Neutral Citation Number: [2024] EWHC 3179 (TCC)

Case No: HT-2022-000311 & HT-2022-000254

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (KBD)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 11/12/2024

Before :

MRS JUSTICE JEFFORD

- -

Between :

(1) 381 SOUTHWARK PARK ROAD RTM COMPANY LIMITED **(2) SOPHIA ELIZABETH SMITH** **(3) ARMAND JUNIOR FRANCOIS SABLON** **(4) PIZARRAS Y BALDOSAS SA** **(5) LAURA JANE MACKIE** **(6) CHARLES WILLIAM GEORGE FRY and EDWARD CHRISTOPHER MURRAY FRY** **(7) GLORIA NOK TUNG CHAN** **(8) PROPERTIES (RESIDENTIAL 2) LIMITED** **(9) SALIM LALANI and ROZMIN LALANI** **(10) KAMALA NADIR KYZY BUCHHOLZ** **(11) LUKE EDWARD PRICE**	**Claimants**
- and –	
(1) CLICK ST ANDREWS LIMITED (in Liquidation) **(2) CLICK GROUP HOLDINGS LIMITED**	**Defendants**

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Mr Michael Levenstein (instructed by **Adam Benedict Limited**) for the **Claimants**
Mr Aaron Emmett (acting in person) for the **Defendants**

Hearing dates: 20 to 22 February; 27 to 29 February; 5 March 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on Wednesday 11th December 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MRS JUSTICE JEFFORD

Mrs Justice Jefford:

The parties

1. This case concerns defects in and damage to a block of flats known as St Andrews House, 381 Southwark Park Road, London SE16.

2. The first claimant, 381 Southwark Park Road RTM Company Limited ("RTM") is a residents' right to manage company, incorporated on 7 August 2018.

3. The second to eleventh claimants are leasehold owners of flats at the Property and participating leaseholders in RTM :

   (i) Sophia Smith: Flat 1

   (ii) Armand Sablon: Flat 5

   (iii) Pizarras Y Baldosas SA: Flat 6

   (iv) Laurie Mackie: Flat 7

   (v) Charles Fry and Edward Fry: Flat 8

   (vi) Gloria Chan: Flat 9

   (vii) Properties (Residential 2) Limited: Flat 10

   (viii) Salim and Rozmin Lalani: Flat 11

   (ix) Kamala Buchholz: Flat 12

   (x) Luke Price: Flat 13

4. All of these leaseholders gave evidence apart from Charles Fry and Rozmin Lalani. Salim Lalani's evidence was admitted as hearsay. Two further witnesses, Noel Lagrenee and Ian Bacon, gave evidence on behalf of the 4th and 8th claimants respectively.

5. The first defendant ("Click St Andrews") is a special purpose vehicle which, at the time of the relevant events and the trial, owned the freehold and head lease of the Property and is a wholly owned subsidiary of the second defendant ("Click Group Holdings").

The claimants' case in summary

6. RTM was incorporated for the purpose of acquiring the freehold pursuant to the Leasehold Reform Housing and Urban Development Act 1993.

7. RTM and the defendants entered into an Agreement for Sale, also referred to as the Freehold Purchase Agreement ("the FPA"), made on 26 February 2020 pursuant to which it was agreed that Click St Andrews would, within a period of not more than 2 years, develop the Property by removing the existing pitched roof and erecting an additional storey of three prefabricated modular units which would be lifted into place. In summary, the intention was that RTM would then purchase the freehold for £100,000 in its capacity as nominee for the participating leaseholders and simultaneously grant leases to Click St Andrews for the three new flats which would then be sold. Click Group Holdings guaranteed the obligations of Click St Andrews under the Agreement.

8. The claimants' case is that the crane lift to install the modular units was scheduled to take place on 24 to 25 July 2021. Adverse weather warnings were issued by the Met Office between 19 and 25 July 2021. On 24 and 25 July there was repeated rainfall and thunderstorms across London and the South East of England. The pitched roof had been removed and the roof structure not kept watertight, which allowed water ingress throughout the building causing damage of varying severity in the flats. The defendants made some efforts to remedy the damage but the claimants' case is that those efforts were inadequate, poorly managed and ultimately incomplete.

9. The claimants engaged experts to undertake their own investigations and that led to the identification of other alleged defects in workmanship in the modular units, including structural and fire safety issues. Recommendations were made for further investigations. At trial, the claimants adduced the evidence of:

   (i) John Rivett, a building surveyor

   (ii) Philip Ebbatson, a civil and structural engineer

   (iii) Alastair Ferguson, an architect

   (iv) Jonathan Chick, a civil engineer (on remedial works)

   (v) David Daly, a quantity surveyor (quantum).

10. A Dangerous Structure Notice was issued by Southwark Council on 9 February 2024 shortly before trial on which the claimants rely.

11. In the Particulars of Claim, the claimants' claims were advanced on the following bases:

   (i) RTM claimed damages for breach of the FPA. There were 29 particulars of breach which encompassed, in a somewhat random order, breaches which had led to the water ingress; defects in fire protection and compartmentation; structural defects; and other miscellaneous items, including most substantially a claim that the Property needs to be re-roofed.

   (ii) RTM advanced the same claims against Click Group Holdings under the terms of the guarantee within the FPA.

   (iii) The leaseholder claimants principally claimed damages for breach of the covenant of quiet enjoyment in their leases. These claims were made against Click St Andrews only.

   (iv) They also framed their claims on the basis of breach of statutory duty, negligence, and nuisance.

Procedural matters and representation

12. The defendants' Defence was filed on 28 November 2022. It was a lengthy and detailed Defence which was drafted by counsel. The defendants denied any liability. Amongst other things, the Defence contended that:

   (i) In exercise of clause 13 of the FPA, they had rescinded the FPA such that there could be no breach of contract;

   (ii) RTM had suffered no loss as it holds no proprietary interest in the Property;

(iii) The water damage suffered by the leaseholder claimants was not caused by any, or did not amount to any, breach of the leasehold covenants, breach of any duty of care in tort or breach of any duty under the Defective Premises Act 1972;

(iv) The claimants had contributed to their own losses and/or failed to mitigate their losses by failing to co-operate with the defendants in the carrying out of remedial works; and

(v) The amount of rainfall was unprecedented and overwhelmed the waterproofing measures that had been put in place but without any breach on the part of the defendants.

13. In July 2022, the claimants became concerned that the defendants were about to sell the new rooftop flats and dissipate the sale proceeds. The claimants obtained a freezing injunction without notice against the defendants and a company called Click Above Limited. That injunction was continued by O'Farrell J on 15 August 2022 against Click St Andrews. Thereafter, the claimants commenced proceedings on 31 August 2022.

14. For the purposes of this judgment, it is not necessary for me to set out the matters on which I was addressed in relation to the liquidation of Click St Andrews. However, the Case Management Conference was heard in May 2023 against the background of a proposed liquidation and an unless order was made against Click St Andrews in respect of adverse costs orders. In breach of that Order, those amounts were not paid. Nor did the defendants comply with the case management directions.

15. On 19 May 2023 a resolution was passed for the company to be wound up voluntarily.

16. The net result of these matters was as follows. Firstly, as a result of the failure to comply with the unless order, Click St Andrews was debarred from participating in the proceedings. By e-mail dated 5 February 2024, the liquidators also confirmed that they would not be defending the claim and would not be represented at trial.

17. Despite this, it was properly recognised by the claimants that they would still have to prove their case against Click St Andrews rather than simply entering judgment. Click Group Holdings was still able to participate in the trial and did so, represented by Aaron Emmett who had been a director of both defendants but had resigned as a director of Click Group Holdings in August 2023. At the Pre-Trial Review on 19 January 2024, the court made an order that, if Click Group Holdings intended to be represented at trial by Mr Emmett or anyone other than a legal representative, the court required evidence of a board resolution permitting that person to represent the company. A resolution was forthcoming shortly before trial signed by a director, Anita Bandak. Since the trial, the claimants have raised with the court their concerns that, according to the Companies House website, Ms Bandak had ceased to be a director of Click Group Holdings prior to the authorisation to Mr Emmett to act. The claimants recognise that that that may be an error in the date registered at Companies House. The issue has not yet been resolved. However, for the purposes of this judgment, it seems to me the obvious and practical course that I should take account of any submissions made by, and cross-examination conducted by, Mr Emmett in the course of the trial.

18. Neither of the defendants had served any witness evidence and no witnesses were called for the defendants at trial. Perhaps inevitably, Mr Emmett on occasion strayed into giving evidence. Where that happened, I have regard to the fact that any such evidence was not properly admissible and, in any case, was not given under oath or affirmation.

19. In the absence of legal representation, Mr Emmett relied heavily at trial on the legal arguments that had been advanced by counsel in the Defence. He placed particular weight on the fact that the Defence had been drafted by counsel who is now leading counsel. It is, of course, the case that counsel should only advance arguments that are legally sustainable but they remain that – legal arguments for the consideration of the court.

20. Before Click Group Holdings ceased to be represented, an expert in the field of architecture had been instructed, Joanne Williams of CCI, and she had agreed a joint statement with the claimants' expert, Alastair Ferguson of Hawkins Associates. Since Mr Ferguson was called to give evidence, I have regard to that Joint Statement. No expert reports in any discipline were served on behalf of the defendants and no expert evidence adduced by them at trial.

Amended Particulars of Claim

21. In the Particulars of Claim at paragraph 69, and the many breaches alleged having been set out, it was averred that:

> "The aforesaid acts, omissions and defaults amount to a breach of section 2A of the Defective Premises Act 1972 ("DPA"), insofar as neither the Rooftop Flat Works nor the Defendants' attempts at remedying the same or drying out the Property were done in a workmanlike or professional manner with proper materials."

22. The reference to the aforesaid acts, omissions and defaults appeared, therefore, to be a reference to any and all of the breaches set out in the 29 sub-paragraphs and their sub-sub-paragraphs.

23. On that basis, that is breach of the duty owed under section 2A of the DPA, the claimant leaseholders sought to recover losses which arose from Click St Andrews' breaches which were expected to be not less than those "set out elsewhere" in the Particulars of Claim. The other paragraphs referred to were those setting out the cost of remedial works (as then estimated) and the extent of the leaseholders' individual claims. The claimant leaseholders further sought a Building Liability Order pursuant to section 130 of the Building Safety Act 2022 in respect of Click St Andrews' liability under the DPA.

24. Section 130 (Building Liability Orders) provides:

> *"(1) The High Court may make a building liability order if it considers it just and equitable to do so.*
>
> *(2) A "building liability order" is an order providing that any relevant liability (or any relevant liability of a specified description) of a body corporate ("the original body") relating to a specified building is also—*
>
> *(a) a liability of a specified body corporate, or*
>
> *(b) a joint and several liability of two or more specified bodies corporate.*
>
> *(3) In this section "relevant liability" means a liability (whether arising before or after commencement) that is incurred—*
>
> *(a) under the Defective Premises Act 1972 or section 38 of the Building Act 1984, or*
>
> *(b) as a result of a building safety risk.*

25. Section 2A of the DPA provides:

(1) This section applies where a person, in the course of a business, takes on work in relation to any part of a relevant building.

(2) In this section "relevant building" means a building consisting of or containing one or more dwellings.

(3) The person owes a duty to—

(a) the person for whom the work is done, and

(b) each person who holds or acquires an interest (whether legal or equitable) in a dwelling in the building,

to see that the work is done in a workmanlike or (as the case may be) professional manner, with proper materials and so that as regards the work the dwelling is fit for habitation when the work is completed."

26. The purpose of the section was principally to provide for duties to be owed to the individual owners of flats who did not otherwise fall within the definition of persons to whom a duty was owed under section 1 in respect of work taken on for or in connection with the provision of a dwelling. This section came into force on 28 June 2022 and it follows, and was accepted by the leaseholder claimants, that no relevant duty was owed to them before that date. What also follows is that no duty was owed in respect of the carrying out of the Works as defined in the FPA and any duty could only be owed in respect of any work that was done after that date which was limited to such attempts as there were at remedial works.

27. I observe also that the duty owed under section 2A is not, as would appear from the pleaded case, one to see that the work is done in a workmanlike or (as the case may be) professional manner and with proper materials. The section continues "and so that as regards the work the dwelling is fit for habitation when completed." It is well-established that the duty owed under section 1, which is in the same terms, is a single duty to see that the outcome is that the dwelling is fit for habitation. Lack of fitness for habitation is correspondingly a necessary element of breach of that duty. I can see no reason why the duty owed in section 2A of the DPA should not be characterised in the same way.

28. I address this case below but I raised these issues with counsel in the course of opening submissions and, in particular, the absence of any identification of any particular breach of the duty owed under this section. As I have already said, paragraph 69 of the Particulars of Claim referred to all alleged breaches the vast majority of which occurred at a time when section 2A was not in force and no duty under that section was owed. There was no specific identification of breaches of the duty under section 2A. There were two general allegations of failure to undertake the drying out with reasonable skill and care and failing to plan and implement the drying out with reasonable skill and care, alleged breaches which may or may not have occurred after the section came into force.

29. It was only in respect of breaches of the duty under section 2A, if they could be identified and if they were made out, that the claimants might ask the court to make a Building Liability Order ("BLO"). Consideration was, therefore, given to the claimants' case and Mr Levenstein indicated there was a further matter which might give rise to a claim for a BLO under section 130(3)(b) of the Building Safety Act 2022, namely the breaches relating to structure and fire which, it was at least open to the claimants to argue, gave rise to a building safety risk as defined in section 130(6) as "a

risk to the safety of people in or about the building arising from the spread of fire or structural failure".

30. That did not form part of the leaseholder claimants' pleaded case but a short amendment was formulated to capture that claim and an application was made to amend. Although that application was made late in the day, I allowed the amendment for the reasons I gave at the time. Accordingly, there is now a claim advanced in these proceedings for a BLO on this further basis. The body against whom the BLO is sought remains unspecified in the Amended Particulars of Claim.

31. It is clear from counsel's submissions, however, that the leaseholders will seek a BLO against Click Group Holdings as an associated company (section 131). That may be of limited benefit given the nature of Click Group Holdings financial position as it appeared to be and was addressed at the time the freezing injunction was continued against Click St Andrews only but that is not a reason for the application not to be pursued. The claimants have not to date identified any other corporate body against which such an order might be sought. That is in no way a criticism and in no way impacts on any application for a BLO that may be made. The Building Safety Act 2022 says little about the procedure to be adopted by a party wishing to seek a BLO but it certainly does not require a party to make that claim within existing proceedings. It would be surprising if it did since the circumstances in which it might be just and equitable to make the order may not arise until after proceedings to establish a relevant liability are concluded and a BLO could be sought against a corporate body that did not even exist at the time of those proceedings. Where it is already in contemplation that an order will be sought against a particular associated company, it seems to me sensible and efficient for that claim to form part of what might be called the main proceedings, as is, in effect, the case here. But that does not preclude a subsequent claim for a BLO against some other associated company.

32. At the conclusion of the trial, I made it clear that I would address in judgment the matters which went to whether there was a relevant liability but not the making of the BLO itself which would be a matter for a further hearing. That was, in particular, to guard against the possibility that the order would be sought against a company other than Click Group Holdings and to give Click Group Holdings a proper opportunity, in any event, to address the issue of whether it would be just and equitable to make such an order against the background of the judgment.

The Agreement for Sale

33. As I have said, the primary basis for RTM's claims against both defendants, arises under the FPA. In the FPA, Click St Andrews was referred to as the Seller, RTM as the Buyer and Click Group Holdings as the Guarantor. The Property was defined as the freehold and leasehold property known as St Andrew's House, 381 Southwark Park Road, London SE16 2JT.

34. The FPA contained the following Recitals:

*"**Background***

(1) On 4 January 2019 the participating tenants (as defined by the 1993 Act) served upon the Seller a Notice pursuant to Section 13 of the 1993 Act ("Section 13 Notice") claiming the right to purchase the freehold of the property.

(2) On 11 March 2019 the Seller served upon the Buyer a Notice pursuant to Section 21 of the 1993 Act admitting that the participating tenants were entitled to exercise the right to collective enfranchisement in relation to the Property.
(3) This Agreement is being entered into in pursuance to the Section 13 Notice whereby the Buyer was appointed as the Nominee Purchaser for the purposes of Section 15 of the 1993 Act.
(4) The Guarantor has agreed to guarantee the performance of the Seller under this Agreement and be joined as a party."

35. Clause 1 (Definitions) included the following definitions:

(i) *"The 1993 Act: the Leasehold Reform, Housing and Urban Development Act 1993."*

(ii) "*Completion: the date on which the Transfer of the Property to the Buyer is actually completed, and reference in the Standard Conditions to "actual completion" are to be read accordingly."*

(iii) *"Completion Date: in accordance with Clause 13."*

(iv) *"Initial Longstop Date: 2020"*

(v) *"Leaseback: the 999 year lease granted by the Buyer to the Seller in the draft form annexed to this Agreement as Appendix E."*

(vi) *"Planning Permission: means the detailed planning permission for the Works issue by Southwark Council on 3 May 2019 under reference 18/AP/4042 a copy of which is at Appendix D."*

(vii) *"The Works: the works to the Property in accordance with the Planning Permission."*

36. Clause 5 (Works) provided :

"…
5.2 The Seller shall use all reasonable endeavours to procure that the Works are carried out:
(a) with due diligence and in a good and workmanlike manner;
(b) using only good quality materials and well-maintained plant and equipment
(c) In accordance with this Agreement, the Planning Permission, and the Requisite Consents in respect of the Works;
(d) In accordance with all statutory or other legal requirements and the recommendations or requirements of the local authority or statutory undertakings:
(e) in compliance with all British Standards, codes or practices and good building practice
…..
(g) causing as little annoyance disturbance and nuisance to the Tenants as is reasonable possible;
(h) and making good any damage caused to the Property to the reasonable satisfaction of the Buyer; …."

37. Clause 6 was concerned with Works Insurance and will be referred to briefly below.

38. Clause 13 provided:

"13.1 This Agreement is conditional on the Seller completing the Works in accordance with the terms of this Agreement.
13.2 Immediately the Seller has completed the Works and obtained the necessary Building Regulations Completion Certificates in relation to the Works, the Seller shall give written notice of that fact to the Buyer including supplying the said Building Regulations Completion Certificates, such notice to be sent by courier to the Buyer's Solicitor (the "Completion Notice").
13.3 This Agreement shall become unconditional immediately on receipt by the Buyer's Solicitor of the Completion Notice.
13.4 The Completion Date is 10 working days after this Agreement shall have become unconditional pursuant to clause 13.3 above.
13.5 If the Seller has not served the Completion Notice on the Buyer's Solicitor in accordance with this clause 13 by the Initial Longstop Date then the Initial Longstop Date shall be extended for a further year ("Extended Longstop Date"). …
13.6 If the Seller has not provided the Completion Notice by the Extended Longstop Date either party may at any time afterwards but before receipt of the Buyer's Solicitor of the Completion Notice serve written notice on the other rescinding this agreement and neither party shall have any claims against the other in respect of the Agreement and Standard Condition 10.1 shall apply."

39. Clause 14 (Leaseback) provided that on Completion the Buyer will grant to the Seller the Leaseback.

40. Clause 17 Guarantee and Indemnity) was in the following terms:

"17.1 The Guarantor guarantees the due and punctual performance by the Seller of all the Seller's duties and obligations under the Agreement.
17.2 If the Seller fails to observe or perform any of its duties or obligations under this Agreement, or if the Seller fails to pay any sum, loss, debt, damage, interest, cost or expense due from the Seller to the Buyer under or in connection with this Agreement, the Guarantor (as a separate and independent obligation and liability from its obligations and liabilities under clause 17.1) shall indemnity the Buyer against all loss, debt, damage, interest, payments, charges, cost and expense incurred by the Buyer by reasons of such failure or non-payment and shall, on first written demand, pay to the Buyer, without deduction or set-off, the amount of that loss, debt, damage, interest, payment, charges, cost and expense.
…"

41. Clause 18 (Buyer does not have to pursue Seller) provided that the Buyer does not have to pursue any remedy against the Seller before proceedings against the Guarantor under the FPA.

The purported rescission of the FPA and RTM's claim

42. As provided by clause 13.1, the FPA was conditional on the Seller completing the Works in accordance with the terms of the FPA and did not become unconditional until receipt by RTM's solicitors of Click St Andrews' Completion Notice. In the event, no Completion Notice was ever given by the Seller to the Buyer.

43. By letters dated 27 February 2022 and 2 March 2022, Mr Emmett on behalf of Click St Andrews purported to rescind the Agreement under clause 13.6. In the course of the proceedings, the defendants made an unsuccessful application for summary judgment against RTM on the basis that the Agreement had been rescinded.

44. Under clause 13.2, the Completion Notice was to be served after the Works were complete and Click St Andrews had obtained the necessary "Building Regulations Completion Certificates". Click St Andrews did not serve a Completion Notice by the Initial Longstop date (which appeared in the FPA only as "2020"). Clause 13.5 then provided that, in that event, the date was extended by a year to give the Extended Longstop Date. No Completion Notice was served by a date in 2021 and no Completion Notice was ever served by Click St Andrews. None of this is factually controversial.

45. On 23 December 2021 the claimants' solicitors had sent lengthy and detailed Pre-Action Protocol Letters to both Click St Andrews and Click Group Holdings. In the case of Click Group Holdings, the letter expressly stated that the letter constituted a "first written demand" in accordance with clause 17.2 entitling the claimants to compensation for defective works, damage to the Property and consequent financial losses and including legal costs whether as costs or under clause 17.2.

46. By letter dated 25 February 2022, RTM proposed to the defendants that they extend the Extended Longstop Date by 3 months and vary the terms of the Freehold Purchase Agreement to remove the right to rescind.

47. RTM's further letter dated 25 February 2022 gave notice of intention to hold Click Group Holdings to its obligations under clause 17 in respect of "all sums for which [Click St Andrews] and therefore [Click Group Holdings] are or may become liable under the Agreement for Sale."

48. By letter dated 27 February sent to RTM's solicitors (as identified in the FPA), Click St Andrews sought to rescind the FPA. The letter was headed "Formal Rescission Notice" and cited clause 13.6. Apparently, having received no response, a further letter in the same terms was sent to solicitors then known to be acting for RTM.

49. RTM's response by solicitors' letter dated 4 March 2022 denied the validity of the recission notice and asserted that Click St Andrews was in breach and was not, therefore, entitled to rescind the Agreement and that, because of the many breaches of the Agreement, it was no longer possible to return the parties to their pre-contractual position.

50. On the basis that the FPA was still extant, by letter dated 25 March 2022, RTM claimed that Click St Andrews was in repudiatory breach of the Agreement and accepted that repudiation as terminating the contract.

51. In the Defence, on which as I have said Click St Andrews relied fully at trial, the following arguments were advanced:

    (i) The parties could be returned to their pre-contractual position which was one in which RTM had no proprietary interest in the Property and its deposit could be returned.

    (ii) Click St Andrews was not in breach.

    (iii) Even if Click St Andrews was in breach that did not affect its right to rescind in exercise of the rights under clause 13.6.

    (iv) The FPA did not require the Works to be completed by the Extended Completion Date and the exercise of the right to rescind under clause 13.6 was not limited to a party who had fully complied with its obligations under the FPA. Clause 13.1 provided that the Agreement was conditional on Click St Andrews

completing the Works and only became unconditional once the Completion Notice had been served.

(v) On a proper construction, therefore, the defendants argued that either party could rescind the FPA in the event that the Completion Notice had not been served by the Extended Completion Date, whether or not that party had breached any other terms of the FPA.

52. RTM's case is that the right to rescind was not a right to rescind the contract ab initio but to terminate the contract such that the obligations to sell and buy ceased to be operable but any claims for damages for breach of the FPA were unaffected.

53. It would, in my view, be surprising if the Seller's interpretation of the FPA were correct. It would have the effect that the Seller could fail to carry out the works properly and fail to complete but avoid all consequences of those breaches by rescinding the FPA. That would also create the legally improbable position that the Works had been carried out on no contractual basis at all.

54. The only argument in favour of such an interpretation would be on the basis that the Buyer would never suffer any loss because it had no interest in the property and the Seller would have obligations to the leaseholders under the leases. But that argument has no regard to the potential for the RTM to suffer other losses in any event, the nature of the RTM as a legal mechanism for enfranchisement, and the prospect, therefore, that the RTM would become responsible for the carrying out of remedial works.

55. As a matter of construction, the term rescission is often used, arguably inaccurately, to refer to termination rather than rescission ab initio. Mr Levenstein relied on the decision of Court of Appeal in *Buckland v Farmar & Moody* [1979] 1 WLR 221 in which Buckley LJ said that the word rescission had no "primary meaning" and its meaning was to be discovered from the context. At 232F, he concluded:

"It seems to me really impossible, with all respect to the argument of counsel before us, to construe the works "rescind" in any sense other than the second of the two senses I have indicated, that is to say, other than as referring to acceptance by the vendor of a repudiation of the contract by the plaintiffs, leaving the vendor's rights under the contract which had already matured at the date of the acceptance of the repudiation intact."

56. In *Hardy v Griffiths* [2014] EWHC 3947 (Ch), Amanda Tipples QC (as she then was) addressed the argument of counsel that, in a contract for the sale of land, if a contractual right to rescind exists, then the principles of rescission ab initio apply. She held that there was no authority to support the proposition that the contractual right to rescind results in the contract being terminated ab initio so that unperformed obligations intended to remain enforceable after the contract has been brought to an end are somehow dissolved or discharged. At [109] she continued:

"(4)The rights unconditionally acquired by the vendor of land prior to the exercise of his contractual right to rescind, survive the rescission of the contract. That is unless the contract for the sale contains clear express words divesting or discharging the vendor of such rights."

57. In the present case, the argument that might be advanced is that RTM's rights were never unconditional as the FPA was expressed to be conditional. But in my view it is

the obligations to buy and sell that are truly conditional and not the obligation to carry out the Works, at least once that obligation has been partially performed. If it were otherwise, those obligations would exist in some sort of contractual vacuum.

58. In my judgment, therefore, the effect of the purported rescission was that the rights of the Seller and Buyer to sell and buy were terminated but no more than that. RTM always had a cause of action in respect of other breaches of the FPA which had occurred prior to the termination of the FPA. At the time proceedings were commenced, RTM's claim may properly have been for nominal damages only but it has since acquired the freehold and is responsible for the carrying out of remedial works and will suffer substantial loss and damage. It is not necessary for a completed cause of action in contract for it to have suffered that substantial loss and damage before the commencement of proceedings.

59. It follows that RTM is also entitled, pursuant to the guarantee in clause 17, to recover from Click Group Holdings any sums for which Click St Andrews is liable under the FPA.

60. RTM also argued that, at the time of the rescission letters, it had already made a first written demand under clause 17.2 (on 23 December 2021) and on 25 February 2022 notified both defendants of its intention to make a claim under the indemnity and guarantee provisions. It followed, RTM submitted that the purported recission amounted to a repudiatory breach which the claimant accepted. I do not see how the making of that demand had the effect contended for. Mr Levenstein's argument appears to be that the purported exercise after the demands under the guarantee had been made evinced an intention not to be bound by the terms of the FPA, but that presupposes, in the claimants' favour, that there were enforceable obligations under the conditional FPA and, therefore, turns on the same issue as to whether the right to rescind could be exercised and/or with what effect. However, it does seem to me that the fact that such a demand could be made is consistent with the interpretation of the FPA which I have adopted. Once it had been made, it would be perverse if the termination of the contract could then create a situation in which RTM had no claim for loss which was the subject of the guarantee.

61. For completeness, I address two further arguments advanced by Mr Levenstein on behalf of the claimants. The first was that a claim could be brought by RTM against Click Group Holdings in reliance on clause 17.3 of the FPA. That clause provided that if the Seller suffered an Insolvency Event, the Guarantor should indemnify the Buyer against all loss incurred by the Buyer by reason of the Insolvency Event and pay accordingly on first written demand. Insolvency Event was widely defined and encompassed matters that may occur before, for example, the Seller entered into liquidation. In the pleaded case, RTM expressly relied on the letter of 25 February 2022 as its notification of intention to claim under the guarantee adding that this was in addition to its letter dated 23 December 2021 which constituted the first written demand. On any view, both these demands preceded the liquidation of Click St Andrews and there is no evidence of any other Insolvency Event prior to these letters. Further no case was developed as to losses that had been suffered as a result of an Insolvency Event. It may have been argued, albeit with some difficulty, that the earlier demands were, in some way, a pre-emptive strike and/or that the losses were all monies that the claimants could not recover from St Andrews. It is, however, unnecessary, to examine such arguments - which were not advanced - as a claim under clause 17.3 adds nothing to a claim under clause 17.2.

62. Secondly, Mr Levenstein argued that Click Group Holdings had never served its own rescission notice and, therefore, remained bound by the guarantee in the FPA whatever the position in respect of Click St Andrews. In my judgment, this argument is misconceived for a number of reasons. Clause 13 of the FPA, on its face, refers to the actions of the Seller and the Buyer and it is clear that the reference in clause 13.6 to "either party" serving notice refers to the Seller and the Buyer only and not to the Guarantor. Further, it would be extraordinary if a guarantor could give notice to rescind the underlying contract performance of which it had guaranteed. There is no conceivable basis on which one could carve out the guarantee and construe the FPA as giving Guarantor the right to rescind the Guarantee. Lastly, if Click St Andrews' rescission notice had had the effect of rescinding the FPA such that it had never owed any enforceable duties to RTM, there would be nothing for Click Group Holdings to have guaranteed. In any event, for the reasons I have given, none of this is material.

The no loss defence

63. As I have already indicated, a further all encompassing defence raised by the defendants is that, even if the defendants are in breach of the FPA, RTM has suffered no loss in respect of the damage to or defects in the fabric of the building as RTM has no proprietary interest in the Property. At the time of trial, the factual position was that RTM was still seeking to acquire the freehold and, therefore, anticipated that it would suffer loss and incur the costs of carrying out remedial works.

64. RTM would always have been entitled to nominal damages for breach of the FPA and the Click Group Holdings' guarantee would have extended to these damages even though nominal. It was submitted on behalf of RTM that the purpose of the RTM (to acquire the freehold), and the contemplation that it would do so, was sufficient to give raise to an entitlement to substantial damages. There is an obvious attraction in that submission which reflected the intentions of RTM and the leaseholders but it failed to grapple with the potential issues in awarding a substantial sum in damages to a party that was not obliged to acquire the freehold or carry out remedial works.

65. In the event, the difficulty does not arise as RTM acquired the freehold on 8 May 2024. Accordingly, there can now be no issue in awarding substantial damages to RTM as freehold owner. It is not material that RTM did not own the freehold at the time the proceedings were commenced or at trial – as I have said the company could always have recovered nominal damages and those damages can now be substantial.

The position of the leaseholders and the leaseholders' claims

66. The Particulars of Claim advanced not only claims for the carrying out of remedial works to the fabric of the Property but also claims in respect of damages suffered by individual leaseholders.

67. As against Click St Andrews, and as I will come to, the leaseholders have potential causes of action under the leases, for negligence and in nuisance, and, as it was also argued, under section 2A of the Defective Premises Act 1972. However, the leaseholder claimants were not parties to the FPA and do not therefore have claims for breach of the FPA and thus under the guarantee against Click Group Holdings. Their claims were, therefore, pleaded only against Click St Andrews which is in liquidation but might have had the benefit of insurance taken out in respect of the Works or other liabilities.

68. However, the claimants also now contend that it is open to RTM to advance the leaseholders' claims. In so far as those claims flow from the breach of the FPA, the leaseholders through RTM will then also have the benefit of the guarantee and thus indirectly a judgment against Click Group Holdings.

69. As set out in the Amended Particulars of Claim, RTM claimed as damages for breach of the FPA, the cost of remedial works to the Property (referred to as "the RTM Company Claims"). These sums were claimed both against Click St Andrews and against Click Group Holdings, in reliance on the guarantee contained in clause 17. The leaseholders' losses (referred to as "the Leaseholder Claims") were separately claimed against Click St Andrews as damages for breach of contract, negligence, nuisance and/or pursuant to statute. They included the cost of remedial works to the building and the individual flats and specific individual losses suffered by the leaseholders.

70. As pleaded therefore, it appeared (i) that RTM only claimed the cost of the remedial works and did so against both defendants but (ii) that the leaseholders claimed the cost of remedial works and individual losses and (iii) that the leaseholders advanced those claims only against Click St Andrews as the freeholder and the party that had undertaken the Works.

71. In the relief sought, the claimants' claims were, however, pulled together and the claimants (without distinction) were said to claim the RTM Company Claims and the Leaseholder Claims. Shortly before trial, the claimants had permission to serve an updated Schedule of Loss. In that Schedule, the claimants said that although the losses were still split into RTM and Leaseholder losses:

> *"… all Claimant Leaseholders are members of RTM. RTM (through its status as the right to manage company on behalf of the Claimant Leaseholders and intended nominee purchaser of the freehold) and the Claimant Leaseholders have a common interest in repairing the Property (whether in terms of the overall structure, common areas or specific flats) and share the entitlement to recovery of the losses pleaded."*

72. In written Opening Submissions (paragraph 123), Mr Levenstein made the following submission:

> *"The above categorisation* [of loss] *is without prejudice to the legal reality that all the Claimant Leaseholders are members of RTM. RTM (although its status as the right to manage company on behalf of the Claimant Leaseholders and intended nominee purchaser of the freehold) and the Claimant Leaseholders share a common interest in repairing the Property (whether in terms of the overall structure, common areas or specific flats) and thus share the entitlement to recovery, between themselves, of all the losses pleaded."*

73. That was essentially the same argument that was advanced in the Schedule of Loss. It was followed by a footnote which submitted that: *"Insofar as they do not relate to person-specific losses (eg. income, injury, distress, etc). The nominee purchaser's rights may stand in for those of individual tenants."* The authority cited for that last proposition was *Trinity Church Square v Trinity House of Deptford Strond* [2016] UKUT 484 (LC) at [14].

74. The paragraphs that followed set out the value of the claims that were made and, in all cases, referred to the claimants' claims without distinction. It, therefore, appeared that, with the exception of personal losses (income, injury and distress), it was the intention to advance a claim by RTM for losses that were incurred by the leaseholders. The

obvious potential benefit to the claimants collectively would be that if RTM could advance this claim as one for damages for breach of the FPA it could be advanced against Click Group Holdings as well.

75. However, when Mr Levenstein opened the case orally, he said that the defendants were liable to the leaseholders under the FPA because the FPA was entered into by the RTM as nominee for the benefit of the leaseholders. When addressing the losses suffered, he submitted further that the leaseholder claimants were all beneficiaries of the FPA and had a common entitlement to recovery with RTM.

76. If the leaseholders were able to rely on the FPA that would have the benefit for them of a basis to claim damages directly from Click Group Holdings under the guarantee. I cannot see, however, that the fact that the RTM is acting as nominee for the leaseholders in respect of the carrying out of the works as well as the acquisition of the lease leads to the conclusion that the leaseholders can each claim as individuals under the FPA. The company is established to act on behalf of the leaseholders for the purposes of the Leasehold Reform, Housing and Urban Development Act 1993 but it is still a legal person which a distinct legal identity. It is, further, not an agent for individuals but acts as principal.

77. I also raised with Mr Levenstein the impact of clause 22 of the FPA which is headed "Exclusion of Contracts (Rights of Third Parties) Act 199 (sic)" and provides:

"Nothing in this Agreement is intended to confer on any person any right to enforce any term of this Agreement which that person would not have had but for the Contracts (Rights of Third Parties) Act 1999."

Mr Levenstein submitted that the proper reading of this clause was that it meant that a third party would not have rights unless the 1999 Act applied – it did not exclude the application of the Act so that it did apply and the leaseholders acquired rights under the Act. This reads the clause as meaning that nothing in the Agreement is intended to confer rights on a third party that they might have had <u>other than</u> those that they may acquire under the Act. Even without any regard to the heading of the clause, that cannot, in my view, be right and the meaning of the clause is the precise opposite. The clause preserves any right that a third party might have had irrespective of the Act but does not confer any right that the person would <u>not</u> have had unless the Act conferred that right to enforce.

78. It seems to me, therefore, that the clause does not harm the leaseholders' argument if – and it is a significant if – they have a right to enforce the FPA irrespective of the Contracts (Third Party Rights) Act 1999. As I have already said, I cannot see any basis on which they do have such a right.

79. The focus of the claimants' submissions, however, shifted to the different issue, advertised in the written submissions, of whether RTM could recover the leaseholders' losses. By the time of closing submissions, the leaseholder claimants' claims were clearly identified as those against Click St Andrews for breach of the covenants in the lease, negligence and nuisance, those against Click Group Holdings that could be advanced under section 2A of the DPA and by way of a BLO. However, the claimants now contended that RTM could recover all of the leaseholders' losses (without limitation to certain types of loss) – as it was put, RTM's claims subsumed and included the leaseholders' losses. Counsel helpfully provided a diagram which showed the "flow" of claims.

80. It is this matter which I turn to next but I have set out the background for two reasons. Firstly, it seems to me, with respect, that the issue of which claimant was claiming what and on what basis had not been adequately thought through in the pleadings or even by time of trial. It is a matter that requires careful consideration and identification of the approach that the parties and the court takes. Secondly, it could still appear that there is a gap in the pleaded case in terms of the scope of RTM's claim. However, given the extent to which this issue was canvassed and clarified at trial, it would be wrong, in my view, to find that RTM could not advance the leaseholders' claims as its own claims, if there is a proper basis for doing so.

81. As I have indicated above, the argument that there was such a proper basis was first advanced relying on a decision of the Upper Tribunal in the *Trinity Church Square* case. I address that first as it seems to me to have provided no assistance at all. The decision was concerned with the effect of section 1(4) of the Leasehold Reform, Housing and Urban Development Act 1993. Summarising the statutory provisions, where qualifying tenants exercise their rights to enfranchisement through a nominee, the situation may arise where there is property which is not demised to any tenant but over which the lease confers rights which are exercisable by a tenant in common with others. In such as case, section 1(4) provides that the right of acquisition is satisfied if the person who owns the freehold grants rights which ensure that the occupier has "as nearly as may be" the same rights as enjoyed on the relevant date by the qualifying tenant. In that case, the rights were a licence to use a garden square which would not be acquired as part of the freehold.

82. Against that background, the Upper Tribunal observed at [14] that there was no requirement that the rights (over freehold land not acquired as part of the enfranchisement) must be granted to the nominee purchaser and that the implication was that the grant would be to the qualifying tenant whose lease conferred rights over that land, rather than to the nominee purchaser, "although in this case the parties have agreed that rights granted to the nominee will suffice." That was the product of a specific agreement against a particular statutory and factual background. It in no way supports a general proposition that the nominee stands or can at its option stand on the rights of the leaseholder and, in the present, case bring claims in respect of the losses of the leaseholder.

83. The far stronger argument on behalf of RTM which counsel then developed arises from the purpose of the FPA and the statutory background.

84. The statutory background is the right of long-leasehold tenants who are qualifying tenants within the meaning of the 1993 Act to enfranchise by acquiring the freehold. The process is started by the service of a notice under section 13 and, by section 13(3)(f) the notice must specify the person or persons appointed as the nominee purchaser for the purposes of section 15. Section 38 provides that "nominee purchaser" shall be construed in accordance with Section 15. Section 15 then provides:

"(1) The nominee purchaser shall conduct on behalf of the participating tenants all proceedings arising out of the initial notice, with a view to the eventual acquisition by him, on their behalf, of such freehold and other interests as fall to be so acquired under a contract entered into in pursuance of that notice.

(2) In relation to any claim to exercise the right to collective enfranchisement with respect to any premises, the nominee purchaser shall be such person or persons as may for the time being be appointed for the purposes of this section by the participating

tenants; and in the first instance the nominee purchaser shall be the person or persons specified in the initial notice in pursuance of section 13(3)(f)."

85. There are further sub-sections, principally concerned with termination of the nominee purchaser to act as such, which are not material.

86. It is plain from this background that the role of the nominee purchaser is to act in the enfranchisement on behalf of the tenants with a view to the acquisition of the freehold and any other interests that fall to be acquired "under a contract entered into in pursuance of that notice." In the present case, the express purpose of the FPA went further than the simple acquisition of the existing freehold premises and extended to having works carried out to extend the Property before the freehold was acquired. Provision was also made for a leaseback of the additional flats to Click St Andrews by means of 999 year leases. As set out expressly in the FPA, this was the contract which was entered into in pursuance of the notice given under section 13. In pursuance of that contractual arrangement, RTM would acquire the freehold and step into the shoes of Click St Andrews as freeholder.

87. Mr Levenstein referred the court to a passage in Hague on Leasehold Enfranchisement, 7th edition, that suggests that in the acquisition of the freehold the nominee company acts as trustee for the leaseholders as beneficiaries. Although, if right, that may provide a route to recovery by RTM of the beneficiaries' losses which would then be held on trust, it was not a submission that was developed further.

88. The argument that was developed was that on acquisition of the freehold, RTM would become liable under the leases on the same basis as the former freeholder. Mr Levenstein submitted that such losses were within the contemplation of the parties when the FPA was entered into and I agree with that submission. It seems to me that it is, in a sense, helpful to look at this from the perspective of the FPA having become unconditional – in other words, the Works would have been completed, the Completion Notice served, and the freehold transferred. If there had then transpired to be defects in the Works, the RTM would have had a claim against Click St Andrews and Click Group Holdings (under the guarantee) for damages for breach. The damages which the parties would have contemplated the RTM would have suffered would include any losses for which the RTM was liable to the leaseholders.

89. If that needs more support, Mr Levenstein also placed reliance on the Commonhold and Leasehold Reform Act 2022 at section 96(2) which provides that: *"Management functions which a person who is landlord under a lease of the whole or any part of the premises has under the lease are instead functions of the RTM company."* Section 96(5) provides that *"Management functions" are functions with respect to services, repairs, maintenance, improvements, insurance and management."* The existing leases (under which RTM would acquire, and now has acquired, these function) include the covenant of quiet enjoyment.

90. In the present case the freehold would not be and was not acquired by means of the FPA but, if the same losses could not be recovered by the RTM, at least when it acquired the freehold, it would create a perverse situation. The qualifying tenants and their nominee could not acquire the freehold, in exercise of their statutory rights, without taking on the burden of the leases and any liabilities under the leases. As Mr Levenstein put it, there was an injury to the freehold which the tenants and the nominee were entitled to acquire. The RTM could not, therefore, be put into the position it ought to have been in if the FPA had been properly performed unless it was entitled to recover

in respect of that injury which would necessarily include the recovery of any sums for which it was liable under the leases. If the position were otherwise, there would be a serious impediment to the exercise of the statutory rights to enfranchise.

91. I am inclined to the view that that would have been the position, even if the RTM had not, since trial, acquired the freehold unless there was evidence before the court that the freeholder had itself remedied any breach and paid any relevant damages so that the "uninjured" freehold could be acquired by the RTM. But it not necessary for me to decide that issue since RTM is now the freehold owner.

92. That leaves the issue which was addressed in submissions as to whether the RTM can recover in respect of all the leaseholders' damages suffered as a result of breaches of the leases or only those that have accrued since the RTM became the freeholder. At one point in the argument, it was suggested that there might be such a distinction. Mr Levenstein, however, relied on section 3 of the Landlord and Tenants (Covenants) Act 1995 which provides:

"*(1) The benefit and burden of all landlord and tenant covenants of a tenancy—*

(a) shall be annexed and incident to the whole, and to each and every part, of the premises demised by the tenancy and of the reversion in them, and

(b) shall in accordance with this section pass on an assignment of the whole or any part of those premises or of the reversion in them.

.....

(3) Where the assignment is by the landlord under the tenancy, then as from the assignment the assignee—

(a) becomes bound by the landlord covenants of the tenancy except to the extent that—

(i) immediately before the assignment they did not bind the assignor, or

(ii) they fall to be complied with in relation to any demised premises not comprised in the assignment; and

…"

93. In light of this provision, there would seem to be no question that the burden of all Click St Andrews' covenants was contemplated to pass, and did pass, to RTM on the acquisition of the freehold and that that burden includes the liability to the leaseholders whether before or after that acquisition.

94. Subject to any further submissions, I will, therefore, where I find a relevant breach of both the lease and the FPA, give judgment for RTM in respect of the leaseholders' losses. That does not affect the leaseholders' own claims against Click St Andrews but, for the avoidance of doubt, there can be no double recovery.

The leaseholders' bases of claim

95. Each of the claimant leaseholders has or had a lease of a flat from Click St Andrews as landlord.

The leases

Quiet enjoyment

96. Each of the leases defined the Building in the same terms as the Property has been used in this judgment and "the Property" as the relevant flat. Each of the leases contained the following covenant at Schedule 6 (Landlord's Covenants), clause 1 (Quiet Enjoyment):

"So long as the Tenant pays the rents reserved by and complies with its obligations in this lease, the Tenant shall have quiet enjoyment of the Property without any interruption by the Landlord … except as otherwise permitted by this lease."

97. The leaseholders' case is that the water ingress and the widespread damage caused to their properties are a breach of the covenant of quiet enjoyment as are any other fire safety or structural defects . The leaseholders are entitled to claim damages for breach.

Insurance

98. The leaseholders also advance a case on the basis of failure to comply with the landlord's covenants in respect of insurance. Schedule 6, clause 2.1 provided the landlord's covenant:

"To effect and maintain insurance of the Building against loss and damage caused by any of the Insured Risks with reputable insurers, on fair and reasonable terms that represent value for money, for an amount no less than the Reinstatement Value subject to:

(a) Any exclusion, limitations, conditions or excesses that may be imposed by the Landlord's Insurer; and

(b) Insurance being available on reasonable terms in the London Insurance market …"

Insured Risks are defined as:

"fire, explosion, lightning, earthquake, storm, flood, bursting and overflowing of water tanks, apparatus or pipes, escape of water or oil, ….and any other risks which the Landlord decides to insure against from time to time and Insured Risk means any one of the Insured Risks."

99. Under clause 3, in summary, if any part of the Building was damaged by an Insured Risk, the landlord was obliged to claim under the policy and use the funds received to repair the damage.

100. I note also that under clause 6.1 of the FPA, Click St Andrews was required to insure the Works "on customary contractor's all risks terms" for not less than their reinstatement value and under clause 6.3 of the FPA, Click St Andrews was required to maintain insurance in respect of damage to property for an indemnity of not less than £10 million. There is a generalised allegation by RTM of breach of these terms the particulars being that Click St Andrews failed to obtain or maintain sufficient insurance cover in respect of the Works, failed to procure a policy which responded to the claimants losses at an appropriate level of indemnity, and failed to compensate the claimants from Click St Andrews' own funds so far as any losses were uninsured or underinsured.

101. The leaseholders' case in relation to breaches of Click St Andrews' insurance obligations under the leases, and what it seeks to achieve, other to establish a breach in principle, is frankly unclear. The nature of the leaseholders' case is that <u>if</u> Click St Andrews failed to take out adequate insurance that is a breach of the terms of the lease

or if Click St Andrews did take out adequate insurance and has received monies under the policies, it has failed to use those monies to repair the property which is also a breach of the terms of the lease.

102. In the Particulars of Claim, the claimants refer first to a Contractors' All Risks policy. Although not referred to at all during the trial, the trial documents include a Contractor's Combined Insurance Policy from Tokio Marine (HCC) for the period from 1 October 2020 to 30 September 2021 which names Click St Andrews and Click Above Ltd. as the Assured. The policy includes Public Liability cover in the amount of £5m and Contractors' All Risks Cover for "the Contract Works" in the sum of £2 million for any one occurrence. The leaseholders refer to a letter dated 1 October 2021 from brokers confirming that Click St Andrews' Contractors' Combined Insurance policy would cover in full various heads of losses arising from the water ingress. The claimants say that, despite that, Click St Andrews has failed to make any payments to the leaseholders. The leaseholders also refer to a letter dated 9 August 2021 from Laith Mubarak of the defendants to RTM confirming cover of £2 million in respect of the rooftop works (which is consistent with the CAR cover) and of £2.3 million in respect of reinstatement of the Property.

103. The inference that it appears the leaseholders seek to draw from the brokers' statement is that Click St Andrews has received payments. If Click St Andrews has received any monies under this policy, that may have given the company the means to pay damages to the claimants. If the monies were received under the policy taken out in accordance with the terms of the lease, there might be a further breach in failing to use the funds to carry out repairs. There is no obligation under the lease to pay these insurance monies over to the leaseholders.

104. In a witness statement in September 2022, in the context of the freezing injunction, the claimants' solicitor drew together evidence that £102,000 had been paid under the Tokio Marine policy which it was understood was for repairs to flats 15, 16 and 17 (although there were no details of those repairs). That would be seem to be consistent with a payment under the CAR policy since the flats formed part of the Works. He also identified insurance payments to Click Above Limited, Click Hershel Limited, a company called "United Projects", directly to Mr Emmet, and to a management company called J M W Barnard. In the Particulars of Claim a little later, however, the leaseholders said that they understood that Tokio Marine had declined cover both under the CAR policy and under the public liability cover. Then in a later statement made in September 2023, Mr Bacon stated that he believed sums totalling £108,500 had been paid out under the CAR policy. What is apparent from this somewhat conflicting evidence is that, if any monies have been paid to Click St Andrews, they are most likely payments under the CAR policy. Although, as I have said, that might have enabled Click St Andrews to finance remedial works and/or pay compensation to the leaseholders, it was not money paid under the insurances which the leases, on their natural reading, required Click St Andrews to maintain.

105. It may be that the leaseholders' contention is that the obligations under the lease extended to the taking out of insurance against loss and damage caused by the carrying out of the Works but, save as set out below, no such argument was articulated or developed.

106. The leaseholders also contend that, in so far as there were policies in respect of the Works (which may or may not be intended to refer to a contractor's all risks policy or

to the insurance required under clause 6.3 the FPA) or the new build flats have the benefit of insurance backed warranties, the defendants have failed to indemnify the claimants in respect of any payments under these policies. The case advanced is a conditional one predicated on the possibility that there are such policies and have been payments under such policies to the defendants. That is the closest that the leaseholders came to advancing the argument I referred to above and I cannot accept it. The lease on its natural reading requires Click St Andrews to take out buildings insurance not insurance against loss during the carrying out of works which is not within the definition of Insured Risks. That was the purpose of the FPA requiring insurance to be taken out against damage to property but that did not create an obligation to pay monies received under that policy to the leaseholders. I make the same observation that the receipt of monies from that policy may have given Click St Andrews the means to pay damages to the leaseholders but that was not a breach of the terms of the lease.

107. The leaseholders also say that they understand that the buildings insurer is Giant Risk Solutions which has declined cover on the basis of an exclusion concerning the defendants' failure to maintain wind and water tightness of the building during the carrying out of the Works. This insurance would appear to be the policy that the landlord is obliged to take out in accordance with the terms of the lease and that was Mr Bacon's understanding. If that exclusion has the effect that the landlord has failed to effect and maintain insurance against Insured Risks in breach of the landlord's covenant, then there is a breach of that covenant but, without further particulars of the policy, it is not, in my judgment, proper simply to infer that breach. The policy itself may be an entirely appropriate one to comply with the terms of the lease which allows for exclusions and limitations that may be imposed by the insurer. It appears that the insurer's position is that the landlord has acted in a manner which engages an exclusion and causes the insurer to decline cover but that is a different matter from a breach of the covenant.

108. It is worth me observing, from the perspective of the leaseholders, that, in any event, a finding by this court that Click St Andrews was in breach of its insurance obligations could at best give rise to an entitlement to damages against Click St Andrews in sums that could have been recovered under the proper policy but without the benefit of that policy.

109. As I have said, under clause 6.1 of the FPA, Click St Andrews was required to take out a CAR policy and, under clause 6.3 of the FPA, to maintain insurance in respect of damage to property for an indemnity of not less than £10 million. The Tokio Marine policy does not offer that level of cover in respect of public liability and there is no evidence of any other relevant cover. There is, therefore, on the face of it, a breach of the obligation owed to RTM in clause 6.3. Clause 6.4 provides that Click St Andrews will not do anything that may render the policy void or voidable. It is not at all clear why cover has been declined and whether there may have been a breach of clause 6.4. Even if there is an available claim for damages for breach, the breach can only be damages in the amounts that would have been recoverable by Click St Andrews under the insurance policy but, if cover has been declined for good reason and not because of any act or omission of Click St Andrews which amounts to a breach of clause 6.4, there is no loss. In any case, those damages would now be sought by RTM against Click St Andrews without the benefit of insurance. Although there is, therefore, a breach in principle of clause 6.3, any award of damages would not help to satisfy the financial claims of the claimants.

110. Mr Levenstein also sought to place some reliance on clause 8.2 of the leases. It is unnecessary to set out that clause in full. In summary, it provided that if the repair, rebuilding or reinstatement of the Building was impossible (my emphasis) following damage or destruction by any of the Insured Risks, the Landlord's obligation to reinstate would be deemed to be discharged and the proceeds of any insurance policy on the Building would be held on trust for the Landlord and the Tenant/ the Flat Tenants in proportion to their respective interests in the Building to be agreed or determined in arbitration. This clause has no relevance to the present case. It is not impossible to repair the Property. Indeed, that is the complete opposite of the claimants' case and the claims made for the cost of remedial works.

Breach of statutory duty

111. As set out above, the leaseholders also advance claims for breach of section 2A of the DPA and seek a BLO in respect of building safety risks. I address this further below.

Negligence

112. In addition to, and it must be in the alternative to, the claims for breach of the covenant of quiet enjoyment, the leaseholders aver that Click St Andrews owed a duty:

> *"to exercise all the reasonable care and skill to be expected of a competent and professional contractor during the course of [the Works] such that they were to be completed to a reasonable standard and fit for purpose. Such a duty included that St Andrews avoid causing any physical damage to the Property and economic loss, whether consequential or pure, to the Claimants."*

That duty of care is denied by the defendants.

113. Although the leaseholders seek to rely on all the alleged breaches of the FPA, the particular breaches relied on are causing or failing to prevent water ingress to the common parts and flats 5, 6, 7, 8 and 9 and causing or failing to prevent elevated moisture readings and mould growth in the same locations.

114. The duty to take care to avoid causing physical damage to the property should be uncontroversial and breach of such a duty would be sufficient to found most, if not all, of the leaseholders' claims in respect of the water ingress, moisture and mould growth.

115. The pleaded duty on its face, however, extends beyond a duty not to cause physical damage to the leaseholders' property and amounts to a duty owed to the leaseholders to carry out the Works with reasonable care and skill and, indeed, so that the completed works were fit for purpose. The basis for this extended duty was not the subject of any submissions as to the basis on which it might be owed. It could only arise from some assumption of responsibility. I start by saying that, at highest, I can only see that a duty to exercise reasonable care and skill might be owed and not a duty to provide something which is fit for purpose. The latter goes beyond any duty of care in tort. So far as the former is concerned, on the one hand, RTM acts as nominee for the participating leaseholders in the enfranchisement and, in this case the carrying out of the Works, which militates in favour of finding that Click St Andrews assumed the relevant responsibility to the leaseholders. However, the statutory position is that a nominee must act in the enfranchisement and it would seem to run contrary to that position to find that, where contractual arrangements were then made with the nominee, the selling freeholder also owed duties to the participating leaseholders.

116. I do not consider it necessary, to decide whether such an extended duty was owed and whether such a claim could succeed. The cost of remedial works can properly be recovered by RTM, and by the leaseholders for breach of the covenant of quiet enjoyment, and a distinct claim by the leaseholders on this alternative basis adds nothing.

Nuisance

117. Lastly, the leaseholders advanced their claims (both in respect of individual losses and the cost of remedial works) in nuisance. This basis of claim is a yet further alternative; it adds nothing; and I do not consider it further.

118. Additionally, it was pleaded and argued on behalf of the leaseholders that the water ingress and its consequences gave rise to a statutory nuisance there was a statutory nuisance, under section 79(1)(a) of the Environmental Protection Act 1990, as the damp and mould posed a risk to health. The remedy for statutory nuisance is the service of an abatement notice by the local authority (under section 80), failure to comply with which amounts to an offence and/or proceedings in the magistrates court by person aggrieved by the existence of a statutory nuisance. No case was advance as to how any such statutory nuisance gave rise to civil liability and no authority for such a proposition was cited. Again this was entirely an alterative basis of claim and not material in any event.

The rainwater ingress

119. Having outlined the claimants' case above, I return to this case in more detail.

120. As originally constructed in about 2000, the Property comprised 14 flats over 4 storeys with a pitched roof. The Works involved the addition of a fifth storey with 3 additional flats (nos. 15,16 and 17) which were to be above and adjoining the flats on the 4th floor (nos. 11, 12, 13 and 14). The flats themselves were to be comprised of modular units.

121. To construct the further storey, the pitched roof had to be removed and replaced with a flat roof and steel sub-frame which was to support the further flats. During construction, the steel sub-frame formed part of a crash deck and the modules were intended to sit about 300mm above the deck. The steel sub-frame also acted to transfer weight and was supported on the existing loadbearing masonry walls of the property, some of which were extended upwards to support the sub-frame.

122. At the beginning of the week commencing 19 July 2021, there was still in place a pitched corrugated tin roof supported on scaffolding – referred to as "the tin hat roof" – which was temporarily in place to protect the rooftop works. That tin hat roof had obviously to be removed to install the modules that would create the fifth storey.

123. The claimants' pleaded case was that the process of removing the tin roof, installing that modular units and weatherproofing the roof would take 7 days. The Defence states that the removal of the tin hat roof commenced on 19 July and was carried out on 19 and 20 July. The defendants' case was that these works would take 2 days using a crane, although Mr Emmett said in court, as submission, that the removal was carried out by scaffolders and took 5 days.

124. In an e-mail dated 13 July 2021, Mr Tyrell, the Design and Construction Manager for the project, had explained to the residents that Click St Andrews intended to install the

modules over the weekend of 24 and 25 July. In order to do that, they needed to have obtained a road closure for a crane which would lift the modules into place. The e-mail said that they had applied for a second closure as well on a "back up weekend in case of high winds".

125. As I have indicated, it was not entirely clear on the evidence when the tin hat roof was removed and/or when that process was complete. There were competing versions of how this was done and how long it had taken. But it was necessarily removed by the weekend of 24 and 25 July in order to place the modular units.

126. During the week of 19 July 2021, there were yellow and amber weather warnings for rainfall and thunderstorms in London at the weekend (that is 24 and 25 July). A yellow thunderstorm warning was issued on 19 July for London and the southeast of England although the storms were expected to die out in the evening. There was a further yellow warning on 20 July 2021.

127. On Wednesday 21 July, the Met Office issued a yellow weather warning for "heavy thundery showers" across the South East of England on 24 and 25 July. The warning said that heavy, thundery showers were likely to break out by day, particularly on Sunday "when these could be widespread and locally torrential". Lightning and hail were also expected.

128. On Friday 23 July, the Met Office issued another yellow weather warning. This warned of a renewed threat of thunderstorms and torrential rain on Friday evening until Saturday evening. A further yellow warning, also issued on Friday, warned of heavy showers and thunderstorms on Sunday.

129. Click St Andrews commenced the crane lift on Sunday 25 July 2021. At 2.33pm that day, an amber warning was issued for the period from the issue of the warning to 7.00pm that day. Heavy showers and thunderstorms had formed in a line stretching northeast from Surrey towards western Essex and it was predicted that each shower could bring 20-40mm of rainfall.

130. On the afternoon of 25 July there was, in fact, torrential rain at the site.

131. Records (measured at Deptford approximately 2 miles from the property) show that between 19 and 23 July, there was no rainfall; on 24 July there was little daily rainfall (0.03mm); but on 25 July there was daily rainfall of 21.6mm. There was further rainfall in the following two weeks including 22.9mm on 28 July 2021 and 48.5mm on 7 August 2021.

132. The installation was not completed on 25 July. On 26 July, Click St Andrews wrote to the leaseholders accepting that the rainfall had completely overwhelmed the waterproofing in place and that *"had we been aware of this level of rain we would not have removed the roof."*

133. In November 2021, Thames Water published a report into the storm on 25 July 2021 which included the following:

"On the morning of 21 July, the Met Office issues a "yellow" warning for the following Sunday. Again, this warning covered all of the south east region. In the days leading up to the storm, the Met Office issued further warnings about the severity of the storm, forecasting a low likelihood of extreme rainfall levels – again, around 25mm was still considered the most likely with a "low likelihood of significant impacts".

On the afternoon of 25 July (during the storm), the Met Office upgraded its weather warning to "amber" due to heavy rain showers and thunderstorms from northeast Surrey to western Essex. More than a month's rain fell in a few hours … The Met Office has confirmed a return period of 118 years for the amount of rain that fell in one hour."

134. There was a further crane lift on 7 August 2021. Video recordings show a module being craned into position during heavy rain. The claimants contend that there was further water ingress reported on multiple dates but particularly on 7 August 2021 and 14 September 2021 and this caused further substantial damage.

135. The claimants' case can be shortly put. During the carrying out of these works in these weather conditions there was water ingress to the Property which caused significant damage and caused a number of the leaseholders to have to leave their homes. Obviously the flats at higher levels near the exposed roof were more affected than those below. That water ingress was the consequence of the provision of inadequate protection at roof level.

Breaches

RTM and Click St Andrews: the Freehold Purchase Agreement

RTM's case

136. RTM's position is that the inadequate protection provided at roof level amounted to or involved a breach of the express provisions of the FPA. Implied terms were also relied upon but it does not seem to me to be necessary to consider such implied terms as the issues are covered by the express terms and breaches thereof.

137. RTM relies principally on the provisions of clause 5.2 and contends that the inadequate water protection (and the consequent water ingress) amount to or evidence a failure to use all reasonable endeavours to procure that the Works were carried out with due diligence and in a good and workmanlike manner.

Click St Andrews' position

138. In relation to the FPA, Click St Andrews denies any breach of duty.

139. It is convenient to start with the issue of what protection was provided and ought to have been provided to the roof during the carrying out of these works. It might be thought that some protection to the roof would always be required given the vagaries of British weather and I did not understand Mr Emmett to suggest otherwise.

140. In its Defence, Click St Andrews said this:

"In preparation for the installation of the modular units and prior to the Removal of the Temporary Roof, St Andrews laid a sacrificial waterproofing layer comprising a Visqueen waterproofing membrane to provide protection from average rainfall during the period of the removal of the Temporary Roof and the installation of the modular units ("the Membrane"). The Membrane was not installed in anticipation of a one in 30-year weather event which included far in excess of above average rainfall." (my emphasis)

141. Put somewhat colloquially, Click St Andrews' position is that that membrane was proper and appropriate protection against normal rainfall. The actual rainfall on 25 July

was exceptional and, as they said to the leaseholders at the time, the protection was overwhelmed by the torrential rain.

142. Click St Andrews further stated that, the tin hat roof had already been removed when the first yellow weather warning was given. In light of the terms of the yellow weather warnings, it was reasonable to continue with the works. The amber warning was only given on 25 July 2021. At that point installing the modules offered the best means of protection.

143. The claimants submit that it was negligent (and in breach of clause 5.2) to remove the tin hat roof at any time during the week commencing 19 July given the prediction of rain in the yellow weather warnings. It is, it is submitted, no answer to that to say that the rainfall on 25 July was particularly and unexpectedly severe. The yellow weather warnings were sufficient to alert a competent contractor to risks of proceeding with the works at the coming weekend. Further, in his 12th witness statement, Mr Creasey, the claimants' solicitor, had pointed out that, as early as 20 July 2021, the weather forecasts on the BBC and ITV lunchtime news had predicted storms across London over the weekend. In any case, although the rainfall over the course of one hour was exceptional, the volume of rainfall was not.

144. Further, and in any event, as I have said, the claimants submit that the protection to the roof was inadequate. If Click St Andrews was going to proceed with the works when there was a risk of rainfall and/or a risk of rainfall to the extent indicated by the yellow weather warnings, it ought to have provided protection sufficient to protect the building in those circumstances. It did not. There was no Reply to Click St Andrews' Defence but in submissions the claimants said that, other than the tin hat roof, the extent of the weatherproofing measures implemented by Click St Andrews was tarpaulin sheets hung over parts only of the scaffolding, so not covering the whole of the roof, and a Visqueen damp proof membrane at roof level.

145. The claimants' solicitors obtained an e-mail from the suppliers of the tarpaulin, Premier Tarpaulins, stating that they received two orders for tarpaulin from Click St Andrews on 26 July 2021 and a further order on 2 August 2021. In other words, these tarpaulins were not supplied until after the water ingress on 25 July 2021. I do not understand Click St Andrews whether in the Defence or in submissions to place any significant reliance on the tarpaulins as weatherproofing for the roof.

146. So far as the Visqueen membrane is concerned, there was a dispute of fact as to what was installed. As I have said, the defendants' pleaded case was that Click St Andrews installed a sacrificial waterproof membrane, that is one that would remain in place and be sacrificed to the construction process. The claimants accept that a Visqueen membrane was installed on the roof but it was not a sacrificial membrane and, importantly in my view, it was to be and was removed as the modular units were craned into place.

147. The architects prepared a joint statement and, although no evidence was called on behalf of the defendants, I regard the agreed opinions as in evidence since Mr Ferguson, who was party to the statement, gave evidence on behalf of the claimants. It is also appropriate for me to refer to the unagreed opinions which give context although Ms Williams' opinions on such matters were not adduced in evidence. The joint statement was produced in a slightly unusual manner. It included a background section which set out the experts' understanding of the key events and appeared to be an agreed statement of their understanding of the facts. The experts had been asked to address a series of

questions and Schedule 1 to the joint statement set out their responses to each of the questions. Where they were wholly agreed they set out a single response. Where they were not wholly agreed they set out their separate response even if those separate responses demonstrated that there was, in fact, a large measure of agreement.

148. In Schedule 1, these experts agreed that they had seen no evidence that a sacrificial membrane was installed. In the background section, the architects agreed that photographs taken after the storm showed that Click St Andrews had protected the property with a black plastic membrane that had been loosely laid over the open joists of the crash deck and that water could be seen on the top of the membrane where it had collected between the joists. To position the modules, Click St Andrews had to "peel back" the membrane and expose the crash deck locally and then re-protect it once the module was in place. Despite the submissions of Mr Emmett, there was no evidence that a sacrificial membrane had, in fact, been installed and, so that it is clear, I find as a fact that there was no sacrificial membrane installed and only the Visqueen or black plastic membrane to which the experts referred.

149. In Schedule 1, they said they had not seen any evidence as to when the Visqueen membrane was purchased or installed. They then addressed two questions on which their answers were not wholly in agreement: (i) If the First Defendant did lay a waterproof membrane, was it installed correctly, and did it cover the entirety of the roof? and (ii) Did the First Defendant properly plan for and provide adequate temporary waterproof protection to the Property during the works? Neither expert expressed an opinion on the factual premise of the questions but both proceeded on the basis that Click St Andrews had laid a Visqueen EcoMembrane.

150. Ms Williams expressed the opinion (with which Mr Ferguson did not agree) that as an impervious plastic sheet this had the potential to be used as a temporary waterproofing membrane. However, she said that there was no standard guidance for its use in this manner. That was unsurprising since they were agreed that the manufacturer only provides guidance for using this membrane at ground level. The manufacturer's guidance states that it should be installed on a smooth continuous surface, such as a grouted beam and block floor, or a compacted blinding layer or a smooth concrete blinding, and then covered immediately to prevent damage from following trades. Visqueen also provided a letter dated 30 September 2022 to the claimants which stated:

"Visqueen EcoMembrane DPM is suitable for use in ground floor constructions only, positioned above or below the structural floor, to protect the building against moisture from the ground. The product is not intended for use where there is a risk of hydrostatic pressure or is not covered by a protective screed or layer to prevent damage."

151. From the photographs they had seen, the experts agreed that the membrane sagged between the joists; the joints were not taped; and it was not protected from foot traffic. Further, they could not tell if it covered the whole roof. They did not agree as to whether it would be subjected to hydrostatic pressure or needed to be protected from sunlight.

152. As to the second question, the experts further agreed that the works appeared to have been planned so that the modules would be craned into position in summer on a single day to reduce the risk from adverse weather. Ms Williams considered that, although the membrane would have to be peeled back when the modules were craned into position, the risk to the Property was mitigated by planning for this to happen in a single

day and that there was thus adequate protection. She added the following "provision" to this opinion:

"The evidence is that the Visqueen damp proof membrane was adequate for the weather conditions, including light rain on 24 July, during the period from its installation until the exceptional rain event rain event of 25 July when craning was in progress, and it is likely that it had been peeled back in part to allow this to happen. ..." (my emphasis).

153. The experts then agreed that, given the yellow weather warning on 23 July, and the possibility of using a back up date, Click St Andrews ought to have delayed the crane lift planned for 25 July.

154. Mr Ferguson did not agree that the protection was adequate in any event. He made the points that when the membrane was displaced any water that had gathered was likely to be displaced into the flats below and that, when installing the modules, workmen would have had to walk on the membrane which was likely to displace it. The need to displace the membrane to fit the modules meant that, in the event of even light rain, water ingress would have been inevitable during installation. In his opinion, a sacrificial waterproofing layer below the transfer structure, that is the steel sub-frame, would have avoided any displacement.

155. Mr Ferguson was cross-examined on the opinions expressed in the joint statement. He was asked if it was possible to put the tin hat roof back on after the weather warnings. Mr Ferguson's response was that it would have been possible after the first yellow weather warning (but not after the crane lift had begun) but he emphasised that it should not have been necessary as there needed to be a secondary measure to protect the roof whether there was rain or not. He agreed that the rain on 25 July was exceptional but he did not agree that the membrane would have been adequate protection if there had not been exceptional rainfall because any rainwater that had collected on the membrane had nowhere to go.

156. Mr Ferguson was also asked about the use of a so-called water vacuum cleaner to meet this point about water collecting on the membrane – he was aware of them, he had not seen them in operation, there was no mention of the use of one in any risk assessment for these works and he had not seen any evidence that one was used. I observe that this was the first mention of such a water vacuum cleaner and that Mr Ferguson was right to say that there was no evidence of one being used. If this was being put forward as a means of rendering the membrane adequate protection, it was irrelevant because it was not what happened which was in the control of Click St Andrews.

Discussion

157. It was not in itself a breach of clause 5.2 to start removing the tin hat roof on 19 July 2021. But it was a breach to do so if no adequate protection against rainfall and the risk of water ingress was provided. Not only is there always the risk of rain but there was never any certainty that the installation of the modular units could be completed in one lift, hence the back up date for a road closure that had been obtained. Further there is no evidence that simply installing the modular units, in the sense of lifting them into place, was the best protection against rain and water ingress as pleaded by the defendants or any protection against rain as evidenced by the continued water ingress on and after 7 August 2021.

158. In my judgment, and for those reasons, unless adequate protection to the roof was provided, there was such a breach irrespective of any weather warning. Based on the evidence of Mr Rivett, to which I refer below, the claimants set out a sequence which they argued the works ought to have followed. The key point in this was that a sacrificial membrane ought to have been installed before the tin hat roof was removed and the roof exposed.

159. Once the first yellow weather warning had been given – which on the defendants' case was before the removal of the tin hat roof had been completed – it was all the more imperative that some means of protecting the Property even from "normal" rainfall was provided. In fact, the weather warnings given all week and well before the amber warning presented a picture of a wet week and not one in which a dry weekend could reasonably be expected.

160. It is clear, in my judgment, that no adequate protection against even normal rainfall was provided. The Visqueen membrane, although not intended for this purpose, might have provided some protection but, given that it was loosely fitted and required to be pulled back and then somehow refitted, it was unlikely to have provided adequate protection.

161. At its highest, Click St Andrews' intention appeared to have been to crane all the modular units into place in one day and, in that way, mitigate the risk of water ingress when the membrane was peeled back. That was what, in the joint statement, Ms Williams had considered appropriate. On the facts, however, the yellow weather warnings that were given identified the risk of rain over the weekend when the membrane would need to peeled back. The risk was, therefore, not mitigated. I have no hesitation in accepting the agreed view of the experts that Click St Andrews ought to have delayed the crane lift.

162. The amber warning was, as the defendants have emphasised, only given on the day of the crane lift. There was no evidence as to the sequence of events on that day and as to whether there was rain and water ingress before the membrane was peeled back or when it had been peeled back, but it seems to me that the most likely inference from the extent of water ingress that occurred is that the roof was at some point unprotected. Once that warning had been given, the operation ought to have been postponed and, at the very least, the membrane left in place or put back in place. The operation ought not to have proceeded in heavy rain, with no means of protecting the roof and on the basis that the modular units would provide the best protection.

163. There was little evidence before me as to what happened on 7 August other than that the crane lift proceeded in similar conditions of heavy rain. As set out in the claimants' case as to the sequence of works, what ought to have been done is the installation of a sacrificial membrane/ waterproofing layer below the steel frame so that the installation of the modular units had no impact on the protection provided by that membrane.

164. For completeness I would add that the fact that there may have been exceptional rainfall on 25 July 2021 is something of a red herring in the sense that it may have caused the water ingress to be more significant than it would have been if, say, the same volume of rain had fallen over a longer period and with less ferocity. But there is no evidence that whatever was placed over the roof would have been adequate protection against such normal rainfall and it would still have suffered from flaws in installation and the need to be peeled back.

165. Although I have addressed this breach as one of a failure to carry out the Works in a good and workmanlike manner, I note that there is also an obligation in clause 5.2 to use reasonable endeavours to repair any loss and damage and, once the water ingress had occurred, there was a discrete breach of that obligation. The acts and omissions of Click St Andrews in carrying out the Works which give rise to liability under the FPA and the subsequent failure to remedy the damage caused also amounted to breaches of the covenant of quiet enjoyment.

Other defects and expert evidence

166. There is no question that the water ingress in July, August and September 2021 caused damage to individual flats and to the common parts.

167. At the time of the Particulars of Claim in October 2022, the claimants' case was that some time after the flooding, Click St Andrews had started to position portable dehumidifiers in common parts and individual flats to dry out the building. These measures had proved totally inadequate and high levels of moisture remained, at that time, including saturation of cavity wall insulation and sub-floor voids.

The Rivett reports

168. In light of the damage caused, RTM instructed John Rivett, MRICS, of Berrys to examined the state of the Property and report on the cause of damage including whether adequate steps were being taken to protect the Property from water ingress. Inspections were undertaken by Mr Rivett and colleagues on 17 and 18 August 2021 and on 13 December 2021, leading to a report dated 21 December 2021. The report contained a schedule of condition of the flooding following the water ingress in July and August 2021 and a schedule of remedial works following further water ingress in September 2021.

169. It is unnecessary to replicate the detail of the schedules to the report. It is sufficient to say that Mr Rivett recorded the condition, particularly in respect of evidence of water ingress, in all the common parts and each of flats nos. 1 to 14 and exhibited many photographs to support his observations.

170. Mr Rivett was provided with instructions as to the circumstances of the water ingress in July and August 2021. In his first report, he expressed an opinion on the sequence of works which was drawn from what colleagues with greater expertise had told him. This was the sequence of works relied upon by the claimants. In short, however, and as he said in cross-examination and in answer to a question from the court, the real failing was in no putting in place a sacrificial membrane – the roof should not have been left exposed without a sacrificial membrane. Although these type of works were not, therefore, specifically within his expertise, this evidence served to reinforce the conclusions I have reached.

171. The further water ingress on 14 September, was after the date of Mr Rivett's first inspections. He had been sent a video of water ingress through the ceiling of flat 8 and had reports of further damage to flats 11 and 13. He reported that the contractor had only installed temporary tarpaulin sheets to the modular units and the roof which had failed adequately to keep water out of the building.

172. Mr Rivett did not consider the drying out works to be adequate – there was an insufficient number of dehumidifiers and they were standard room dehumidifiers

which, in his experience, would be inadequate. Specialist methods, such as high pressure vacuum drying were likely to be required and undertaken by a specialist. There was also no systematic approach to identifying and monitoring moisture levels.

173. Mr Rivett provided a supplemental report in the form of a letter dated 29 March 2022. In that he addressed in particular the drying out certificates which had been provided for the communal parts and individual flats from a firm called Restorations (UK) described as fire and floor restoration specialists. The drying certificates for each of flats nos. 1 to 14 were produced at trial. They were mostly dated 26 October 2021 with others dated November 2021 and a couple dated in January 2022. They followed a similar pattern with each stating that Restorations (UK) declared that the property was dry to an acceptable level following their visit to take damp meter readings with "our protimeter mm (2)".

174. In his letter, Mr Rivett repeated that his inspection had recorded very high moisture levels and mould to the walls in the common parts. The meter readings provided for the drying out certificates were undertaken using a standard surveyor's Protimeter MMS2 moisture meter and the certificates did not indicate whether any intrusive inspections, such as trial holes through the walls, had been carried out to establish whether the cavity insulation was wet or dry and there had been no intrusive inspections to establish whether the concrete floor slabs were dry. In his experience a specialist drying out contractor would carry out such investigations. He continued:

"The specialist would normally provide a Schedule and Method Statement for the drying out, and different methods are likely to be employed in the various structural elements such as floor slabs and cavity walls. No such drying out methodology has been provided. Only surface testing has been undertaken by Restorations (UK) using standard surveying moisture meters."

175. Mr Rivett further repeated that on his inspection he had seen considerable quantities of mould spores on the plasterboard in the common parts and that there would, inevitably, be mould growth in the structure behind the plasterboard. Removal of mould, he said, ought to have been carried out by an accredited professional and certified and there was no mention of mould removal in the certificates.

176. He concluded:

"It is my opinion that, without the background methodology supporting the Drying Certificates, they cannot be relied upon, and further information is required. Whether the dehumidifiers installed by Click were adequate or not to properly dry the building is difficult to assess based on the limited information and methodology within the drying reports provided."

177. In February 2023, Mr Rivett also produced condition reports on flats 15 and 17 in which, amongst other things, he noted that a rubberised roof covering had been applied which had not bonded properly to the sub-base and, in his view, was installed to an insufficient fall. As a result the covering was debonding and water was ponding and he expressed the view that would shorten the life expectancy of the roof from the 15-20 years life expectancy that it should have.

178. In this first report, Mr Rivett also identified further areas for investigation.

179. Firstly, he expressed concerns about the loadbearing structure of the building and the rooftop flats. He noted that, at the time of his inspection, the modular units were not

properly aligned but were being levered into alignment. He was, however, concerned, (i) that the supporting steelwork for the corner of one unit was significantly short and when it was properly in place the corner would not be supported on the steelwork; (ii) that the end of the steel transfer beam which was to take the load of the unit was unsupported on the building structure; and (iii) that the steelwork was cantilevered and did not appear to be properly supported on the external or loadbearing wall. Mr Rivett noted that he was not a structural engineer and recommended that a structural engineer or the Building Control Officer advised on the adequacy of the supporting load transfer structure and the supports for the specific module he had referred to.

180. Mr Rivett also said that he had been informed that the modular units had a factory applied GRP waterproof roof covering but that he was informed by the site foreman that a gap between the units and the GRP needed to be filled to make the roofs watertight. The modular units are constructed in steel which could expand and he was, therefore, concerned about the detail of expansion joints and again recommended the instruction of a structural engineer to advise.

181. Lastly, Mr Rivett expressed concern about (i) the adequacy of fire separation between the top floor flats and the underside of the modular units and (ii) the creation of a void between the original ceilings and the modular units with electrical cables running through the void which posed a fire risk. He recommended the instruction of a Fire Engineer to advise.

182. At trial, Mr Rivett was called to give evidence and, in the usual way, verified his reports, and was then cross-examined by Mr Emmett. Some of that questioning was related to the concerns Mr Rivett had expressed about structural and fire safety issues but these questions took matters no further because Mr Rivett had simply raised his concerns and advised that further advice be taken.

183. In relation to the views he had expressed in his first report about the actions taken to dry out the property, Mr Rivett was asked whether he was aware that the work was being undertaken by Restorations (UK) and whether knowing that would change his views. He was not aware of that and had not seen any specialist on site at the time of the inspection. He repeated the reasons he had given in his March 2022 letter as to why the certificates (issued later) did not appear adequate. It was put to him that the certificates were issued after his inspection so that it was not fair to assume that intrusive inspections and adequate readings had not been carried out. Mr Rivett responded that that was unlikely based on the certificates which only referred to one standard piece of equipment having been used. He expanded on these points in re-examination, pointing out that there was very little detail in the certificates, that he would normally expect to see detail of the method of drying out, the locations of the readings and how they were taken. His evidence also was that without "force drying out", in which the structure is sheeted and air pumped, the timescale between the water ingress and the certificates was unlikely to be sufficient for drying out.

184. I note that the drying certificates did not state the Restorations (UK) had carried out the drying out, although that had been Mr Emmett's evidence in interlocutory proceedings. They certainly did not state how this had been done and there was no other evidence of any kind of force drying out being undertaken. I agree with Mr Rivett's view that it is difficult to know whether there was adequate drying out by the time of the issue of the certificates. In my view they are a wholly unsatisfactory basis on which to conclude that there was adequate drying out and/or that the issues of mould had been addressed.

Mr Ferguson

Fire Safety

185. In addition to his evidence in relation to the cause of the water ingress, Mr Ferguson also gave evidence in relation to fire safety. There was some attempt by the defendants to challenge Mr Ferguson's expertise in relation to these issues. It was, in fact, the case that at the case management stage of these proceedings, there was discussion of whether there ought to be permission to call a discrete fire expert. The claimants sought permission to do so which was opposed by the defendants. The court was satisfied that that was not necessary and that an architect could give such evidence. Mr Ferguson was clear in his evidence that fire safety should be part of the expertise of all architects, that he worked for Hawkins who are well known specialists in the field and that, for the past three years, his work had predominantly concerned defects relating to fire safety. In my judgment, he patently had the relevant expertise.

186. Despite my having addressed this issue in dealing with the application to amend, Mr Emmett persisted in his closing submissions in stating that no fire expert had been called by the claimants (which was wrong) and that the experts called were not qualified to comment on the Fire Strategy considered by the Approved Inspector. No Fire Strategy was produced or put to Mr Ferguson and the submission that he would not have been qualified to comment was also wrong. To the extent that it matters, it was also wrong to submit that Mr Ferguson was not aware that there were sprinklers in the new flats – he was asked about it and he said he was aware.

187. In his report, Mr Ferguson set out the site investigation which he had undertaken on 8 June 2023 when he had examined the remedial works thus far undertaken and the compartmentation between the old flats and the new rooftop flats.

188. He set out in detail the construction of the new ceilings to the (old) top floor flats (nos. 11 to 14). The new ceilings consisted of two layers of 12.5mm thick Knauf FirePanel plasterboard beneath 100mm mineral wool insulation. Above each ceiling was a void which had been used to distribute services to and from the flats. He observed that there was no proprietary fire-stopping such as fire collars or other methods of protection where pipes penetrated the ceiling. Within the void above every flat, there were electrical cables which penetrated the ceiling with no sealant and in several locations live electrical cables. Above all except flat 14, there was builders' waste in the void. In flat 13, a new boiler had been installed – the flues penetrated the ceiling without any proprietary fire stopping or other protection and terminated within the void.

189. Mr Ferguson described the crash deck formed of timber joists spanning between the elements of the new steel structure which were intended to support the modular units. He noted that it did not appear to have been protected with intumescent paint. Some joists were unprotected against fire and there were gaps through which smoke could pass. There was a void above the crash deck in which there was builders' waste. He concluded:

"I could not see any evidence that the compartment walls of the modular units above had been extended down into the void to subdivide the cavity, or any other form of fire-resistant cavity barrier had been installed."

190. Mr Ferguson could see no evidence of fire-stopping between the compartment walls and the external walls. In flat no. 11, the blockwork wall had been reduced in height

and no fire-stopping was in place above. In each flat he saw cables and other services passing through the separating walls of the flats without fire-stopping.

191. As Mr Ferguson set out in his report, the relevant Building Regulation is B3 which provides:

"(1) The building shall be designed and constructed so that, in the event of fire, its stability will be maintained for a reasonable period.

….

(3) Where reasonably necessary to inhibit the spread of fire within the building, measures shall be taken, to an extent appropriate to the size and intended use of the building, comprising either or both of the following –

(a) sub-division of the building with fire-resisting construction;

(b) installation of suitable automatic fire suppression systems.

(4) The building shall be designed and constructed so that the unseen spread of fire and smoke within concealed spaces in its structure and fabric is inhibited.

192. The relevant guidance as to how those requirements could be met in a block of flats was provided by Approved Document B1 (AD-B1), 2019 edition with 2020 amendments.

193. His opinions were as follows:

(i) Since the ceiling void contained unprotected structural steelwork, the lower ceiling should have been fire resisting and provided the necessary compartmentation between floors. Following the guidance on compartmentation, this ought to have provided a minimum period of fire resistance of 60 minutes. The two layers of plasterboard would provide some fire protection but, in his view, not for a period of 60 minutes because (a) the access panels did not have smoke seals; (b) only two of four access panels had been certified as 60 minute fire resisting; (iii) there was no firestopping or adequate firestopping to pipes or cables passing through the ceilings.

(ii) The underside of the crash deck had been lined with cement particle board which would resist fire for some time but the crash deck would not provide the 60 minute resistance because (a) the particle boards were not continuous; (b) the boards were not sealed at the edges; and (c) there was no evidence of firestopping to protect pipes passing through the deck.

(iii) The separating walls between flats did not provide adequate compartmentation because they continued up to the crash deck (which itself did not provide adequate compartmentation) and they were penetrated by cables and ductwork without fire-stopping.

(iv) The void above the crash deck was also unprotected.

194. It is convenient to quote Mr Ferguson's conclusions:

"4.1.15 In summary, if the compartment walls of the third-floor flats were continued up to the underside of a fire resisting ceiling, the void above the ceiling would only need to be divided with cavity barriers in line with the compartment walls. However, as there was no adequate compartment ceiling, to comply with the Building Regulations, the walls should be carried up to the underside of the roof level. They are not.

4.1.16 Therefore, in my opinion, the compartmentation between flats does not met functional requirement B(3) of the Building Regulations.
4.1.17 Furthermore, as the steel sub-frame in the ceiling void had not been painted with intumescent paint, it is likely that [Click St Andrews] relied on the lower ceiling to protect the structure against fire. As the lower ceiling will not adequately resist fire, the structure is not adequately protected.
4.1.18 Therefore, in my opinion, the structural protection to the flats does not meet functional requirement B3(1) of the Building Regulations."

195. There was little or no challenge to Mr Ferguson's evidence on fire safety issues.

196. It was suggested to him that two layers of fire rated plasterboard could have been adequate protection for the void. The best he could say was that it was possible but there needed to be a tested solution and there were so many holes in the plasterboard that he did not think it could provide adequate protection. There was, of course, no positive evidence that it did. It was also suggested to him that the compartmentation in the void could be completed after the boiler flues were installed and the electrical works completed in the void. Mr Ferguson's response was that to do that you would need to remove the ceilings and he had never known a contractor do this work in that sequence. Neither of these matters seem to me to have cast any doubt on Mr Ferguson's views about fire safety.

197. The principal matter put to Mr Ferguson was that if the Approved Inspector had issued a final certificate, as Assent Building Control did on 10 June 2022, he ought to be satisfied that the Building Regulations had been complied with. As he said, he would expect a proper assessment to be made but the certificate itself did not render the building safe. In this case, he was surprised that the certificate had been issued given the instances in which he could see that the fire protection was not there and where there were so many things wrong. In his view, the certificate should not have been issued and the building was not safe. In any case, the certificate is nor more than evidence of compliance – it is not conclusive and says so on its face.

198. In light of Mr Ferguson's evidence, I am satisfied that in carrying out the works, Click St Andrews was in breach of clauses 5.2(a), (d) and (e) of the FPA in each of the respects set out above and that these give rise to a relevant liability for the purposes of section 130(3)(b) of the Building Safety Act 2022. I am also satisfied that these matters amount to a breach of, or placed Click St Andrews in breach of, the covenant of quiet enjoyment.

Miscellaneous defects

199. As the case was pleaded and opened, there were a number of other defects unrelated to fire safety on which Mr Ferguson's opinion had been sought.

200. One was an allegation that the defendants had failed to install vapour barriers within the softwood parapet studwork leading to the build-up of condensation and increasing the likelihood of timber decay. This allegation was derived from Mr Rivett's first report in which he had said that there did not appear to be vapour barriers and that <u>could</u> lead to condensation and additional maintenance costs. He recommended a planned maintenance programme. Mr Ferguson was not able to comment on whether there was a vapour barrier or the risk of condensation. This was the limit of the evidence. It was,

in my view, at best speculative and I am not satisfied on the balance of probabilities that there was any breach in this respect.

201. It was also alleged that the defendants had failed to install any or adequate sound proofing between the old and new top floor flats. Again that allegation was derived from a comment by Mr Rivett that there did not seem to be any formal sound protection materials to comply with the Building Regulations. Mr Ferguson addressed this issue in his report. He was unable to state definitively that the as constructed detail would satisfy the Building Regulations but he would expect the materials installed to provide a reasonable level of acoustic separation. Further, in answer to the question posed to him "Did the First Defendant install any adequate sound protection materials in the Property as part of the works?" his answer was:

"Yes. The First Defendant installed adequate sound protection materials in the roof void above Flats 11,12,13 and 14. I have seen no evidence to suggest that the construction detail failed to meet the Building Regulations requirement for acoustic separation….."

202. In light of this evidence, I cannot be satisfied on the balance of probabilities that there was any breach in relation to sound proofing.

203. There was a specific allegation relating to the installing of boiler flues exhausting into the roof void. I have referred to this above. Although elsewhere in his report, Mr Ferguson referred to flues in the plural, he identified only one boiler flue. However, there is also photographic evidence which appears to show two flues. In any case, I am satisfied that the installation so that the flue discharges (or flues discharge) into the void is a breach of clause 5.2 of the FPA and of the covenant of quiet enjoyment.

204. A further allegation was that the original soil vent pipes had not been extended through the ceiling void and instead connected by flexible PVC ducting to air bricks. Many of the ducts were twisted and torn giving rise to a smell of foul waste below. That allegation was supported by the observation and evidence of Mr Ferguson and photographic evidence. It clearly amounts, in my judgment, to a breach of the obligation in clause 5.2 to carry out the works in a good and workmanlike manner and a breach of the covenant of quiet enjoyment.

205. A further allegation was that ductwork in the ceiling void was propped up with loose pieces of wood and blocks. That was again supported by the expert evidence and clearly a breach of the obligation to carry out the work in a good and workmanlike manner and similarly a breach of the covenant of quiet enjoyment.

206. More troublesome, and of greater significance, is the complaint that the original pitched tile roof was not replaced with a like for like replacement but with a lightweight flat roof with at most half the life of the previous roof. The FPA does not, as such, provide for or require a like for like replacement. It does require Click St Andrews to carry out the Works in accordance with the Planning Permission. Mr Ferguson states in his report that "the original planning consent" specified that the roof would be finished with Marley Modern interlocking roof tiles which have a reasonable life expectancy of 60 years. I have not been referred to any amendment to the consent but neither does there seem to be any suggestion that there has been a breach of the planning consent. In his report on quantum, Mr Daly makes reference to the Granit planning application drawings which describe the roof as having a Mariseal liquid roofing system which implies that there was some change.

207. Mr Ferguson further states that a "single ply" roof is a synthetic rubber membrane (EPDM) which, with maintenance, can be expected to last 30 years. In this case, his understanding is that that roof has been coated with glass reinforced polyester (GRP) which could be expected to have a similar life-span. However, the material is less able to cope with movement in the substate so that the construction details would have to be carefully considered to address movement at junctions. He concluded:

"I therefore cannot definitively say that the new roof has an equivalent performance to the original concrete tiles. In principle I do not consider it a significant downgrade, if properly detailed and installed, however I note Mr Rivett's inspection report dated 22 February 2023 highlighted poor workmanship on the roof and defer to his opinion on the quality of construction."

208. Later he said that he did not agree that the new roof is an inadequate replacement that will require more onerous or expensive maintenance or has a significantly reduced life span when compared with the tiled original.

209. I note further that Mr Ebbatson, whose evidence I address below, said simply that, in the absence of design details, the position on the adequacy of the roof was unclear.

210. Drawing the threads together, I am not satisfied that there was any breach in the selection of materials but I am satisfied, on the basis of Mr Rivett's reports, that there are defects in workmanship which will reduce the lifespan of the roof which it is, therefore, reasonable and appropriate to replace.

211. I would add for completeness that Mr Rivett was not challenged on this evidence about the condition of the roof. Rather, in addition to the argument that the roof was adequate, what was relied on by the defendants was a 10 year guarantee of the Mariseal overlay to the roof. That guarantee from RJ Evans Flat Roofing Ltd. was provided to the court with the defendants' closing submissions. That there is a guarantee does not, in law, mean that there could be no claim for damages for breach against Click St Andrews. But, in any case, the guarantee was highly unsatisfactory as it provided that it ceased to apply where ownership of the property was changed. Since the purpose of the FPA was to transfer the freehold to RTM, that made the guarantee pointless.

Mr Ebbatson

212. Mr Ebbatson is a structural and civil engineer at HKA who was called to give evidence on structural matters. In particular he had been instructed to address the structural issues raised by Mr Rivett. He had inspected the property on 7 October 2021. His colleague, Mr Rousakis, returned on 13 April 2023 and produced a site investigation report supported by many photographs. Mr Ebbatson recited and adopted Mr Rousakis' observations which were supported by the photographic evidence. For the purposes of preparing his report, Mr Ebbatson had been provided with design drawings for the structure prepared by Michael Barclay Projects Ltd., consulting engineers.

213. It is not a criticism of Mr Ebbatson but he produced a lengthy report which addressed issues such as the cause of water ingress and some matters relating to fire safety which were not properly the matters on which there was permission to adduce his evidence. The relevance of my observation is that the bulk of the cross-examination of Mr Ebbatson addressed these issues and there was otherwise little or no challenge to his evidence and in the absence of such challenge, I accept the conclusions of Mr Ebbatson.

214. The primary focus of Mr Ebbatson's evidence was on the adequacy of the existing structure to support the steel grillage, that is the steel substructure intended to support the modular units and transfer the load to the existing loadbearing walls of the Property. He noted that the steel grillage bears onto the existing structure through steel spreader beams onto the internal walls and timber ladder frames onto the perimeter walls. Mr Ebbatson produced a diagram showing and numbering the spreader beams and I adopt his numbering.

215. Mr Ebbatson placed particular reliance on the design standards in BS 5628, BS-EN 1996-1-1, BS-EN 1996-2 and the Institution of Structural Engineers Manual for the design of plain masonry in building structures, 2nd ed, all concerned with safety in the design of masonry structures.

216. On the adequacy of the existing structure to support the steel grillage, Mr Ebbatson's opinion was as follows:

(i) The perimeter timber ladder frame was adequate to support the loading from the steel grillage except for the loading applied to beam 15 which exceeded the bearing capacity by 18%.

(ii) In respect of the bearing of the perimeter ladder frame onto the existing masonry walls, the bearing capacity was adequate beneath beams 2, 3, 6 and 12. An additional spreader plate and stud were required beneath beam 15 to increase its bearing area and reduced the load so that the capacity was not exceeded. The axial compressive capacity of the existing masonry piers was likely to be adequate.

(iii) He considered that further investigation of the structural properties of the original lintels to bear the perimeter frame might be required.

(iv) Otherwise he expressed the opinion that no structural work were required to the penthouse modules provided it could be demonstrated that:

"a) The beams, beam-to-column and beam splice connection of the steel modules are capable of resisting the tying forces required by the Building Regulations for class 2b structures.

b) The columns of the steel modules and their base connection are capable of resisting the maximum tensile load that would occur if any of the support of the transfer beam was lost due to an accidental event."

(v) He would expect the spreader beams to be packed and supported over their full length in accordance with the design drawings. In his evidence, he added that they had not been packed over their whole length. He considered that the bearing length of the spreader beams below beams 1, 3, 15 and 16 resulted in utilisations, that is the beams bearing loads, significantly in excess of the limits set out in applicable design standards and the Building Regulations to the extent that it may pose a potential risk to safety such as a local bearing failure or partial collapse.

(vi) In Mr Ebbatson's view the internal blockwork needed to be extended to compensate for the reduced bearing length of the spreader beams. That might require temporary propping before they were reinstated and he advised further

investigation of the bearing of the steel grillage beams onto the existing blockwork.

217. Mr Emmett, in cross-examination, summarised this evidence, rather dismissively, as being that Mr Ebbatson had highlighted 4 beams that needed attention. Although it is fair to say that it was in respect of four beams that he identified a breach of the relevant design standards Building Regulations and of clause 5.2, the breach was a serious one which potentially affected the structural stability of the building. As Mr Ebbatson said the concern was that the shortening of the spreader beams increased the concentration of the load on the masonry walls which were more brittle and which was likely to cause at least local issues. There was no immediate concern at this stage but any risk would increase as the building aged.

218. I note as well that Mr Chick, who gave evidence on remedial works, is also a civil engineer of many years experience. Although it was not within the scope of this report, he was asked in cross-examination what would happen if the remedial work was not done. His answer was that the beams had introduced concentrated loads on the masonry below. Over time the masonry would tend to fracture which would reduce their ability to bear the load leading to a local failure in the masonry. That was entirely consistent with Mr Ebbatson's evidence.

219. I am satisfied that there are breaches of the FPA in respect of these beams and any beams that were not adequately packed and that these give rise to a relevant liability for the purpose of the Building Safety Act 2022. It does not seem to me that it would be right not to so characterise a failure to comply with design standards concerned with structural safety on the grounds that the risk has not yet manifested itself and may not do so and is capable of being addressed. That is the nature of risk and that is what the "relevant liability" is concerned with. It also follows that these matters amounted to a breach, or placed Click St Andrews in breach, of the covenant of quiet enjoyment.

220. The Particulars of Claim also included a specific allegation that the modular units were not properly aligned to the sub-frame such that one of them was not properly supported and was unstable. Mr Levenstein repeated this allegation of breach in Opening Submissions. In Closing Submissions he submitted that the rooftop flats were not level and gave as the relevant evidential reference Mr Rivett's condition report on flat 17 dated 22 February 2023. I have already observed that, in his first report, Mr Rivett noted that, at the time of his inspection, the modular units were not properly aligned and were being levered into alignment. In the condition report on flat 17, he noted that the floor of the kitchen, dining and hall areas sloped and said that he "suspected" that that was because the modular units were not properly aligned. He advised that the structural support and alignment issues should be checked by a structural engineer. However, Mr Ebbatson, in his report and evidence, said nothing about alignment. The high point of this allegation is, therefore, Mr Rivett's suspicion. I do not consider that sufficient for me to conclude, on the balance of probabilities, that one or more of the units are not properly aligned. Having said that, it would not seem to impact the claim for damages as there is no distinct claim for remedial works in this respect.

221. A further specific issue relied on by the claimants and addressed by Mr Ebbatson was compliance with the Building Regulations in respect of disproportionate collapse, that is a collapse that occurs in a building when the failure of one component leads to the failure of a series of other components. Requirement A3 in Approved Document A

states that "The building shall be constructed so that in the event of an accident the building will not suffer collapse to an extent disproportionate to the cause."

222. The Approved Document at Table 11 sets out different Building consequence classes for which different levels of robustness are required. In the present case, the addition of a further storey took the building from class 2a to class 2b. Mr Ebbatson identified that two alternative approaches might be applicable to a penthouse extension of this nature. One is the incorporation of a strong floor above the roof of the existing building designed to act as a crash deck unless it can be demonstrated that an impact from the collapse of the penthouse structure does not need to be accounted for. The other is to demonstrate that the extension is only marginally more unsatisfactory than before. Each of these strategies needs to be agreed with the local authority.

223. In this case, the grillage was designed to conform with class 2b. Ties were designed to deal with transfer to the steel grillage. From Mr Ebbatson's review, no consideration had been given to the load from falling debris but he said that the penthouse structure was not likely to collapse onto the existing structure due to loss of support and thus the steel grillage did not have to be designed to resist an impact load arising from falling debris. Further the design had not been implemented to accommodate tying forces in satisfaction of the disproportionate collapse requirements. As he said, that did not mean that the modules could not accommodate the tying forces but that it needed to be proved by calculation. In other words these are the matters referred to in the quotation above from the report. In any case, the disproportionate collapse strategy had to be agreed with the local authority and he was not aware that it had been.

224. Mr Ebbatson's conclusion in his report was that the disproportionate collapse strategy was acceptable provided it conformed to the A3 requirement in respect of consequence class 2b. That seems to me to say nothing and certainly not that it did not conform. Referring to the earlier part of his report, it appears to be a reference back to the fact that the grillage was unlikely to be impacted by falling debris and Mr Ebbatson added that that confirmation was required from the local authority.

225. In cross-examination, Mr Ebbatson agreed that the detailing of the design (in terms of the disproportionate collapse strategy) was adequate. He said that he had seen nothing to show that it was agreed with the local authority but that that was a technical non-conformance.

226. On the basis of this evidence, I am unable to conclude that there was any breach in respect of the disproportionate collapse strategy. If I am wrong about that on the basis that there was no agreement with the local authority, the remedy is reaching that agreement and there is no basis on which I could find that the strategy was not adequate and that remedial works were required. Whether that might be the case is speculation.

Remedial works

Mr Chick: structural and fire safety

227. It follows from what I have said above that remedial works to the Property are required for which Click St Andrews are liable under the FPA and on the other bases discussed above. Click Group Holdings is similarly liable to RTM under the guarantee.

228. Mr Chick of JP Chick & Partners Ltd. gave evidence in relation to the remedial works required to remedy the defects identified in Mr Ebbatson's report principally, of course,

the structural issues with the beams identified. It was put to Mr Chick in cross-examination that Mr Ebbatson had identified four beams that needed to be addressed but Mr Chick had proposed works to eight beams. It seems to me that there is nothing in this point since what Mr Chick has done is identify the beams which have insufficient bearing because of the use of packers as well as those which are not full length and which accordingly require remedial works.

229. Since Mr Ebbatson had addressed the fire safety issues, these were included. As I have said, this was not properly the matter on which Mr Ebbatson gave evidence but the proposed remedial works are intended to address fire stopping as well and are appropriate to address the matters on which I have found in the claimants' favour. The proposed remedial works also address some workmanship defects, for example, a strapping plate not fixed. For the avoidance of doubt, any such workmanship defects which I have not specifically addressed but which are referred to in Mr Ebbatson's report should be included in the scope of remedial works.

230. Mr Chick's evidence was that he had noted that the quantity surveyor, Mr Daly, had allowed a period of 5 months for the carrying out of the remedial works. He considered that inadequate and that they could take up to a year. He added that works to transfer loads rarely run smoothly – allowance has to be made for that and other contingencies. Time needs to be allowed to gain full access, remove plates and insert temporary support, apply epoxy resin and wait for that to go off. On the basis of the answers that Mr Chick gave in cross examination that would appear to take less than 2 weeks for each beam and the one year time estimate might therefore appear exaggerated. He also suggested a period of 6 months. I bear in mind that the scope of remedial works includes the fire-stopping and compartmentation and works related to the water ingress and, allowing for contingencies, it seems to me that a period of longer than 5 months is realistic. Doing the best I can, I take a period of 9 months.

231. I subsequently gave permission for Mr Daly to rely (with two limited exceptions) on the contents of a new Appendix 7 to his report which incorporated increased costs for the longer time frame for remedial works figures being given for a 6 month programme and a 12 month programme.

232. The two limited exceptions were paragraphs in relation to remedial works in respect of fire safety issues which Mr Daly considered were not within the scope of the works identified by Mr Chick and had not been costed. A relatively modest sum of around £8k was sought to be added but, in short, it appeared to me too late to add remedial works through the mechanism of a quantum report.

Quantum

233. As I referred to above, shortly before trial, permission was given to the claimants to serve an updated schedule of loss. The schedule continued to separate out RTM losses which related to the building as a whole and leaseholder losses which related to individual flats. However, advertising the way the case was opened and the argument relating to the entitlement to recover, the schedule stated that RTM and the leaseholders shared a common interest in repairing the property and shared the entitlement to recovery of the losses pleaded.

234. I deal first with what I shall still call the RTM losses relating to the remedial works required to the building as a whole. For the avoidance of doubt, however, in terms of

what I award to the claimants I make no distinction between RTM and the leaseholders for the reasons I have already given.

235. In summary, in terms of the cost of remedial works, the claimants relied on the report dated 8 December 2023 of David Daly, a chartered quantity surveyor; a tender appraisal dated 30 January 2023 produced with Buildsmith Solutions and JPD Corporation; and an updated breakdown and documents from the leaseholders of flats 11, 12 and 13. This created an unconventional position in which there was both a report from an expert whose evidence the claimants had permission to call and from a different quantity surveyor who said that he was making a true market appraisal based on a single tender return but who was not to give evidence. Mr Daly, however, then considered the JPD Corporation tender and made some adjustments to his figures (which were addressed in his Appendix 7) and, save as appears below, I accept Mr Daly's figures and quantification.

236. So far as the structural works are concerned (incorporating the firestopping), Mr Daly's total figure for measured works was £72,040.00. However, that includes £25,000 for investigation and possible works to the external lintels and assessment of the column capacity to the second floor. Although recommended by Mr Ebbatson, there is no evidence of any defect in these respects – Mr Daly says himself that it is not known if any remedial works will be required. I do not consider that there is a sufficient evidential basis on which to award this sum. Similarly, Mr Daly has noted that Mr Chick says work may be required to other beams and has included a further sum of £47,040.00. There is no evidential basis for me to award this sum to the claimants. It is speculation.

237. Mr Daly has costed the propping to support the grillage while works are carried out at £15,000 and I accept that figure.

238. Mr Daly assesses the cost of removing and replacing the ceilings and other finishes on the third and fourth floors at £13,600 per floor and I accept that figure.

239. Mr Daly also included the cost of 8 weeks preliminaries at £6,863.50 per week. In his report, he explained that he had costed this distinctly from the interior fit out works. In his Appendix 7, this distinction appears to have gone but a lower figure per week (£6,101) is included to reflect economies of scale if the works are carried out over a longer period. Added to this figure, however, is a 5% uplift for contingencies and a 5% addition for professional fees. In my view, the contingency is already allowed for in the longer period for the carrying out of remedial works. The uplift for professional fees is a matter which Mr Daly added after considering the JPD tender which included a lump sum of £75,000 for professional fees. Although the claimants already have the benefit of experts' reports, it seems to me that these are the sort of works which will require professional design and supervision and that that additional percentage is appropriate. As it involves no further evidence, I will invite the claimants to provide me at the hearing in respect of consequential matters with the calculated cost of preliminaries and professional fees (including VAT) which will form part of the final order as to damages payable.

240. In respect of decant costs for flats 11, 12 and 13, the owners of which are claimants in the litigation, Mr Daly in his report allowed £18,000 per flat over a 10 week period. The owners are still not in fact in occupation and will not need, strictly speaking, to decant, but they still require alternative accommodation and/or lose the rental income they would otherwise have. The "decant costs" can, it seems to me, be treated as an

equivalent. Again, Mr Daly has in his Appendix 7 put forward a slightly lower figure of £800 per flat per week uplifted by 5% for contingencies and 5% for professional fees. As with the preliminaries costs, it seems to me that the contingency is already allowed for in the increased period and, in this case, I can see no reason for a percentage for professional fees as well. Therefore, the cost that I allow will be £31,200 per flat, totalling £93,600.

241. There are a number of what I have called miscellaneous defects in respect of which I have not found in the claimants' favour. The cost of remedying these defects is not, therefore, recoverable. However, the identification of the remedial works and quantification has not been approached in a way that enables these to be stripped out. In fact, having regard to Mr Chick's evidence, it seems to me that no claims are made in respect of these items and, if they are, they are simply subsumed within the works to remedy the more serious defects.

242. Mr Daly was instructed to cost the replacement of the roof. There is very little detail of the proposed replacement, save that Mr Daly allows for a roof covering based on a Trocal Sika membrane system from which I infer that the proposal is to replace the roof with similar but without the workmanship defects that Mr Rivett has identified. The total cost is £134,248.04 which I award to the claimants.

243. So far as further remedial works following the water ingress are concerned, Mr Daly has considered (i) the remedial works to address the schedules of defects to flats 1 and flats 5 to 9 prepared by Mr Rivett and (ii) a total refurbishment of flats 11 to 13. I should say that, in the course of the proceedings, I raised a specific query as to where Mr Daly had set out the scope of the remedial works he was costing. In answer to that query, he drew my attention to the Appendix to his report which contains in an Excel spreadsheet a detailed analysis of the remedial works and their cost. There was no challenge to this evidence other than the argument as to mitigation which I address below. It follows that it is unnecessary, and indeed impractical, for me to recite the content of the Excel spreadsheet and that, in the circumstances, I accept Mr Daly's assessments.

244. Mr Daly's total figures are set out in his report as follows:

(i) Common parts: £26,318.50

(ii) Flat 1: £3,500

(iii) Flat 5: £8,990

(iv) Flat 6: £26,262.20

(v) Flat 7: £30,946.10

(vi) Flat 8: £39,104.00

(vii) Flat 9: £38,945.00

(viii) Flat 11: £44,502.00

(ix) Flat 12: £47,214.00

(x) Flat 13: £38,635.00

245. Professional fees at 5% should also be added to these figures. In his report, Mr Daly also included a figure for preliminaries because he had drawn a distinction between the structural and the interior remedial works. As I have said, that distinction has gone and the longer period of remedial works accounts for all works so that no separate amount should be included.

246. I turn next to the costs that have already been incurred and other damages claimed. These are essentially the leaseholders' claims but also advanced by RTM for the reasons set out above.

247. In his report, Mr Daly undertook an exercise in relation to each flat/ leaseholder claimant in which, in summary, he compared the sums set out in the Appendix to the Particulars of Claim, the (greater) sums claimed in witness statements and the available documentary evidence to support the claims. He identified inconsistencies between the Particulars of Claims and the available evidence and set out his own assessment, excluding, for example, claims for legal fees which fall to be dealt with as costs.

248. In the course of the trial, at my request I was provided with a table of losses by flat which gave the totals set out in the updated schedule of loss, references for the evidence that fed into those figures and the figure which Mr Daly had found substantiated or had assessed in his report. In due course, the leaseholders also gave evidence.

249. Mr Daly then produced his Appendix 7. In that Appendix he included a spreadsheet of leaseholder claims which were colour coded to show (i) in green substantiated costs (that is substantiated by documentary evidence); (ii) in red, costs for which there was evidence in a witness statement; (iii) in orange, items that were partially substantiated; and (iv) in yellow claims for legal costs and distress and inconvenience.

Flat 1

250. This is the flat of Sophia Smith, who gave evidence. At the time of the water ingress, Ms Smith was not living in the flat but her sister was. As the property is on the ground floor, it suffered only minimal paint damage. No claims were made for any remedial works but Ms Smith gave evidence as to her anxiety about the state of the building. It is well-established that sums awarded for distress and inconvenience are modest. In Ms Smith's case there has been no physical inconvenience although there may be some when remedial works are carried out to the building. In closing submissions, Mr Levenstein put forward a figure of £500 and I will award that sum for distress and inconvenience.

251. When Ms Smith was cross-examined she was asked whether Click St Andrews had asked for access to her flat and whether she had been told that Click St Andrews should not be given access. She said that she had been asked for access and given it and it had never been suggested that she should not do so.

Flat 5

252. This is the flat of Armand Sablon who gave evidence. Mr Sablon lives in Hong Kong and for him the flat is an investment and a source of rental income. After the water ingress, his tenants vacated the flat and he was unable to rent the flat out again, losing rental income and he was liable to pay council tax, and utility bills on an uninhabitable flat.

253. His claimed losses amounted to £50,049.93 in respect of lost rental income and £3,095.97 for council tax and utilities both of which Mr Daly found to be substantiated.

254. Mr Sablon had remedial works carried out and had been able to rent the flat out again since 28 April 2023. He described the remedial works as a lick of paint, at a cost of £4,800. Although there was no documentary evidence for that figure, it is a reasonable sum which I award.

255. It was, in effect, put to Mr Sablon that he had failed to mitigate his losses as he could have undertaken decorative repairs earlier. His response was that he was aware that there were issues about the safety of the building and he held on as long as possible because he did not want something to happen for which he would be liable. I have considerable sympathy with this position, particularly as he was living abroad and I do not find that he failed to mitigate his loss. I, therefore, award the sums claimed for loss of rent, council tax and utilities.

256. Mr Sablon's claim also includes sums that fall within the interior works claim and are accounted for above. In an exhibit to his statement, he claimed over £51k in respect of legal fees which are not recoverable as damages. In the same exhibit, he claimed £20k for distress and inconvenience although in the table of losses that is said to be unquantified. In closing submissions, Mr Levenstein suggested a more modest figure of £1,000. However, given that Mr Sablon did not and does not live in the property, I cannot see that he has any basis on which to claim such damages.

257. In cross-examination, Mr Sablon was also asked about access for Click St Andrews. His evidence was that he had given his keys to Mr Bacon and told Laith Mubarak of Click St Andrews that he could get the keys from Mr Bacon. As far as he was aware, he had not restricted access.

Flat 6

258. This is the flat of Noel Lagrenee who gave evidence. The flat is, in fact, owned by Pizarras Y Baldosas SA, the 4th claimant, a family company of which Mr Lagrenee is a director. At the time of the water ingress, the flat was occupied by tenants. Mr Lagrenee's evidence was that, as a result of the water ingress, the tenants had to move out and stay in a hotel which Click St Andrews promised to pay for but did not. Rent was waived in compensation for the tenants' losses and additional costs. Thereafter, when the tenants moved back in, they were given a 10% discount on the rent in compensation for the condition of flat. Thereafter some repainting was done to make the flat more presentable.

259. The claim is for £703.85 in respect of hotel costs; £2,606.40 in respect of compensation to the tenants; £3,680.00 in respect of the discounted rent; and £2,500 in respect of remedial works. None of these figures is supported by documentary evidence. However, I accept the evidence of Mr Lagrenee which was not challenged and award these sums. Mr Lagrenee also confirmed that Click St Andrews requested access and that was allowed.

260. In his first statement dated 5 February 2023, Mr Lagrenee also stated that there would be further losses because a new tenant had also required a reduction in rent of £200 per month because of the condition of the flat and the common parts. I am not been able to identify any evidence which crystallises this claim. It does not seem to have been referred to counsel's table of historic losses or Mr Daly's Appendix 7 but, if the relevant evidence is identified, it may be included in the final order.

261. It was submitted that a sum of £1000 should be awarded for distress and inconvenience and there was evidence from Mr Lagrenee of the inconvenience to him and his wife caused by dealing with the damage. However, the claimant is a company and I cannot see that an award to a company can properly be made.

Flat 7

262. This is the flat of Laura Mackie. Ms Mackie advances a small claim for £1,137.34 for damaged or destroyed contents, including plants, food and books particularly professional texts. Her evidence was that these were either saturated or affected by the dehumidifiers. These claims succeed.

263. At the time of the water ingress, Ms Mackie was away at her sister's wedding and taken by surprise by a multitude of WhatsApp messages from the Property's chat group. She moved out to stay at a friend's property while the friend was away. She said that she was told by Click St Andrews that alternative accommodation would be arranged for her but nothing was done and she moved back on 26 September 2021. Her kitchen remained saturated.

264. Ms Mackie did accept that Click St Andrews had on occasion been refused access. She said that the leaseholders tried to co-operate but Click St Andrews was painting over wet walls and putting plasterboard over mould and it felt unsafe. She did not know what they were doing and wanted to safeguard her asset. As she said, the leaseholders wanted a dry building and the structure sorted out first.

265. Mr Emmett, in effect giving evidence, put to Ms Mackie that he had recorded a video call of a without prejudice discussion in October 2022 in which he tried to find a way forward. Leaving aside any issue as to Mr Emmett giving evidence or seeking to rely on without prejudice communications, Ms Mackie first said in response that it had felt as if it was an attempt to persuade the leaseholders not to maintain the freezing injunction. She then agreed that it had felt constructive but she did not want to negotiate without legal representation and after her previous experiences had no confidence in Click St Andrews. I deal with the alleged failure to mitigate below and this particular matter was not, in fact, relied on in that respect. But to the extent that it is part of the defendants' case and that I can take it into consideration, it does not, in my view, demonstrate any failure to mitigate. Ms Mackie's reservations were, in all the circumstances, entirely understandable and the stress that dealing with Click St Andrews – which she was doing on a daily basis – was palpable in her evidence.

266. Some of Ms Mackie's evidence was leapt on by Mr Emmett as some kind of admission that the claim was being brought at the behest of solicitors and it was one of a number of occasions when Mr Emmett sought to criticise solicitors and portray the claim as "trumped up". I make it very clear that I accept the evidence of Ms Mackie that the claim was forced on the claimants by the defendants and that there is no basis whatsoever to impugn the conduct of the claimants' solicitors.

267. A claim for £1000 for distress and inconvenience was advanced for Ms Mackie and I also award that sum.

Flat 8

268. This is the flat of Edward Fry who gave evidence. At the time of the water ingress, Mr Fry was living in the flat and also had a tenant. Both moved out and Mr Fry incurred

the cost of their rent until they returned on 26 September 2021. He was told that Click St Andrews would cover these costs but they did not do so. The total cost was £9,360.00 and Mr Fry produced copies of confirmation of bank transfers to his then landlord, Mr Fenton. Mr Fry also received no rent from his tenant and claims a further £1,800 which is not supported by any documentation.

269. Although Mr Daly shows Mr Fry's claims as nil, that does not seem to me to be right and I accept Mr Fry's evidence as to the costs he incurred and loss of rental income and award these accordingly. I also award £1,000 for distress and inconvenience.

270. Mr Fry, in common with others, said, when asked that he had never denied access of Click St Andrews and that the site manager, Tim Bull had his keys but he pointed out that he had been asked to give access to install dehumidifiers and not to remedy damage.

Flat 9

271. This is the flat of Gloria Chan. Ms Chan claimed lost rental income from her spare room from August 2021 to August 2022 at £850 per month (as total of £10,200) and a replacement blind at £1,143.95. Mr Daly excludes the latter claim for which he says there is no substantiation. Ms Chan had, however, exhibited an e-mail estimate from John Lewis dated 28 September 2021 and in that amount and that amount should form part her damages.

272. So far as the loss of rental is concerned, Ms Chan's evidence was that, pre-Covid she had had a lodger at £850 per month. She planned to have a lodger again, had advertised the room and received inquiries. I accept her evidence and that the consequence of the water ingress was the loss of this income and I award this sum. I also award the sum sought of £1,000 for distress and inconvenience.

273. Ms Chan also said that Click St Andrews had requested for inspections not to carry out remedial works. They had placed a dehumidifier in the kitchen which had leaked onto the floor. She had never refused access. On the contrary, while she was away for 3 weeks, she had left a spare set of keys.

Flat 10

274. This is the flat of Ian Bacon who was the first of the leaseholders to give evidence. It is owned through a company, Properties (Residential 2) Limited, the 8th claimant. Mr Bacon does not live in the flat and it was tenanted.

275. The sums claimed are (i) remedial works (£19,069.30); (ii) cost of alternative accommodation for the tenant (£8,645.00); (iii) loss of rental income (£13,000); (iv) miscellaneous items such as additional council tax because the property was empty (£1,762); and (v) statutory interest pursuant to the Late Payment of Commercial Debts (Interest) Act 1998. Mr Daly records all of those claims as substantiated but there is no explanation of the claim for interest as late payment of a debt rather than discretionary interest on damages. I award all the sums claimed except for the interest amount. There is also a claim advanced in submissions for £2,000 for distress and inconvenience but since the claim is brought by the company I make no such award.

276. Mr Bacon was another tenant who had given his keys to Click St Andrews for access. He asked for them back in March 2022 as there had been no activity for some time.

Flat 11

277. This is the flat of Salim and Rozmin Lalani. The evidence in respect of this flat was given by Mr Lalani. At the start of the trial an application was made to adduce his evidence as hearsay on the grounds of his health. Mr Levenstein submitted that the fact that the defendants were unable to cross-examine Mr Lalani should not undermine his evidence. The sums claimed were accepted by Mr Daly to be substantiated, albeit by somewhat late evidence, and Mr Emmett did not challenge Mr Daly on this. I accept that submission.

278. The Lalanis do not live in the flat which Mr Lalani said was bought as an investment with a mortgage. Following the water ingress, the tenants had to move out. The flat is still uninhabitable and they have suffered the loss of the rental income whilst continuing to pay the mortgage. Mr Lalani has said understandably that, although they do not live in the property, dealing with the damage, loss of rent, and so on, has taken a mental toll on him and his wife.

279. The sums claimed are (i) loss of rental income (£73,749.05); (ii) miscellaneous sums for council tax and utilities (£10,706.07); and (iii) damage to furniture (£5,978.32). I award these sums. In addition, in submissions, Mr Levenstein advanced a claim for £5,000 as damages for distress and inconvenience. Even though the Lalanis do not live in the flat, it is one of the worst damaged and I accept the evidence of the distress it has caused them and award the amount sought.

Flat 12

280. This is the flat of Kamala Buchholz. Ms Buchholz makes by far the largest claim.

281. Ms Buchholz has been out of her flat (which is on the top floor) since the water ingress. Her evidence was that Click St Andrews had keys to access her flat between July 2021 and October 2022 except for a period of 2 weeks. To the extent that any remedial work had been done, Click St Andrews had stripped out the bathroom walls and floors, put plasterboard in place and painted the kitchen. No bathroom or kitchen had been fitted.

282. The largest element of her claim, therefore, was for £179,050.89 for alternative accommodation. Mr Daly regarded this cost as partially substantiated on the basis that he had seen invoices for these costs but not an Excel spreadsheet referred to. There was no challenge to the reasonableness of this sum over a lengthy period and I accept Ms Buchholz's evidence that these are the costs she has incurred and award them by way of damages.

283. Ms Buchholz also claims:

(i) Damages in respect of damaged contents in the sum of £18,099.53

(ii) Parking charges which she would not otherwise have incurred in the sum of £6,277.00

(iii) Storage charges £4,866.27

(iv) Moving charges £2,886.98

(v) Council tax £2,280.85

(vi) Water and electricity £4,588

(vii) Food whilst in a hotel £1,155.05.

These are all costs or wasted costs that flow from the water ingress and they are awarded as damages.

284. I do not take the same view in relation to the claim for dry cleaning costs in the amount of £6633.76. There was little explanation from Ms Buchholz for these costs. In her first statement, she made reference to having to move into a hotel and, therefore, having to pay for laundry. In her second statement, she placed these costs in a table for costs which she would not have incurred if she had remained living in her flat. Whilst I can see that some modest costs may have been incurred when staying in a hotel, there is no explanation for this substantial sum being incurred. I award her an estimated sum of £1,000.

285. I do not consider that I have sufficient evidence to be satisfied on the balance of probabilities that any cost of time off work was caused by the water ingress. The only evidence is a screen shot of an undated portal that shows the cost to Ms Buchholz in the sum claimed. There is no further explanation or evidence in relation to that time off or the incurred cost.

286. Ms Buchholz claims a sum of over £11k for therapy. I accept that, as the owner of one of the top floor flats who has been out for occupation for over 3 years, she is entitled to higher level of damages for distress and inconvenience than others may be but, in my judgment, it goes too far – a least without any evidence of the impact on her mental health – to say that there is a causal link between the water ingress and therapy. I award, however, £7,500 for distress and inconvenience.

287. There is a small sum of £750 in respect of the cancellation of a civil wedding ceremony. No causal link is evidenced and this small claim fails.

288. Lastly, Ms Buchholz claims £2,078.58. As I understand her evidence, she had to make payments on her bank overdraft as she went into overdraft as a result of the other losses she was incurring. Mr Daly has identified a statement for £1,067 and that is the sum I award.

289. I should add two things. Firstly, in Mr Daly's Appendix 7, he shows a claim for distress and anxiety which is greater than the cost of therapy claimed and he shows a claim for legal costs which will be dealt with as costs. Secondly, Mr Emmett's questioning of Ms Buchholz was intended to suggest that, by obtaining the freezing injunction, the leaseholders had inhibited Click St Andrews from carrying out remedial works and, in particular, had objected to Click St Andrews releasing funds to carry out remedial works. Ms Buchholz rightly pointed out that Click St Andrews had had her keys for many months before the freezing injunction was obtained. In any case, this was a matter for the court. Mr Emmett suggested that the monies to fit the kitchen were not released until the judge allowed it and Ms Buchholz replied that all she knew was that the kitchen had not been fitted. Whatever the point was that was being made, it did not assist the defendants and, if anything, the evidence that these works had still not been done made their position worse.

Flat 13

290. This is the flat of Luke Price who gave evidence. Mr Price explained that he lived in he flat until the flooding after which he and his partner endured the stress of living in a succession of Airbnb's. He estimated that they had moved 30 times. He also owns a property in Manchester which was rented out. Eventually he decided to relocate to Manchester and travel to London for work 2-3 days per week. As a result, he first incurred the cost of alternative accommodation and then lost the rental income on the property in Manchester, although he has expressed this as a claim for loss of rental income on flat 13.

291. He claims £32,870 for alternative accommodation and £27,115 in respect of lost rental income. In addition he claims £17,783 for certain additional costs including storage, utilities and laundry. Mr Daly includes these in his Appendix 7 as costs that are only supported by a witness statement and not by documentary evidence. As they appear in the exhibit to Mr Price's statement, it appears that there may have been supporting documentation but I have not been able to identify it. Nonetheless, I accept Mr Price's evidence as to the costs incurred and award these amounts.

292. Mr Price also includes a claim for late payment of a commercial debt. It is not possible to see what sum this relates to and why and, as I have said before, why it is not claimed as discretionary interest.

293. Mr Levenstein put forward a sum of £5,000 as damages for distress and inconvenience but I consider Mr Price's position and experience to have been similar to that of Ms Buchholz and I award £7,500.

294. As in the case of other leaseholders, Mr Price denied that he had refused Click St Andrews access to carry out remedial works. He had given his keys to, he thought Mr Bacon, and had asked for them back only after Click St Andrews abandoned site on 14 October 2022. After that he was not asked for access again.

Mitigation

295. In addressing the individual leaseholders' losses, I have referred to the cross-examination and the evidence that they gave about giving Click St Andrews access to the Property. It was very much a theme of Mr Emmett's cross-examination to suggest that Click St Andrews had been refused access to properties and that, if they had been allowed proper access, they would have carried out remedial works promptly.

296. In closing submissions, Mr Emmett pointed to documents that recorded two instances in 2022 of workmen being told that they could not enter flat 11 "without consent", culminating in the locks being changed, and one instance of the party wall surveyor being refused access to flat 13. In a note for the court, Mr Emmett also pointed to an e-mail from Mr Creasey on 17 February 2022 that stated that workmen had carried out work in flat 13 in direct contradiction of instruction from Mr Price. That contradicts Mr Price's evidence but it was not put to him for an explanation and it does not, in fact, demonstrate that Click St Andrews were unable to gain access. Any other alleged evidence of refusal to allow access was self-serving and emanated from Click St Andrews and/or Mr Emmett. Having heard the evidence of the witnesses, I cannot see any merit in the submission that they failed to mitigate their losses. There was no evidence that a policy of refusing access was adopted and the leaseholders cannot be criticised for seeking to maintain some kind of control over access to their homes. In

any case, by October 2022, Click St Andrews had ceased to carry out any remedial works.

Further matters

297. The total sums payable by way of damages to RTM and the leaseholders will be drawn together and form part of the final Order. RTM and the leaseholders are not registered for VAT and, therefore, where they have paid or will pay sums which include VAT, the totals should include the VAT.

298. In relation to a number of leaseholders, their claims were made to the date of the updated Schedule of Loss and/or the date of trial but they have continued to incur losses, particularly if they have remained out of occupation. These losses flow from the breaches established and should be recoverable as damages but they should be established or estimated from the evidence already before the court.

Defective remedial works

299. As pleaded, the claimants' case was that Click St Andrews had failed to plan and implement the drying out of the property with reasonable care and skill; had failed to ensure that the property was watertight before commencing remedial works; and had failed to carry out remedial works.

300. In opening, that case was elaborated upon, although in fairly general terms. It was said that the schedule of remedial works proposed was wholly unrealistic and that the defendant ignored the advice of their own surveyors, Project Surveyors. Their investigation and report dated 6 October 2021 had identified widespread damage and advised that no remedial works should be undertaken until the building was dried out and watertight. Drying out should be undertaken by a specialist. The claimants referred to Mr Rivett's evidence about the drying out undertaken and the inadequacy of the drying out certificates.

301. By the time of closing submissions, the claimants also alleged that inadequate steps were taken to repair firestopping and to re-stabilise its structural integrity and that the defendants had prematurely remedied flat 14.

302. As I have considered above, the reliance on defective remedial works was driven by the desire to be able to allege a breach that fell within section 2A of the DPA. Even with the consideration that had been given to this aim, it was still, by the time of closing submissions, a wholly generalised case. It is impossible to identify anything that was done, after the coming into force of section 2A, that could give rise to a breach of that section or to any identifiable or quantifiable damage. This particular aspect of the claimants' case fails.

The Dangerous Structure Notice

303. On 9 February 2024, Southwark Council issued a Dangerous Structure Notice in respect of the property. The notice stated:

> *"Having been notified that the above named structure may be in a dangerous state, the council's building control duty surveyor …. has completed a survey. The surveyor has found the structure to be in an immediately dangerous state.*

The result of these findings (sic) this notice requires you to take down, remove or secure the structure and undertake any further work that may be required in consequence of these actions."

304. Although this notice is a matter of obvious and great concern to the claimants, I have not placed any reliance on it in coming to my conclusions. The survey was not provided and the notice does not in any way assist in identifying what the council considers to be dangerous.

Consequential matters

305. I would be grateful for the assistance of counsel in drawing together the total sums which I have awarded with a view to including that figure in the consequential order and identifying what has been awarded to individual claimants. I repeat that there can be no double recovery.

306. There is a freezing injunction in place against Click St Andrews, made by O'Farrell J on 22 August 2022. That will remain in place. There is an outstanding application before me to vary the injunction which will be the subject of a separate judgment. I will deal with the claimants' wish to discharge the undertaking as to damages at the consequential hearing.

307. I have made decisions as to whether there is a relevant liability for the purposes of section 130 of the Building Safety Act 2022 and any application for a BLO will be dealt with at the consequential hearing, together with costs, interest, and any other outstanding matters including the final quantification of claims as referred to in this judgment.