the Cs' costs that a surveyor was sent in by the loss adjuster for the insurers.

111. It is submitted that D were negligent in handling this incident, that they did not deal with it with reasonable speed and that even if the insurers may seem to have contributed to the delays, it was only due to the unreasonableness of D in the first instance (see Insurance submissions and **D1/302** re loss adjuster's preliminary report on 27/10/05).

112. In relation to the subsequent damage to the floor, the first submission on behalf of Cs is that a proper investigation of the potential damage to the floor (as well as to the ceiling) would have been a reasonable step on behalf of D and that damage to the floor ought to have been reasonably foreseeable after such an extensive flood.

113. Monique Jamera (MJ) gave evidence that she was surprised to hear that no-one had made the link between the flood and potential damage to the floor at an earlier stage. There was never any correct investigation and/or assessment of damage to the floor by D, neither by RU on his visit on 29/06/05, nor by any other surveyor from D between that time and the time it was decided that an insurance claim was to be made, nor by the loss adjuster's surveyor Jessee Cooper in October 2006, nor by JG when he was called in to assess the floor in early 2007 or when he visited the premises again after the floor tiles had been removed in January 2008.

114. JG's evidence at trial was that he was asked to look at the floor early 2007 following a minor leak that had occurred in the gallery in October 2006; he also asserted that he was sure that this minor leak could not be the cause of the lights tripping later on (in March 2007); then JG explained that "Ms Gavin had contacted J Greene and C Natt about the floor coming up" and that "she thought it might have been from the leak in 2006".

115. Cs have always agreed that the leak in flat 3 in 2006 was promptly remedied (this is when Cs realised that it was flat 3 above the back of the gallery and not flat 2 - **C1/296**). It is also agreed that Cs were worried that the lights tripping in March 07 may have been related to the October 06 leak (which had only affected the ceiling). However, it is submitted that, contrary to the evidence given by JG at trial, JF did not think that the damage to the flooring might have been from the minor leak in 2006, but that she believed it could have been from the flood in 2005 (where water was covering the entire floor) and that it was what she said at the time.

116. It is therefore submitted than instead of simply relying on his "observations" (**B1/14/61**), it would have been reasonable for JG to have had the floor correctly investigated at the time of his visit in early 2007. When in 2008 the vinyl tiles were removed and mould was apparent underneath, JG once again states that "there was no visible damage to the underlying floor area" (**B1/14/62**); his evidence at the trial was that although he took photographs "they were unfortunately lost in our system".

117. Once again it is submitted that through JG's assumptions or acts of omission D did not take reasonable steps in tracing or remedying Cs complaints with regards to the floor in March 2007 and in January 2008.

118. When Oliver Barnett (OB) gave evidence in relation to his "grand tour" visit of the premises on 19/11/07, he said that he could not remember seeing any leak, just history of those being related to him. When photographs of the leak in the electricity room were pointed out at him, OB said that he could not remember seeing that (the leak in the electricity room at the time was the subject of a lengthy complaint from Cs to D). When asked to confirm that he would have seen that or organised contractors to sort it out, OB was very hesitant in giving any replies.

119. It is submitted that as part of the areas of historical damage pointed out to him OB was indeed shown the floor tiles in the gallery and that he also saw the electricity room. OB gave evidence that he assumed the floor coverings were part of the tenants' fittings and referred to the tenants' obligations in the lease.

120. JF pointed out at the fact that the vinyl flooring had been put in by D in 1999 as part of the initial refurbishment of the shop (**C2/2/16**) and

referred to an email from Matthew Greenhalgh in May 2008 on behalf of the insurers to MJ, OB's assistant: "should the flooring predates the tenant's residence in the property I shall happily add the details to the material losses claim" (**D3/819**); in that same email concerns were expressed "that this damage was never raised before" and the report and photographs taken in January 08 were requested. D simply did not reply to this email (**D3/831**). When asked by JF why there was no reply to this email, OB simply answered: "I don't know". It has to be noted that this cross-examination of OB by JF does certainly not support the allegation by Ms Bhaloo in her submissions (ZB/25/52) that JF accepted that the insurers were to blame.

121. It is submitted that D failed to take reasonable action and failed to remedy the damage to the floor at 104 despite the following facts:

- potential damage to the floor was or ought to have been foreseeable following the flood of the gallery
- D was alerted as early as March 2007 that there was by then evident damage to the floor
- D was alerted again in January 2008 that this was by then obvious and to be treated as a matter of emergency
- the insurance informed D as late as May 2008 that they could still process a claim to cover this damage

122. It is also submitted that not only does this show a total lack of reasonable care on the part of D but also that this demonstrates a clear act of omission.

123. The evidence of Mayor Jonathan Simpson (JS) on the 6th day of trial was that after his last visit to the gallery in May 2008 he tried to arrange a meeting with D and ended up having a telephone conversation with OB, whom he found to be "exceptionally

unprofessional, quite fractious and very antagonistic" and that he had "never dealt with any public official who had such an aggressive manner". JS further explained that when he spoke to OB about the floor damage to the gallery and the latest related offer made by OB to JF (**D3/853**), he was told "she will have to take this offer or she will have to close down". JS added that OB said that with "glee in his voice".

124. Through the evidence of JS, the submission of further evidence by JF and the cross-examination of OB by JF, it was apparent that during the time of the dispute between Cs and D around the floor of 104, further pressure was applied by D onto Ms Gavin in what is submitted to be an attempt to eventually force her out of the premises. Although this may not strictly apply to the issue around the floor and will need to be further submitted at a later stage in trial with regards to the claim for harassment by Cs and the claim for repossession by D, it is however important to underline the simultaneity of those events at this stage in order to have a clear view of the last actions and intention of D regarding the floor of 104.

125. Overall the problems relating to the ceiling and floor of 104 caused substantial nuisance to Cs by way of physical damage to the premises, smell, business interruption and further disruption which took place immediately after the flood and after but also on a much longer term due not only to the consequential and gradual damage occurring to the floor and left unattended but also due to the particular nature of the business run in the premises (of which D were at all times aware). Esther Caplin (EC) gave evidence during the trial hearing that when she had an exhibition of her artwork setup in the Scarlet Maguire gallery in 2007, the floor looked indeed slightly damaged but she was able to secure the use of the gallery for a price that no other galleries would have been able to compete with.

126. The ceiling and floor at 104 were damaged from a flood coming from the flat upstairs and/or communal water pipes to the building. The tenants' flat above the premises are in D's ownership and there are clear obligations to repair put on the landlord (see tenancy agreement for flats D1/1-7l. Any communal water supply pipes are, like the stack pipes, serving residential flats above the premises and under D's responsibility. The defect was therefore adopted by D and continued by D's failure to remedy to the defect with reasonable speed and care. Responsibility for consequential damage stems from the responsibility for the original defect. This caused nuisance to Cs with smells, damp, mould and physical damage to the premises.

127. Insurance was not effected with reasonable speed and/or not effected at all in the case of the floor. As submitted under the insurance section, D acted carelessly in breach of the duty of care it owed to Cs in its dealings with the insurance company duty and caused loss to Cs which was foreseeable. D was negligent and is liable for Cs losses including loss of profit.

128. It is further submitted that through its action as described above, D is also in breach of the covenant for quiet enjoyment.

Pavement Lights 106
Reference:

- **Item no. 1,6 & 7 in Cs' schedule-1**
- **D's Submission on Liability pp.25-27, paragraphs 54-58**
- **Appendix D to D's Submission on Liability**

Claimants dates	Defendant's suggested dates	Further evidence from Cs further supporting their case and/or counteracting D's suggestions when a dispute arose.
1st occurrence		
Discovered	Disputed	JF gave evidence it was discovered the first

April 04	pre-existing	time it rained **C1/111:** statement from Adam the carpenter
Reported April 04	Disputed Oct 04	RU gave evidence that he came round two or three times and was shown the pavement lights but referred the problem to the planned maintenance department **C1/118** & **C3/4/1-7:** diary entries showing RU visited April-May 2004 JF gave evidence CHA tried to avoid dealing with it for months but she traced back the supplier of the pavement lights (Luxcrete) and the contractor who installed it for D (Kingsbury Construction) and eventually D accepted to repair **D1/125:** J Greene's email to RU about roof lights in the street on 15/10/04 saying "as this is CHA property we will be liable to initiate repairs"
Leak stopped (asphalt repaired) 01/11/04	Agreed?	**C1/112-115**: Oct 04 telephone bill showing calls to Kingsbury construction as late as 28/10/04
Internal damage repaired 15/10/05	Agreed?	**C1/137-139**: insurance claim form & quote from Streamline Job was done by polish builders at same time as final repairs to damage caused by leak to stack pipe 106
2nd occurrence		
Discovered June 06		
Reported beginning of June 06	Disputed August 06	**B2/4/150-151**: ZB referred to this email from J Greene to JF to suggest that the incomplete text message from JF that was received by J Greene (not said when) would be JF's first notification of the incident and therefore would not count as was "incomplete" **C2/3/82**: email from JF to J Greene (3rd bullet point down) specifying a telephone call was first made to J Greene at the beginning of June (3rd bullet point down) **C2/3/81**: landline telephone records showing calls were made to CHA and to Kingsbury Construction in June and July 06. Other references later made to the leak being reported in June 06: **C4/215**: letter to S Monk RSA dated 19/9/06

		C2/3/76 (2nd para): email from Cs to J Gorman & J Greene 29/09/06 also stating it was reported in June first to Ed Coster and that RU visited, as well as Kishor.(Kingsbury)
Ineffective repair to asphalt - FWA - 4/10/06	Agreed	
Effective repair to asphalt - Kingsbury Construction - 16/10/06	Agreed	
Repair to internal damage completed on 10/08/07 by D's contractor	?	**C2/3/96**: hand-written notes from CC on 07/08/07 "Ken – plasterer form FWA (?) skimmed plaster" & 08/08/07 "Ken gave coat of eggshell on stains + new plaster – Need to wait for it to dry then can repaint with emulsion"
3rd occurrence		
Discovered beginning of June 08		
Reported 20/06/08	Agreed	
Water ingress not repaired to date - Internal damage continuing as a result	?	**G1/9/76** See expert surveyors' reports including damp expert surveyor's report

129. **C1/109(i)** contains written confirmation from the local authority that "responsibility for keeping the pavement lights in good condition and repair falls on the owner or the occupier of the premises to which it belongs and that will depend on the terms of any lease (Section 180 of the Highways Act 1980".

130. Despite Ms Bhaloo's attempt at trial to suggest that the Cs are responsible for the pavement lights due to a range of clauses in the lease (1(2)(e) re windows; 2(4) re public rights of way; 5(3)(b) re tenants obligation to insure part of demised they re obliged to repair; 5(6)(b), shop front, stonework, etc.) it is submitted that the pavement lights are not demised to Cs in any form or shape, that they may be considered to form part of the structure of the premises (like a roof – see reference to them as "roof to cellars" in **C1/109(i)**) or are simply D's property and therefore remain under D's control and responsibility for maintenance, like other parts in the building owned by D and not demised to Cs. It is in any case submitted that the pavement lights do not appear in the definitions of the demised premises as shown in the Particulars in the lease of 106.

131. An email from the previous tenant of 106 (**C1/100**) confirms that it was D who put in the pavement lights originally and states: "if they keep a maintenance works log (which they should as a public body) they will be to find a record of the numerous times the builders had to come back to the premises/…/to fix the leaks from the glass bricks. We suffered immensely from the effect of the leaks; mould and damp/…/which they tried to rectify by resealing with a black molten substance". The fact that there were previous leaks affecting the pavement lights at a time prior to the grant of the lease to Cs does not mean that the pavement lights are simply defective and remain so. It is instead early evidence that the asphalt seal surrounding the pavement lights require maintenance by the person who is responsible for the pavement lights or roof to cellars.

132. It is submitted that D knew or ought to have known about it when they had them fitted in originally and even more so at the time when Cs were granted the lease because by then they had been in place for four years already. In fact the evidence of the three sets of leaks

through the asphalt seal surrounding the pavement lights and suffered by Cs through the period of their claim clearly demonstrates the regular lapse of time occurring between two leaks (approximately two years) and this further confirms the foresee ability of the incidents.

133. It is submitted that D did not take reasonable care to remedy to this problem, but also tried to deny any responsibility for it. Going back to the lease of the premises, the floor plans do not make any mention of the pavement area (unlike in the 104 lease where the pavement is clearly shown and marked outside of the demise). However Clause 2(4) of the 106 lease grants the right (so far as the landlord is able to grant the same) to put tables and chairs on the pavement area. From the lease point of view, there is a pavement, but no pavement lights. It is submitted that by omitting to show the pavement lights in the lease D is trying to simply deny their actual existence and that this amounts to an act of mis-representation by concealment of information.

134. The lack of care shown by D is even more deplorable when one knows that D has a planned maintenance team at his disposition for the regular works of maintenance required to the building it owns. On the 8th day of trial, evidence was given by JG that D has a programme planned for regular maintenance; when asked why is maintenance of the asphalt surrounding the glass bricks not included in that programme, JG's answer was: "no, because there isn't that many".

135. It is submitted that there was not only delay on the part of D in effecting the repair to the asphalt at the time of its first occurrence (from April to Oct 04) but that there were further delays in

remedying the internal damage which was directly caused by the water ingress through the defective asphalt. Both types of repairs were in any case foreseeable. The repair to asphalt because it was needed as a result of wear and tear happening over a regular period of time; the internal repair as a direct consequence of the lack of maintenance to the asphalt seal causing water ingress into the premises.

136. It has now been made clear that cases of wear and tear and gradual deterioration are not covered by D's building insurers and it is suggested that D knew of that fact in the first place and that this is the reason why D tried from day one to avoid responsibility for the repairs, i.e. in order to avoid bearing the costs. It is also suggested that this may explain why on one occasion D (via Jaquie Greene – see **D2/552**) came up with the story that the defect occurred as a result of BT moving the pavement slabs in an attempt to process the damage via the insurers, when clearly the problem was that the asphalt sealant had worn out again (see photos in **G1/9/40-42**).

137. The pavement lights, like the roof of a building, require regular maintenance because they are exposed to the weather elements and, in the case of the pavement lights, also because they are exposed to pedestrian traffic. If a roof leaks because the roof tiles have not been changed for so many years and have ended up failing, it is not insured, it requires repairs or renewal. If it leaks because a tree fell over it during a storm, that's a different matter. So whether it is a roof or pavement lights, if water ingress is occurring simply due to poor maintenance, it is not insured because it is not due to an accident, it is due to the person who has the responsibility for its maintenance.

138. Although J Greene submitted a claim to the insurers on 7 August 2006 (**D2/555**) that included water ingress to the pavement lights and to the electricity room, Cs never were informed of the outcome of this claim and Ms Bhaloo confirms in her submission (ZB/27/58) that the insurers were notified, not that a claim was processed.

139. In any case repairs were substantially delayed, despite a letter from the local authority Environmental Health Department following a visit to view the damage (**C2/3/79-80**) and despite further pressure applied by Cs' clients who had booked the premises for the launch of their magazine and were increasingly anxious. On 29/09/06 Cs wrote an email to J Gorman and J Greene (**C2/3/75**) explaining the urgency of the matter and advising that Kingsbury Construction would be the right contractor for the job. One day before the magazine launch evidence was given that D sent FWA to carry out a job which turned out to cause much stress and embarrassment the following night, until Kingsbury Construction was finally sent in on 16/10/06 to remedy the repairs to asphalt. The internal damage that had also been clearly explained to J Greene in writing and with photographs in August 06 was only completed in August 2007 when D finally sent in a contractor.

140. Whether or not the 2006 water ingress to pavement lights and its consequential damage were processed as an insurance claim, it is submitted that unreasonable delays took place with regards to any reasonable action to remedy being taken by D at all stages along the period from June 2006 to August 2007.

141. In relation to the claim made by Cs in August 2005 for the damage resulting from the 2004 water ingress from the pavement lights, it now appears that this was not the right procedure since defects caused by wear and tear or gradual degradation are not covered by

the insurance. It is submitted that D failed to apply reasonable care in remedying this problem, which was directly stemming from an area owned by them and under their responsibility to keep in a good state of repair.

142. With regards to the last instance of water ingress, the 20/08/08 email (**C2/3/4**) which is quoted by Ms Bhaloo (ZB/27/58) as written by CC was actually written by JF at a time when Cs were understandingly confused as to what from the lack of air vents, the leak in the electricity room and the pavement lights was causing the mould to re-appear on the ceiling of the basement of 106.

143. At first it did not seem logical that this would re-occur but it turned out that this was new water ingress coming from the pavement lights asphalt seal, that had worn out again, exactly 2 years after the 2nd instance of water ingress was reported in June 2006.

144. In any case there was no suggestion from D that one of their surveyors would investigate the possible cause of the damage to the ceiling in the basement when Cs alerted them about it. On 07/07/08 CC sent another email to D (**C2/3/111**) explaining that despite treating the area with antifungicidal solution and a coat of damp seal paint, damp had still reappeared. CC then suggested that the asphalt seal may need checking before thinking of repairing the damage situated underneath "we first need to know that the ashfelting seal joints on the pavement above are still 100% waterproof. If not, this may mean covering the problem again rather than solving it."

145. The "prompt steps" taken by M Jamera and referred to in ZB's submission relate to the electricity room, not to the pavement lights. The problems with the ceiling near the pavement lights were simply ignored, as indeed was the problem relating to ventilation, although

this is covered separately in these submissions under the related heading. By suggesting, rightly or wrongly, what may have been the cause of the new damage occurring on the basement ceiling, Cs were only trying to engage D into ascertaining what could remedy it. D has never sent any surveyor to assess the June 2008 damage to the pavement lights and it has remained un-repaired to date. Water ingress was indeed confirmed in the end by the expert surveyors employed for the purpose of this trial. It is submitted that in the case of the pavement lights damage reported to D in June 2008, D did not take any reasonable steps to remedy despite it being yet another foreseeable incident within their control.

146. It has been noted earlier in these submissions that there are a number of rights granted by the landlord to the tenants in the lease. One of them is "The right of subjacent and lateral support and shelter and protection from the elements for the Demised Premises" (*Clause 2(3)*)

147. The water ingress which occurred on several occasions through the defective asphalt seal surrounding the pavement lights is without any doubt water coming from outside, i.e. rain water. It is submitted that by not ensuring that the asphalt seal to pavement lights was maintained in good repair order and by not taking appropriate action when alerted by Cs, D in fact interfered with Cs' ability to enjoy their right of protection from the elements for the demise. By doing this, D derogated from grant, which is a breach of an implied obligation derived from the obvious intention of the parties.

148. The consequences in terms of physical damage to the properties and a bad smell have already been noted. In addition it has to be noted that this happened despite D being fully aware of the use of the premises intended by Cs prior to the grant of the lease and all along,

and that this implied that the premises were to be used for a variety of events such as meetings and various functions, none of which could reasonably take place under such circumstances, neither could the premises be viewed in advance of any potential booking. D can therefore be reasonably expected to have always been in a position where it could foresee the practical consequences of its action onto the Cs' occupation and use of the premises and onto their business. Such consequences were significant in terms of the loss of potential and actual business suffered by Cs and are submitted to be a direct result of D not taking reasonable action in maintaining the pavement lights in a good state of repair.

149. It is further submitted that through its action as described above, D is also in breach of the covenant for quiet enjoyment.

Electricity Room
Reference:

- **Item no. 5 in Cs' schedule-1**
- **D's Submission on Liability pp.27-29, paragraphs 59-64**
- **Appendix E to D's Submission on Liability**

Claimants dates	Defendant's suggested dates	Further evidence from Cs further supporting their case and/or counteracting D's suggestions when a dispute arose.
1st Occurrence		
Discovered June 05		
Reported June 05	Disputed 01/09/05	**C2/3/45** June, July & August 2005 records of telephone calls made from landline to CHA & Thames Water. **C1/340:** JF's email to A Hines 12/12/05 - "I dealt with them myself for the first 3 months and then Ed Costner of CHA kindly took over. The road outside was dug up over ten times and I constantly had to deal with builders inspecting the basement electricity cupboard"
Leak stopped	Agreed	

Dec 05		
2nd Occurrence		
Discovered June 06	Agreed	
Reported June 06	Agreed	**G1/13/100-103**
Leak stopped Jan 08	Disputed After 23/11/07	**B2/6/253** JF's email 3/10/06 "Jim and Les took a look at all the other leaks which were stinking as they were here" **C2/3/37-38:** 20/06/07 1st notice of official complaint made by Cs **C2/2/167:** CHG info sheet describing 4 stages of formal complaints process **C2/3/19**: 26/11/07 last stage of complaint by Cs – leak still going on **C2/3/18:** 04/12/07 D's reply confirming Board Complaints Panel meeting setup on 21/01/08 **B2/6/294***:*A Tomecki's email 14/01/08 "I spoke to Ms Gavin this afternoon /…/she has said /…/the leak has now stopped" […] "Jim will be visiting tomorrow just to double check but it seems that following Thames Water visit on 23/11/07 where they said that there was nothing they were able to do they did in fact stop the leak"
3rd Occurrence		
Discovered 13/05/08	Agreed	
Reported 13/05/08	Agreed	
Leak stopped 24/06/08	Agreed	**G1/13/105-108**
No repair to date to make safe electricity room	Disputed D says not necessary	**G1/13/109-114** **C3/9** Letter from Camden Environmental Health Team 01/07/08 to D: "I noted that the Fire brigade have visited the property and have confirmed that there is a fire risk/danger of electrocution"

150. With regards to the water ingress in the electricity room it is first submitted that D is still to date not showing any reasonable care towards the safety of all occupants of the building in its possession, residential and commercial tenants alike. Since the leak was finally located and stopped on 23/06/08 the fire safety boards, that were

removed when found sodden underneath the water pipe that was leaking, have still not been replaced (**G1/13/105**). The absence of air vents in a room containing a large number of water supply pipes as well as the main electricity board to the building is without a doubt aggravating the potential fire risk in such a confined space. Despite many concerns raised by Cs on this matter, D has never replied anything detailing any reasonable steps taken to remedy this risk or officially clarifying that there is not one.

151. During the hearing, the evidence given by JG was that he does not believe there is such a risk "as this is not a habitable space" and that the leak was on the opposite wall to the electricity intake board when he saw it in 2006. It is submitted that the former statement by JG is not well-founded and the latter is incorrect (see bottom photograph **G1/13/101** clearly showing the sodden wall at the back and the top of the electricity intake box on the right hand-side of the picture, which is the side of 106).

152. In a letter from Camden Environmental Health Team on 01/07/08 (**C3/9)** D were informed: "I noted that the Fire brigade have visited the property and have confirmed that there is a fire risk/danger of electrocution"

153. JG also gave evidence that when he visited in June 06 and again in September 06, what he saw was a minor leak and that he visited once more the electricity intake room in October 06. When asked to comment on whether he thought the photographs taken by Cs (**G1/13/100-103)** and emailed to him on 10/10/06 (**C2/3/39**) were what he would describe as a minor leak, JG said that he did not recall seeing those photographs. It is submitted that when JG visited in October 06 he witnessed and experienced the full effect of the

leak in the electricity room, contrary to the evidence he gave in Court.

154. A year after the leak was first reported to D, the leak in the electricity room was still going on. Partial evidence was given during the hearing with regards to an official complaint procedure entered into by Cs on 20/06/07 (**C2/3/37-38**); by 06/08/07 it had reached stage 2 in the procedure (**C2/3/31**) and stage 3 by 17/09/07 (**C2/3/27**) with still no results as to the ongoing leak. This was despite Thames Water having had the Victorian mains pipes replaced on both roads outside the premises over that summer (see photographs disclosed by Cs with those submissions) which was, according to D on 21/08/07, "including identifying sources of leaks" and "the results will be available in two months".

155. By 01/10/07 another letter of response (**C2/3/24**) was sent to Cs this time by John Gregory, Director of Housing, on behalf of D: "Thames Water are investigating the matter and only once the mains have been renewed in mid December will we know if the leak is Community's responsibility". By that point Cs were seriously worried by the answer received from D because they had already had the particularly stressful experience of the mains replacement works in the summer, so how could they now be told that it was still to happen in December? Cs made a telephone call to Thames Water who confirmed that the works had been completed in August (**C2/3/22** hand-written note from Cs), which is also confirmed in Thames Water's records (1st and 4th rows from top **C3/4/139-142):** "vmr (Victorian mains replacement) completed 2 months ago". Cs wrote a further letter to D summarizing the situation (**C2/3/21)** on 25/10/07. It is submitted that D did not show reasonable care or behave in a manner that could be described as either helpful or efficient on these occasions but instead just attempted to delay things

further seemingly in the hope that Cs would abandon the tiresome complaint procedure (See **C2/2/167** for description of procedure).

156. JS gave evidence at trial that during his visit to Cs premises in October 2007 he had to put his hand over his mouth due to the smell coming from the electricity room which he also viewed. He further added that he had never smelt such a strong smell in the 8 years he had been a councillor for.

157. Acknowledgement of Cs' stage 4 complaint was received on 12/11/07 (**C2/3/20):** "Thames Water have undertaken various inspections and works to the supply pipes that it was assumed could be causing the problem. We were advised by Thames Water on 4th October and 7th October that they could not detect any water loss to their pipes and that they considered the problem had been resolved /…/ Our surveyor, Babetunde Okenule, has arranged for Thames Water to return to site to undertake further investigative works on 23rd November". Thames Water's visit is confirmed in Cs' note (**C2/3/23**). By 26 November 2007 Cs write a further letter of complaint to D (**C2/3/19**) requesting, since their complaint has now passed stage 4 and the leak is still going on, that a Boards Complaint Panel is arranged in accordance with the Housing Association complaints process. D reply on 4/12/07 (**C2/3/18**): "The next Board Complaints Panel meeting will be held on 21st January 2008".

158. It is important to note that the supply pipes referred to in various evidence including Thames Water's records recently obtained by Cs are the Customer's responsibility (see diagram in **C2/3/48**), so whenever supply pipes are referred to, they are clearly D's responsibility, not Thames Water's responsibility.

159. It may be that D had work contracted to be carried out for them by Thames Water, but this was not clearly disclosed by D. This is possibly suggested by some of the evidence from Thames Water from their 2006 leaflet "We can also provide a competitive quote for our commercial customers on request" (**C2/3/49b)** and from their records in 2008 "adv customer that we do not do commercial repairs any more" (**C3/4/139-140** -13th row from the bottom entry). In any case it is not denied that Thames Water carried out extensive works in tracing and remedying defects, it is only suggested that this may have been at least occasionally on behalf of D (i.e. for works relating to supply pipes).

160. Evidence was heard that one week before the Boards Complaints Panel was due to take place in January 2008 Cs discovered the leak had stopped and informed D. There was no explanation from D as to what may have been done to stop the leak, just like there was no explanation from D regarding the leak stopping in December 2005. There is nothing from Thames Water's records indicating that they stopped the leak either around the dates in question.

161. JF gave evidence regarding the "seven leaks" and explained that every time there was a leak it looked like water was coming from up to seven different points on the wall near the pavement side inside the electricity room and that Cs had numbered each one with a blue marker (photographs in **G1/13/101-102**). This also applies to the leak discovered in May 2008.

162. With regards to the steps taken by D in remedying the 2008 leak, they were indeed quite extraordinary: in an email sent to Cs on 19 June 2008 Monique Jamera (MJ) explains in details the complexity of the steps that will have to be followed in order for the leak to be remedied (**C2/3/5**).

163. JF referred to evidence showing that on 19 June (the day of the email from MJ about the complex route necessary for the repair to take place) a letter was sent to D by Camden Environmental Health Team with regards to the electricity room (**C2/3/13**). The following day, on 20 June, MJ sent another email to Cs (**C2/3/4**) stating: "We have been able to source an expert drainage and pipe contractor who we feel may be able to resolve the issue. I have given him your contact details and have asked him to attend site asap".

164. The works were successfully carried out and the leak was stopped on 24 June. JF referred to the Environmental Officer's letter again to show that in this letter the officer stated that he would come and carry out a risk assessment at 11am on 25 June 2008. Whether D prompted action on those two occasions because of the letter from the Environmental Officer was not established, but the coincidence in dates has to be noted. The evidence given by MJ at the trial was that she received quotes from two contractors with regards to the repair job needed in the electricity room: the first one quoted £10,000 whereas the second contractor diagnosed it differently and quoted £200 for it so he was instructed to do the job.

165. The leak turned out to have been coming from a defective water supply pipe concealed under the boxed ceiling sloping towards the back wall of the electricity room, on the side of the pavement (**G1/13/105-108)**.

166. Although it still remains unexplained why the leak stopped for certain periods of time it is submitted that the three instances of leaks in the electricity room reported by Cs had all been coming from the same defective supply pipe located at ceiling level inside the electricity room and discovered in 2008. The fact that water was

observed on the back wall was as a result of the pipes being concealed behind boards that sloped towards the back wall. When the boards were removed they were found sodden with water that had accumulated inside the boxing before flowing down onto the wall and onto the floor. It is submitted that the electricity room and the pipes inside it are under D's responsibility.

167. It is further submitted that for the whole period following on from the first June 2005 report D did not take reasonable care, nor make reasonable steps in remedying to this defect promptly, with the exception of the time after 20 June 2008 when D demonstrated that it could indeed act extremely promptly and rather efficiently.

168. With regards to the dispute as to when was the first time that the leak was reported to D, it is submitted that it was indeed in June 2005. The fact that JF contacted Ed Coster in September 2005 could only have been as a result of her previous contacts with either J Greene, whose responsibility was limited to the commercial properties, or RU. The fact that Cs ended up contacting Thames Water themselves can only be an indication of their determination to get the problem solved, despite the fact that it was not their responsibility, until Ed Coster "kindly" took over (**C1/340**).

169. Cs' determination throughout the period in question to get this problem solved is a further indication that this was interfering seriously with their use of the premises. This is supported further by the photographs and substantial written communication disclosed as well as by the evidence given by JF and JS at the trial.

170. The electricity room is a communal part of the building serving residential flats and commercial units alike with water and electricity and is under D's responsibility and care for maintenance. The defect

was therefore adopted by D and continued by D's failure to remedy to the defect with reasonable speed and care. Responsibility for consequential damage stems from the responsibility for the original defect. This caused nuisance to Cs with terrible smells and physical damage to both premises.

171. This in turn and together with the time Cs had to spend dealing with the problems and the stress caused by the potential danger to the building caused business disruption over a substantial period of time and amounts to a breach of the covenant for quiet enjoyment.

172. Further it is submitted that D, as the landlord of the whole building, is responsible for all parts not demised by him, on the ground that he is regarded as being sufficiently in control of them to impose on him a duty of care to all persons coming lawfully on to the premises.

Fire escape
Reference:

- **Cs' schedule-2**
- **ZB's Submission on Liability pp.29, paragraphs 65-67**
- **Appendix F to D's Submission on Liability**

Claimants dates	Defendant's suggested dates	Further evidence from Cs further supporting their case and/or counteracting D's suggestions when a dispute arose.
Discovered Dec 04	Disputed	**C2/2/180**: email from S. Wernham, Marketing Assistant for spaceshift Oct 04-Feb 05, who after meeting Simon Squires, of Squires Catering, reported that Simon "said in passing that the fire exit would need to be up to scratch" **C2/2/181**: email from D.Given (Marketing Consultant for spaceshift in Dec 04/Jan 05): "I was given all the details to apply for spaceshift to become a potential wedding venue. The fire exit needed to be repaired as it was under lock and key at the time. This did not meet regulations as set out in the registration application from the council"

		C2/2/183-184: Camden Council leaflet re approved venue needing to be licensed with map showing proximity of Town Hall register office to spaceshift. **C2/2/182:** email from Jenni Grant, Superintendent Registrar, stating application can be processed for spaceshift to become an approved venue "once the fire regulations has been approved" **C2/2/186**: email from Rebecca Michael, of Compliments Catering (caterer to the Royal Family – see **C1/149**), who viewed the space at the beginning of 2005 but also deplored the lack of fire escape since she felt the space "would be perfect to hold corporate and private parties in". "As a caterer I would be happy to work on these premises, as long as they met the current H&S regulations" **C2/185**: email from Elaine Mclean who viewed the space in Dec 05 "unfortunately due to the problems you had with your fire exit at the time, I felt it would have been unsafe for this type of event /…/and ended up not using your venue"
Reported early 05	Disputed 19/08/05	JF gave evidence that she first reported this by telephone in early 2005 as she was aware by then that this was a serious issue affecting her business (see evidence referred to above) **C1/160-173** Dec04/Jan05/Feb05: mobile telephone bills showing numerous calls made to D **C2/2/179**: Aug 05 Insurance Claim Form alerting the insurers of the problem (end of 4th para from top) **C2/2/178**: 02/09/05 email to C Natt complaining about fire escape not being "up to standards" (4th para down)
Remedied: 1. Lock removed 13/10/05 2. Lights repaired 28/07/07 3. Direction	 1. Disputed 06/10/05 2. Disputed 27/07/07 3. Disputed 27/07/07	<u>1. Lock removed</u> JF gave evidence that locksmith came in the day before Jessee Cooper, loss adjuster for Quest Gates, visited (J Cooper visited on 14/10/05) **C1/118**: 6th Oct 05 diary page "Lock put on door 4.30pm – CHA – Michael – Witness (<u>13th Oct</u>)" **C2/2/169** (1st para) Cs official complaint form quoting the date wrongly (Sept 05 instead of Oct 05) but confirming that it was "the day before the loss adjuster came" and enclosing

of door corrected & push latch fitted 04/09/07		business card left behind by locksmith. 2. Lights repaired **C2/3/32-33**: handwritten note by CC (bottom of p.32) "appt for emergency light work: Sat 28/07/07 – 9am" and (top of p.33) "28/07/07 Lez – confirmed he will seat down with Babetunde to make sure everything gets done…" **C2/2/161**: 06/08/07 letter from Cs "emergency maintained lights were fitted in the fire Exit corridor and staircase on Saturday 28 July 2007" 3. Direction of door and push latch **C2/2/161**: 06/08/07 letter from Cs "the final exit door at the top of the internal staircase is opening inward and is not fitted with an emergency push latch" **C2/2/157-158**: 21/08/07 response from Keith Carter, Assistant Director Asset Management "Fire door swing – Following the visit of Matthew Bartlett, Lead Fire Safety Officer, I have asked Greater London Locksmiths to contact you to arrange to visit your property to rehang the door for it to swing the other way. The contractor has also been instructed to assess the need for a push bar and fit one if necessary and practical./…/ I apologise for the delay in resolving this" **C2/2/156**: 18/09/07 letter from D re complaint case now closed

173. In her submissions (ZB/29/66) Ms Bhaloo explains that the subject of the fire escape was brought up by JF prior to the grant of the 106 lease and that JF stated that all she required was a light bulb (**D1/114**). In actual fact this was specifically relating to the finding by JF that "service charges" were in Clause 6(1) of the 106 lease, when she was never made to pay any with the 104 premises. Woolf Simmonds, solicitors for D, later confirmed that they had "deleted the whole of old clause 6, which was the clause dealing with service charge" (**D1/115**).

174. The reason JF never noticed the problem with the fire escape before was because the fire escape corridor, located in the basement between her premises at 104 and the 106 premises, was totally blocked by various objects including building materials that had been accumulated there by the tenants of 106. JF mentioned light bulbs because it was also totally dark (there is no window bringing natural light to the fire escape), although you could see that there were emergency type of lights installed on the ceiling - she therefore assumed the bulbs had simply to be changed. When Cs got the keys to 106, one of the first things they did was to clear the accumulation of items in the fire escape corridor, thus unblocking the way.

175. The first time Cs were made aware of the detrimental effects of an unusable fire escape on their business was around the end of 2004 when several caterers interested in using spaceshift as a function venue for their clients came to view the premises and noted the dysfunctional fire escape (see evidence as referred to in the table above). This was further confirmed when Cs made an attempt to apply for a licence from Camden Council in order for their premises to be registered as a wedding reception venue with the Town Hall, which is located only foot steps away from 106.

176. JF gave evidence that January 2005 is about the time when she reported the fire escape to D by telephone and that the first written record was found to be in the insurance claim sent by Cs in August 2005 and stating that the fire escape "should have been in good working order when we were granted the lease" **(C2/2/179).**

177. It has to be noted that there is extensive evidence as to how this interfered with the use of the premises by Cs but because the fire escape area is in the common parts of the building, i.e. within the control of D, and because it was left under lock and key, Cs were

unable to fix the problem themselves, had they wanted to. MJ gave evidence during the trial hearing that "anything that is communal, between residential and commercial, is our responsibility, but I don't know the layout regarding the fire escape"

178. In her submissions Ms Bhaloo explains that the Cs were requesting that "upgrading works" or "improvements" were carried out to the fire escape, thus implying that there was a usable fire escape but that Cs wanted more from it.

179. It is submitted that the works requested by Cs were not of such nature as Ms Bhaloo implies in her submissions. It was instead found that the fire escape was simply and completely unusable, i.e. not allowing escape in any shape or form. Firstly, the entire fire escape area (to which access is shared with the two premises leased to Cs and a third shop at no. 102 – see floor plan **G1/14/115**) was left in darkness as there is no window in either the corridor or the staircase it leads to and there was no light switch to operate the lights fitted on the ceiling (it was later found that the lights were out of order and that all had to be replaced). Secondly, when reaching the top of the stairs to open the final exit door, that door was found by Cs under lock and key, such key presumably in the possession of the D. Finally, if the door was to be unlocked it would be opening towards the small landing located at the top of the staircase, i.e. against the direction of the flow of escape after the last steps of a rather steep staircase (see photos in **G1/15/121**).

180. In the event of fire with people having to leave the premises supposedly in haste via the fire escape, one would have had to find its way through total darkness, climb up steep stairs to finally get to a door that was locked.

181. JF gave evidence that the lock was changed (and replaced with one that had an internal latch), the day before Jessee Cooper, loss adjuster for the insurers visited the 104 premises as the ceiling was being replaced on 14 October 2005. Cs' record of diary entries in **C1/118** shows that the following entry was made on the 6th October: "Lock put on door 4.30pm – CHA – Michael – Witness – 13th Oct". JF gave evidence that this was her note after meeting Michael, a resident of the estate, who told her that he saw the locksmith change the lock on 13 October around the time of 4.30pm. Ms Bhaloo argued that since the entry was made on the 6 October page, it was relating to an event taking place on that day, not on the 13 October as alleged by Cs. The notes taken off the diary records does include the date of 13 October, but when looking at the actual copy of the diary page in **C3/4/25,** it appears that amongst the text crossed out by Cs on that page when making copies of the diaries for disclosure, Cs crossed out by mistake the last part of the entry stating the date of the record, i.e. '13 Oct'. Attached to these submissions, is a scanned copy of the original 6 October diary page, before anything was crossed out for disclosure; the '13 Oct' entry is there, with an arrow pointing at the note it refers to and one can see from the crossed-out version that it was there before. The reason it was written on the 6 October page is, according to JF, because the 13 October page was full, hence the inclusion of '13 Oct' on the 6 October page. Further written statements made by Cs all refer to that day as being "the day before the loss adjuster came" as this was what marked their memories. It is therefore submitted that 13 October 2005 is indeed the day the lock was changed. However it is submitted that the change of lock only solved the problem partly.

182. After that day, the problem with the fire escape had changed to a situation where, in the event of fire with people having to leave the premises supposedly in haste via the fire escape, one would have had

to find its way through total darkness, climb up steep stairs to finally get to a door that would open inwards towards the landing at the top of the steps where one would presumably be standing to open the door. It is submitted that this situation is still not one that one could describe as a usable fire escape but rather one that could lead to a serious disaster in a case of fire.

183. Almost a year later, not receiving any further response to their request, Cs sent a letter on 14/09/06 to RU (**C2/2/174-175**) enclosing a fire risk assessment check list with exact details of the problems as described above. In his witness statement (**B1/13/7-8**) RU states that he does not recall this letter, but that if he had received it, he would have passed it on to Jim Gorman. JG himself states in his witness statement (**B1/14/7):** "I do not believe that I saw this at the time".

184. On 10/10/06 Cs sent an email to JG (cc-ed to J Greene) (**C2/2/170-171)** with an attached copy of the letter to RU, the risk assessment check list that had been sent to him and some photographs of the fire escape. There is no mention of this email in the evidence given by JG. His witness statement totally fails to address this October 06 email and summarises the situation as follows (**B1/14/8**, top para): "on receipt of the Claimants' complaints in July 2007 we inspected and immediately addressed these issues".

185. No mention is either made in the evidence given by D of the fact that Cs had decided to use the formal complaint procedure of the Housing Association in December 2006, despite it being designed to address the complaints of residential tenants, in compliance with the requirements of the Housing Corporation (see **C2/2/167 -** CHG (Community Housing Group) info sheet describing the 4 stages of the formal complaints process). A copy of that form is in **C2/2/168-169.** On that form (see p.169, 2nd para from the top) Cs made a

record that FWA visited to assess the fire escape in October 2006 and confirmed that the works could take place. However with no further action from D after October 2006, it is submitted that this is what prompted Cs, out of further resort, to send the Complaint form on 06/12/06.

186. After months of not hearing anything, Cs were told by D that their form had not been received. Cs re-sent a copy of the original form on 20/06/07, as nothing had changed by then.

187. It is submitted that the evidence given by D as described above is a further example of a total absence of care and even more so of serious negligence, which could have easily caused life loss, had it not been for the relentless efforts of Cs to get the matter resolved. It is clear that D chose to ignore Cs' calls for action for as long as they could, despite Cs clearly alerting them of the possible consequences of the defective fire escape. D merely chose to change the lock because of the visit by a loss adjuster for the purpose of a claim made with their building insurers. D then chose to deny having received some of the requests by Cs, even when giving evidence at the trial, despite the fact that some of Cs' written evidence was obviously pointing at some of their actions (evidence which has presumably been also missed on this occasion by whoever wrote the witness statements).

188. In July 2007 D finally prompted further action. It is submitted that this was entirely due to the general circumstances at the time rather than out of sudden concern from D. The dispute with the insurers (stemming from the insurers' concerns regarding D's failure to address the ongoing problem within a reasonable time) had reached a climax and D was increasingly worried about the situation. On 17 July 2007, K Paterson, on behalf of Chris Natt, sent an internal email

stating to all recipients: "It is possible that our insurers will not accept the claim in which case liability may fall on CHG to meet the alleged damages. It is possible that this will result in a future court case. I think it is important that we ensure that she [Jo Gavin] has no other grounds for complaints against CHG." She then goes on saying: "You will need to make your own interpretation of the lease clauses but I would not of (sic) expected this to be a tenants liability"(**D3/729).**

189. The lights in the fire escape area were subsequently repaired and it is submitted that the date for that repair was 28/07/07 (see **C2/3/32-33** and **C2/2/161** - also referred to, with the inclusion of relevant quotes, in the table above) and not 27/07/07 as submitted in the Appendix F to Ms Bhaloo's submissions

190. It is submitted that the final exit door was re-hung to open in the right direction and a push latch fitted on 04/09/07 or sometime between 24/08/07 and 18/09/07 when the complaint was officially closed (see **C2/2/161**; **C2/2/157-158** and **C2/2/156** - relevant quotes are included in the table above)

191. In any event, whatever D's motivation was to finally complete the repair works to the communal fire escape, it is submitted that it was certainly not done out of sudden care, nor with any promptness. The few steps made can certainly not be qualified as reasonable.

192. In her submissions Ms Bhaloo states in the last paragraph on the subject (ZB/29) that "D has far exceeded its obligations to the Cs by carrying out upgrading works to the fire escape". At the end of paragraph 65 she also states that the lease "deals expressly with the fire escape".

193. It is submitted that it is not the case, at least not in terms of the 106 lease. Despite the access to the fire escape being commonly shared between three commercial units including 104 and 106, the lease of 106 appears to have had both its clauses relating to the fire escape removed and/or replaced (see *Clause 5(26)* and *Clause 2(4)* in the 104 lease). When JF asked for the service charge Clause to be removed, she certainly did not intend for the fire escape clauses to be all together removed. The right which is clearly granted in the 104 lease but has been omitted in the 106 lease is "The right of exit in case of fire (or other emergency) only over the fire escape passages/courtyard ("the Fire Escape Areas") leading from the Demised Premises. Subject to such regulations as may be made by or on behalf of the Landlord from time to time" (*Clause 2(4)*). Whether this peculiar omission in the 106 lease was made by mistake or on purpose is not established. It is also important to note that the floor plans used in the lease of 106 do not show any of the fire escape details either, whereas those are clearly marked on the 104 floor plans. In any event the fire escape is there and its access is equally shared between three commercial premises. It is submitted that by omitting to show the fire escape in the lease floor plans and by removing a right which ought to have been granted to the tenant D is in fact giving mis-representation in the lease of the demised premises by concealment of information.

194. It is further submitted that by not ensuring that the fire escape area was in good using order and further not taking appropriate action when alerted by Cs, D in fact interfered fundamentally with Cs' ability to enjoy their enjoy a right that ought to have been reasonably expected to be granted to them in the lease. By doing this, D derogated from grant, which is a breach of an implied obligation derived from the obvious intention of the parties. It has to be noted that this happened despite D being fully aware of the use of the

premises intended by Cs prior to the grant of the lease, meaning by this that D can be reasonably expected to have been in a position where it could foresee the practical consequences of its action onto the Cs' occupation and use of the premises and onto their business. Such consequences were significant not only because it put themselves, their visitors and clients at danger in a case of fire or other emergency requiring the use of that escape, but also because they lost a substantial clientele both in the short and longer term as a direct result of the fire escape being unusable.

195. It is further submitted that through its action as described above, D is also in breach of the covenant for quiet enjoyment.

196. Further it is submitted that D, as the landlord of the whole building, is responsible for all parts not demised by him, on the ground that he is regarded as being sufficiently in control of them to impose on him a duty of care to all persons coming lawfully on to the premises.

Ventilation
Reference:

- **Cs' schedule-3**
- **ZB's Submission on Liability pp.230, paragraph 68**
- **No appendix from D**

197. Evidence was given to the Court to show that unlike the 104 premises or the other two commercial premises owned by D on Cromer Street, the 106 premises do not have any means of ventilation to the basement floor (see photographs in **G1/16/127-130**) with the exception of the WC (which were repaired by Cs as found faulty on taking occupation).

198. Product information sheets located in **C2/2/110-111** include practical drawings showing how air bricks to the front of a building on the ground floor can bring air via a duct to any area located below the ground floor level.

199. JF gave evidence in her opening submission that all commercial units situated on the ground floor and basement of the Hillview Estate were refurbished as part of the whole programme of regeneration of the estate that was completed circa 2000. Public funds specifically designated for the refurbishment of the shops were obtained by D under the Single Regeneration Budget (SRB) scheme (**C2/2/148** "Project 3110 – Hillview shops"). This was later confirmed by the evidence given by CN at the hearing, who explained that the money came from the SRB, a budget set aside by the council to improve the standards of shops.

200. JF gave further evidence as to the chronology of events that followed with regards to the 106 premises:

201. By June 2000, the initial part of the works such as structural openings, demolition and major alterations had been completed by D but other works such as the fitting of pavement lights, external paving, shop front including security shutters and all internal works had still to be carried out (**D1/48)**. It was agreed that D would pay a total of £24,500 to the tenant (whose business name was 'Char Bar') to organise some of the works themselves (see **D1/76** for a list of those works).

202. By May 2002 the remaining works were not yet completed and Mr Rahman of the 'Char Bar' writes to D (**D1/69**): "The builders left the job unfinished and 'ripped us off" of £20,000, meaning we have had to complete the job ourselves, however the downstairs is still out of

use". In September 2002 an internal note (cc-ed to C Natt) (**D1/88)** shows that D had sent a consultant and a list of the unfinished works was recorded**.**

203. By January 2003 Clare Rahman of the 'Char Bar' business was attempting to assign her 15 years lease, however works were still noted by D as not completed (**D1/92**). A few months later the 'Char Bar' business closed down and the premises remained unoccupied for approximately 6 months.

204. In December 2003, on the night of the Private View of 'Havana Auto', a photographic exhibition starting at the 104 gallery, JF was approached by J Greene who offered her the grant of a lease on the 106 premises and invited her to write to D to show her interest. CN gave evidence at the trial that he would have fully expected J Greene to contact JF about the lease. A copy of JF's letter is at **D1/112-113** and on p.113 (3rd bullet point down) she specifies that she "would require that good standards of practice when leasing a premise are respected in the same way as they were in my shop and all the other shops in the street".

205. CN gave evidence that in his role of Development Director for D at the time his responsibilities included the purchase of land and buildings, obtain funding, design schemes with architects, construction consultants and tenants and that he had to ensure standards were met for good properties. CN confirmed that negotiation was open from the Council to pass the estate to CHA who could get funding from the Council and the Housing Corporation and explained that the refurbishment took place on a rolling basis for residential tenants and that funding was obtained to renovate partly the commercial units located on the ground floor and basement of the estate.

206. When asked by HHJC if he had seen the premises leased to Cs, CN said that he only saw them externally, not internally. When asked by JF if he was aware that the premises were defective, CN said that he was not, that all he knew was that they were empty.

207. This last statement by CN is submitted not to be concurring with the rest of the evidence given. Major structural alterations had been carried out by D on the premises; money had been handed over to the tenants to complete the refurbishment including security shutters (or grills) to windows and door, ventilation to the WC and works to ceiling in the basement, all of which were left unfinished and this had been recorded by D. It is submitted that these are the kind of things that can reasonably be expected to have been brought up to the attention of CN due to his role at the time. It is therefore submitted that D knew of the defects and that it tried to hide it. It is further submitted that D in its role of a housing association owning a large property portfolio, was perfectly able to foresee the consequences of such a defect.

208. JG when giving evidence said several times that the works had taken place in the early to mid-1990s, thus implying this was a long time ago and further explaining when asked by JF that records such as floor plans for residential flats, ducts and pipes layouts in the building, etc. would not be available for what JG referred as an older type of development. Ms Bhaloo in her footnotes (ZB/30) states that JF said that the work was carried out in 1999. The evidence as described above shows that only part of the works were carried out.

209. It is apparent from the evidence that the full regeneration works to the estate were completed in 2000 (**C2/2/153(i)** second entry down – Hillview Estate) with building consultant MacConvilles and contractor Kingsbury Construction. The works to 106 were still at

design stage and involving Kingsbury, MacConvilles, CHA and the 'Char Bar' in June 2000 (**D1/45**) and the hoardings erected in front of 106 during the fitting of the pavement lights were only removed in February 2001 (**D1/61**).

210. The 'Char Bar' tenants were intending to apply for A3 use, which would fit in Class A3 of the Town and Country Planning (Use Classes) Order 1987 and require high specifications for ventilation in order to allow for food to be cooked on the premises. D had explained that if A3 use was not obtained the "proposals to lease [would] fall" (**D1/47** last bullet point). A3 use was obviously not obtained, the work did not reach completion for some of its essential parts, let alone powerful kitchen ventilation. D nevertheless granted a lease permitting the use falling within Class A3 to the 'Char Bar' in 2000 and once again to the Cs in 2004.

211. The evidence obtained by Cs from the Council in relation to the works authorized is not conclusive. Ms Bhaloo refers to a letter from the Council (ZB/30/68) which itself refers to another two documents (**C2/2/121-122)** which simply show that full plans (in accordance with the Building Act 1984 and Building Regulations requirements) were submitted to the council and that these were "passed conditionally" – it has to be noted that this pass is given solely on the view of the plans submitted i.e. before the completion date of the works. When requesting to see further details of the applications Cs were told that because of copyright issues they would require a letter from the owner of the building (**C2/2/116**), which Cs could not obtain.

212. Ms Bhaloo explains in her footnotes (ZB/30) that the Building Regulations 2000 did not come in force until 1 January 2001 and that therefore it is the Building Regulations 1991 that would have

been in force at the time of the works. This may be true in the case of some of the structural alterations carried out by Kingsbury Constructions, but not in the case of the further works submitted by Clare Rahman (see dates of validation in **C2/2/121-122**).

213. As a matter of fact the Building Regulations 1991 (SI 1991 No. 2768) were amended in 1994 (SI 1994 No. 1850) with regards to the limits on application of Requirement F1, relating to means of ventilation. According to the 1994 amendment, "Requirement F1 does not apply to a building or space within a building (a) into which people do not normally go; or (b) which is used solely for storage; or (c) which is a garage used solely in connection with a single dwelling". The Building regulations in force at the time of the refurbishment works to 106 therefore indeed apply to the whole of the 106 premises and it is submitted that they were not complied with (not even in the WC where ventilation was not in working order – although this was later rectified by Cs).

214. Further, the Building Regulations 1991 contain another requirement under the same part F (ventilation) but this time specifically addressing condensation in roof (which, in this case, is not changed by the 1994 amendment). Requirement F2 states that "adequate provision shall be made to prevent excessive condensation (a) in a roof; or (b) in a roof void above an insulated ceiling." It is submitted that the fit out of the pavement lights (also called 'roof to cellar') by Kingsbury Construction on behalf of D demanded such adequate provision in order to avoid the damage (excessive condensation and the subsequent creation of mould to ceiling areas) that has since been observed in the premises and was confirmed by all three surveyors (under the 'cold bridging' observations) and that this was clearly not provided. It is therefore submitted that the whole of part F of the

Building Regulations in place at the time of the structural alterations carried out by D were not complied with.

215. It is further submitted that because D was expected to put public funds it had received to a good use, because the works had taken place at such a recent date and because Cs knew the standards of that same refurbishment via the other shop leased to JF in 2000, it was reasonable for Cs to expect that all regulations had been followed with regards to the construction aspect of the building (in this case demolition and structural alterations) and to expect that, when they signed the lease in 2004, they were granted the lease of a structurally sound property.

216. All the floor plans relating to the estate and disclosed by D have been drawn by the same Architect firm, Livingstone Design Group: the document at **D1/10** shows the front building elevation with 106 on the ground floor on the Tonbridge Road side; **D1/11** shows the front building elevation with 4 shops on the ground floor (unfortunately the copy provided in the trial files is truncated – the copy originally disclosed by D clearly shows air bricks to all shops, including 106, in the form of small rectangles drawn into the wall underneath the shop windows; a smaller copy of the same plan is located in **C2/2/101**).

217. Floor plans drawn by the same architect firm also appear in the copy of the lease of 104 (**A/39/312-313**). On those plans the location of air bricks and ducts to the basement is indicated at ground level by small rectangles on the inside of the front window and at basement level by small circles with an ‘s’ shape inside the circle; there are two air ducts bringing air to the basement at the front and one additional air vent fitted in the basement fire escape corridor at the back, on the right hand-side to the fire exit door from 104.

Additional electrical extractor fans are shown by small circles with a cross inside the circle; there is one at the back of the shop facing the stair case on the ground floor and two downstairs in the kitchen area and WC. One can also see in the form of a couple of dotted lines the duct going from the fans located in the basement through to the back wall into the fire escape and through again to the back courtyard.

218. Cs located floor plans by the same architects showing the layout of the 106, 104 (and 102) shops (**C2/2/99-100**); the air bricks and ducts are indicated using the same symbols; one can see that there are three on the ground floor of 106, ducting air in the same three locations into the basement, where there is an additional air bricks in the bathroom. Interestingly, there are also air bricks showing in the electricity room located in the basement between 106 and 104. However none of the air bricks and ducts showing on those plans for 106 and the electricity room are in fact present.

219. Instead of professionally drawn floor plans, the floor plans used in the lease of the 106 premises appear to be the ones drawn by the 'Char Bar' tenants, showing tables and chairs as if they were part of the permanent layout but no sign of air ducts (nor pavement lights or fire escape). It is submitted that the unsuitability of the floor plans used in the 106 lease is another indication that D knew of the ventilation defect in 106 prior to granting the lease to Cs and that it tried to escape liability by concealing and/or providing as little information by way of floor plans and that this amounts to an act of mis-representation in the lease. The same has been submitted with regards to the pavement lights and the fire escape.

220. JF had written to D prior to the grant of the lease that she expected standards of fittings for the 106 shop to be brought up to the same standards as in the other shops along the street. Things expected at

the time were security shutters and vinyl flooring (**D1/113**) and JF also noted in her letter that "since all of the old Char Bar equipment seems to be gone and the place looks rather messy, I will need a 3 months fitting period". Cs were given 4 weeks rent free on the start of the lease (**D1/117**) and Cs signed the lease in good faith.

221. With no news about JF's requests and no time to waste, the shop re-fitting works started and one problem after another seemed to come up within the premises. Eventually Cs installed a new ceiling downstairs; wooden flooring throughout the premises and a banister over the staircase; ceramic tiles behind the bar and in the WCs; installed a new gas central heating system; carried out repair works to the ventilation in the WCs; to the electricity circuit rings which were found improperly connected; to the internal emergency lighting which was dysfunctional; replaced the smoke alarm system which was also found faulty; redecorated the entire space and refitted the bar area. These works are described throughout the evidence and a summary is given in the insurance claim form filled in by Cs in 2005 (**D1/210**).

222. CN gave evidence that he was very pleased with the standards up to which JF had improved the property.

223. On 18/05/05 JF sent a letter to CN stating: "due to there being no ventilation in the basement of the bar, I would welcome being able to knock a door through [to the back courtyard]" (C2/2/142). On 02/09/05 JF sent an email to CN (C2/2/140) suggesting "Since it would seem that you already paid the previous leaseholder to install ventilation and the job was not done, should we or you make a claim from the insurance (for theft?) so that ventilation can be finally installed as it should?" (the problems with the fire exit were also raised in the same email). JF did not get any response to her queries.

224. By then Cs' understanding was that since they had carried out all the repair works that were needed inside the premises, which was at great cost and had also been delayed by occurrences of water ingress that D took months to repair (the first leak to the pavement lights and the leak to stack pipe), they could count on D to effect repairs that were within their control as the owner of the building. In any event those were repairs that were beyond Cs' control (the fire escape, the lack of ventilation and the electricity room) either because they were in common parts of the building or, in the case of the ventilation, because it meant having to cut through the structure of the building in order to put ducts into the load-bearing walls. It is submitted that this was a reasonable expectation from Cs based not only on the circumstances but also on the drafting of the lease. But once again D simply ignored their request.

225. By August 2008, after a series of leaks from the electricity room, 3 leaks though the pavement lights and 1 to stack pipe, Cs were told by a surveyor friend that the fact that air was not allowed to be drawn into the basement would have most likely contributed to trap in the moisture for longer every time a water ingress had occurred and that this was a serious problem which could not be part of the regulations in force. An exchange of emails took place subsequently between CC & MJ (**C2/2/136-138**): CC first wrote on 07/08/08 providing information relating to the difference noted in comparison to the other shops, referring to the part of building and Health & Safety regulations seemingly applying and asking for D's prompt action on this.

226. MJ gave evidence that she checked with her manager OB who said that anything relating to Health & Safety would be the tenants' responsibility under the lease. On 12 August 08 MJ gave that answer

by email and added “In any event I do not believe the premises do not comply and doubt whether the insertion of air vents will solve all the problems”. On 19 august CC wrote again: “re the other issue around ventilation in the premises, can you please confirm whether or not air ducts have been installed into the foundation of 106-108 /…/ and if so, could you kindly let me know where they are located?”. There was no reply.

227. It is submitted that throughout the period since the lease was granted to Cs, D did not show any reasonableness in their action at all with regards to the ventilation. First they tried to conceal it, then they ignored it. Whether or not D knew of the defect in the first place, the consequential damage of such a defect is foreseeable and D ought to have taken reasonable action when alerted. At no point was there any admission to the defect or any suggestion as to how it could be remedied or who by. Cs even suggested to D that if this was a structural defect going back to the refurbishment works of the estate, D should be able to claim for this from the HAPM structural defect insurance policy that covers them as a Housing Association. Despite Cs giving them notice of the problem and suggesting possible solutions, despite Cs investing substantial funds into making D’s property a better one, there was no step made on D’s side. Despite Cs fulfilling the repair obligations contained in the lease, there seems to be no care on the part of D for their own property or their occupiers.

228. Bit is submitted that by being subject to building regulations when carrying out works to the premises D owed a duty of care to the occupiers of the premises. It was foreseeable that any failure to comply with those regulations would impact upon the intended use of the premises as it was intended at the time of the works and has

remained since (i.e. as commercial premises into which people would normally go).

229. D acted carelessly in breach of duty and caused loss to Cs which was foreseeable. D was negligent and is liable for Cs losses including loss of profit.

An implied obligation for the landlord to keep in good state of repair the structure of the demised premises

230. Despite a long list of obligations to repair imposed on the tenant in the lease, structural repairs are not in fact an expressed obligation (see definitions of the demised premises in *Clause 1(2)*). With regards to the load-bearing walls, the tenants' obligation to repair relates to the internal plaster covering those walls; in relation to the ceilings, again, the tenants' obligation to repair is limited to the "coverings" of the ceiling; with regards to floors, the obligation is towards coverings including "the boards and screed of such floors"; in relation to conduits, the obligation imposed on the tenant is to repair the conduits "within and exclusively serving the demised premises" (i.e. not pipes that are common to the building or shared by the tenant and other occupiers of the building).

231. There is no expressed obligation to repair imposed on the landlord at all.

232. It is submitted that there is a need for an implied obligation to repair the structure to be placed upon D on the grounds that failure to recognise such an implied obligation would be putting the lease at risk to become ineffective in a situation such as the one encountered with the lack of ventilation at 106. Firstly, there is no doubt from the

lease that D retains control of the structure of the demised premises as the tenant is not allowed to make any structural alteration (Clause 5(5) Waste and alteration). Secondly, due to the fact that the structure of the premises is defective (because there are no means of ventilation provided through the external walls and no provision to prevent excessive condensation forming near the pavement lights that are the roof to the basement), physical damage to the inside of the demised premises will always occur. If it is a fact that physical damage will always occur, the direct implication of this is that Cs' obligations to repair the demise cannot be fulfilled in an effective way since they will not be able to repair a damage that is coming directly from a permanent defect.

233. Further, it is submitted that accepting D's lack of action with regards to the structural defects by not implying an obligation to repair the structure, may equally turn the lease into an ineffective contract with regards to the expressed obligation to insure imposed on D. It has already been submitted that D may have breached by its actions the conditions which apply to the building insurance covering the premises. Section 2 of the policy stipulates: "Your duty to prevent loss damage or accidents: The policyholder must take all reasonable steps to keep the property insured in good repair. Any defect discovered must be made good as soon as possible and the policyholder shall take any additional precautions necessary for the prevention of loss damage or accidents as the circumstance may require" and in section 3: "Policy voidable: this policy shall be voidable in the event of misrepresentation misdescription or non disclosure in any material particular"(**C4/60**). Going back to the lease, if due to D's actions the insurance policy is made invalid, in effect it means that there is no such thing as an insurance policy covering the premises. If there is no insurance cover in place, D is in breach of its obligation to insure as expressed in the lease.

234. It is therefore submitted that implying an obligation for D to keep in good state of repair the structure of the demised premises would give business efficacy to the lease.

235. It is submitted that it would also be reasonable and equitable; reasonable because D is the landlord of the entire building, D as such completed a full refurbishment of the building including structural alterations only a few years before the lease was granted and D failed to comply with building regulations in force at the time; and equitable because all other repairing obligations are imposed on the tenant.

236. Based on the facts that D retains control over the structural aspect of the demised premises, that the repairing obligations imposed on Cs are sufficiently explicit and that this is further supported by the terms of the demised premises, it is submitted that the implication of this term is indeed so obvious it goes without saying.

237. It would not contradict any express term of the contract; the fact that the landlord is given the right to enter the premises in order to carry such repair is necessary in order for him to effect such repairs, so there is no contradiction in terms. One can be given the right to enter and be subject to an obligation to repair simultaneously. The obligation does not change the right being given in the lease, nor contradict it in any way. The right given is not one to repair, it is one to enter (with such various purposes as stipulated in the lease, including inter alia inspection, repair, measure).

Conclusion

238. A further indication of D's general intentions towards the 104 and 106 properties was given very recently and it is submitted that this is important to note with regards to all the matters covered in these submissions.

239. As the trial had just started, D sent in a surveyor to carry out a valuation survey of the 104 and 106 premises. Due to the very short notice given to Cs by D's solicitors and also due to the circumstances at the time, Cs were not available to meet with the surveyor on site. However JF happened to pass by the premises and briefly met the surveyor in the street.

240. When the report was later sent to Cs it stated that failing to have been given access to the property, the report conclusions were based on the exterior observations made by the surveyor, the current rateable values from the Valuation Office Agency and the recently applied rent to the two other shops owned by D along the street.

241. The valuation surveyor is from the same firm as the expert surveyor sent by D to report on the state of the premises for the purpose of this claim. The valuation surveyor states in his report that he has seen the photographs of the interior taken by his colleague and that from those, the properties appear to be in good order. From his observations of the exterior, he also says that the property appears to be in a good state of repair.

242. In the conclusion of his report he attaches photographs and floor plans of the interior taken from Cs' business websites. Needless to say that those photographs have been taken for marketing reasons by Cs and are showing the premises in their best light.

243. The valuation surveyor does not make any mention of the defects that are part of this claim and are still existing, despite the fact that they are the subject of the report made by his colleague and despite the fact that all of these defects can be observed at least partly from the outside: there are no air bricks to the front of the 106 premises as opposed to all the other shops in the row; the pavement light asphalt seal is visibly worn out; and the floor of the 104 premises can be at least partly seen by looking through the window.

244. Beside making a note of the unrealistic high market value consequently quoted by the surveyor for both premises, it is submitted that this is yet another indication of the carelessness and ruthlessness of D when it comes to the way it handles its tenants: it would appear from the evidence contained in this report that if D was to re-possess either of the two properties or both, D would be perfectly ready to grant similar leases to new tenants, once again concealing defects for which it denies liability, thus enticing new commercial tenants into a transaction which, from the experience learned by Cs, can only be described as dishonest and deceitful.

245. Although not strictly addressing the purpose of these submissions, the last observations with regards to D's visible current intentions are made in order to bring the attention of the Court not only to the past or present situation but also to the one that will inevitably follow shortly after.

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7 September 2010

Claim No. CHY09015

IN THE CENTRAL LONDON COUNTY COURT

CHANCERY LIST

(1)MS JO GAVIN

(2) MS CHANTAL CRACY

Claimants

and

COMMUNITY HOUSING ASSOCIATION LIMITED

Defendant

SUBMISSIONS ON BEHALF OF CLAIMANTS
