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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**CAM/00KF/LSC/2013/0150**
Property	:	**14 Tolhurst House, Chichester Road, Southend on Sea SS1 2JZ**
Applicant	:	**Mrs Doreen Ivy Tibbs**
Representative	:	**Mrs D I Tibbs In Person**
Respondent	:	**Gradedial Limited**
Representative	:	**Mr Matthew Feldman Counsel**
Type of Application	:	**Court referrals – section 27A Landlord and Tenant Act 1985 – determination of service charges and Schedule 11 Commonhold and Leasehold Reform Act 2002 – determination of variable administration charges**
Tribunal Members	:	**Judge John Hewitt** **Mr Roland Thomas MRICS** **Mr John Francis QPM**
Date and venue of Hearing	:	**Tuesday 11 March 2014** **Southend Magistrates Court**
Date of Decision	:	**2 April 2014**

DECISION

Decisions of the Tribunal

1. The Tribunal determines that:

Claim No. 3QZ25660

1.1 There fell due and payable by the Respondent (Mrs Tibbs) to the Applicant (Gradedial) the service charges claimed being instalments on account for the year 2013 as follows:

1 January 2013	£286.04
1 July 2013	£286.04

1.2 There is not payable by the Mrs Tibbs to Gradedial the several variable administration charges claimed which totalled £1,073.00 – see paragraph 4 below.

Claim No. 3YQ73780

1.3 Gradedial shall pay to Mrs Tibbs damages assessed to 30 September 2013 in the sum of £2,938.58;

1.4 Mrs Tibbs may set-off the said damages to which she is entitled against the service charges otherwise payable by her, whether as set out in paragraph 1.1, or such sum(s) (if any) as may be due and payable to Gradedial as at the date hereof on account for 2014 and a to Gradedial; and any balance shall be paid by Gradedial to Mrs Tibbs by **5pm Friday 25 April 2014**.

Costs

1.5 Gradedial shall by **5pm Friday 25 April 2014** pay to Mrs Tibbs £200 by way of costs of these proceedings.

1.6 An order shall be made, and is hereby made, pursuant to section 20C Landlord and Tenant Act 1985 that none of the costs incurred, or to be incurred, by Gradedial in connection with these proceedings shall be regarded as relevant costs to be taken into account in determining the amount of any service charges payable by Mrs Tibbs.

General

1.7 The files shall be referred back to the County Court. This Tribunal does not have jurisdiction to determine the claims made in the two sets of court proceedings as regards the court fees and the costs generally and these are matters for the court to determine if either party chooses to pursue them.

2. The reasons for our decisions are set out below.

NB Later reference in this Decision to a number in square brackets ([ ]) is a reference to the page number of the hearing file provided to us for use at the hearing.

Procedural background

3. On 17 September 2013 Gradedial issued court proceedings against Mrs Tibbs – Claim No.3QZ25660 [174]. The claim form stated the claim was for £1,465.08 said to be service charges and administration charges due under the lease. The claim form also claimed a court fee of £70.

4. At the hearing it became apparent that there was a typographical error in the claim form and two numbers had been transposed. Gradedial had intended to claim £1,645.08 made up as to:

Service Charges

01.01.13	On account 2013	£286.04	
01.07.13	On account 2013	£286.04	£ 572.08

Variable Administration Charges

20.03.13	Final demand fee	£ 54.00	
14.04.13	Letter before action fee	£ 65.00	
11.07.13	Final demand fee	£ 54.00	
14.08.13	Home Visit Debt Collector fee	£ 195.00	
10.09.13	Breach of lease fee	£ 125.00	
10.09.13	Court Administration fee	£ 250.00	
10.09.13	Solicitors costs to issue	£ 250.00	
17.09.13	Court fee	£ 80.00	£1,073.00

Total **£1,645.08**

5. By an order made 3 and drawn 13 December 2013 [210] District Judge Dudley ordered that the claim be transferred to the Leasehold Valuation Tribunal for determination.

6. On 25 September 2013 Mrs Tibbs issued court proceedings against Rylands Associates – Claim No. 3YQ73780160 [160]. Rylands Associates are in fact Gradedial's managing agents. Mrs Tibbs has confirmed that it was intended that the claim be made against her landlord, Gradedial, and at the hearing before us Gradedial defended the claim on that basis. Thus insofar as may be necessary Mrs Tibbs may need to make an application to the court to amend this claim so that the defendant is cited as being Gradedial.

7. In this claim Mrs Tibbs claimed damages against her landlord for breach of its covenant to keep the subject building in repair. Mrs Tibbs claimed £1,600 in respect of builder's repair costs, council tax and the cost of hiring a humidifier. Broadly at the hearing before us this was broken down as to:

Clark Building Contractors	£620.00
Hanson – hire of humidifier	£ 68.58
Council tax 2012/13 and 2013/14	£911.42

In addition Mrs Tibbs claimed *"Loss of use for myself or for renting for the Judge to quantify"*.

8. By an order made 3 and drawn 13 December 2013 [172]District Judge Dudley ordered that the claim be transferred to the Leasehold Valuation Tribunal for determination.

9. With effect from 1 July 2013 the functions and jurisdictions of the Leasehold Valuation Tribunal were transferred to this Tribunal.

10. Directions were given on 23 December 2013 [106]. Pursuant to paragraph 8 of those Directions Mrs Tibbs confirmed that her claim against Rylands Associates was intended to be made against her landlord Gradedial and the claim has been so treated. In effect it is a counter-claim and Mrs Tibbs claims to be entitled to set-off such damages as she may be entitled to against service charges otherwise due and payable by her to her landlord.

11. Gradedial did not comply with those Directions. In particular it failed to serve a supplemental statement of case pursuant to Direction 11. The Directions were varied and an extension of time was granted to Gradedial by way of an Order made on 30 January 2014, an incomplete copy of which is at [114]. Gradedial still failed to comply.

12. Late in the day Gradedial filed the hearing file with the Tribunal. It is not well presented but is better than nothing. However, Gradedial had not delivered a copy to Mrs Tibbs as required by Direction 19 as varied. Evidently Rylands Associates sent a copy by Royal Mail Special Delivery but as Mrs Tibbs does not reside at the subject Property she was not there to sign for it or to receive it. Whist Gradedial was at fault in not delivering the file, it was unrealistic of Mrs Tibbs to give an address for service at which she does not reside. A copy of the hearing file was made available to Mrs Tibbs at the hearing and a short adjournment took place to enable Mrs Tibbs to run through it.

13. We observe at this point that we were told the hearing file contains the accounts for the year 2013 together with supporting invoices and other documents. As will appear shortly we are concerned only with the reasonableness of the budget and the demands for the on account payments for 2013. Given that Mrs Tibbs had not had time to go through the supporting materials in any detail we considered it would not be just to make determinations on the actual expenditure for 2013. If Mrs Tibbs has issues over particular expenditure we would encourage her to take them up with Rylands Associates and we would encourage Rylands Associates to respond to them promptly and fully. In the event that there are issues which cannot be resolved amicably it is open to either party to make an application to the Tribunal pursuant to section 27A of the Act.

14. On the morning of 11 March 2014 we had the benefit of a site visit. We met with Mrs Tibbs and her builder/decorator, Mr Baker. The caretaker was present for most of our inspection but Gradedial was not

otherwise represented, although it had been notified of the arrangements.

15. At the hearing, which commenced at 11:00 Gradedial was represented by Mr Feldman of counsel. Initially, and until lunchtime he was accompanied by Mr Grant Cooper, director of Rylands Associates, Mr Russell O'Connor head of property management at Rylands Associates and Mr Mark Cutler who has an accounting role. Mr Cooper did not return after the lunch adjournment.

    Mrs Tibbs attended to present her case in person and she was accompanied by Mr Baker.

16. Oral evidence was given by Mrs Tibbs, Mr Baker and Mr O'Connor all of whom were cross-examined and who also answered questions put to them by members of the Tribunal.

17. The hearing concluded at 16:40.

The lease

18. The lease of the subject Property is dated 28 November 2003 [262]. It was granted by Princedown Developments Limited to Quillpost Limited for a term of 999 years from 1 January 2003. The 'Block' is defined as being Tolhurst House, Chichester House and the commercial and shop units 3,5 and 7 Whitegate Road and 2,4 and 6 Warrior Square. There are also definitions of the 'Block Service Charge Proportion' and the 'Residential Service Charge Proportion'.

19. It was not in dispute that the proportions payable by Mrs Tibbs are 1.388888%.

20. Also it was not in dispute that the service charge regime provides for a service charge year 1 January to 31 December, with two equal instalments payable on account on 1 January and 1 July in each year. At the end of each year the landlord is to issue a certificate of actual expenditure and any balancing debit is payable by the tenant within 21 days of the after receipt of the certificate.

21. The Sixth Schedule to the lease [278] sets out a number of covenants on the part of the landlord, including to keep proper books of account and to issue the year-end certificate mentioned above and also by paragraph 6:

> *"To:-*
> *(a) keep in good repair the roof foundations and structural parts of the Block*
> *(b) keep in good repair and decorative order the exterior of the Block*
> *(c) ...*
> *(d) ...*

But without prejudice to the rights of the Landlord to recover from the Tenant or any other person the amount or value of any loss or damage caused by the negligent or wrongful act or default of the Tenant or such other person"

Gradedial's claim - Claim No. 3QZ25660

22. First we clarified how the sum claimed was arrived at. The outcome of that is set out in paragraph 4 above.

Service charges

23. Mrs Tibbs confirmed she accepted that the two interim payments on account were payable by her, subject only to her counterclaim. Thus we determined these two sums were payable on the dates stated.

Administration charges

24. Mr Feldman, on behalf of Gradedial conceded that Gradedial had not served a statement of case detailing the administration charges claimed and the basis on which they were claimed to be payable by Mrs Tibbs. Mr Feldman said that he was instructed to concede and withdraw all of the administration charges claimed as set out in paragraph 4 above. Thus we determined that these sums were not payable By Mrs Tibbs.

Mrs Tibbs' counterclaim - Claim No. 3YQ73780

25. Mr Feldman said that the claim for £68.58 was not challenged. The claim for Clark Building Contractors was not challenged in principle but the quantum was challenged. The claims for council tax and loss of use were both challenged.

26. Mr Feldman accepted that Gradedial had not served a statement of case or filed any documents. Evidently this was due to a misunderstanding within Rylands Associates as to what was required. Mr Feldman told us that the appropriate persons who could give evidence on behalf of Gradedial and who were able to deal with the matters raised in the counterclaim were Mr O'Connor and Mr Cutler both of whom were present at the hearing but neither of whom had served written witness statements. Mr Feldman made an application for an adjournment so that written witness statements could be served. Mr Feldman frankly and properly acknowledged that it was regrettable written evidence had not been served and that there was no legitimate reason for non-compliance. He also accepted that the sums in issue were not large.

27. The application was opposed by Mrs Tibbs who submitted that the manner in which Rylands Associates had handled the proceedings was symptomatic and typical of the way in which it had dealt with her generally; she had come to the hearing with Mr Baker who was to give evidence on her behalf and whom she would have to compensate for his time and it would be unfair on her to have to come back another day.

Mrs Tibbs observed that there were a number of gentlemen from Rylands Associates present in court but that she was battling on alone.

For much the same reasons Mrs Tibbs also objected to Mr O'Connor and Mr Cutler giving oral evidence.

28. Having adjourned for a short while to consider the application we concluded that given the clear warnings and risks of sanctions given to Gradedial through its representative and managing agents, Rylands Associates it would be unjust to Mrs Tibbs, contrary to the overriding objective and an inappropriate use of Tribunal resources to adjourn the hearing to another day. We informed the parties that we refused the application to adjourn, but granted the application to allow Mr O'Connor and Mr Cutler to give oral evidence, even though their witness statements had not been served. We also granted a slightly extended lunch adjournment to enable Mr Feldman a little more time to take instructions and for Mrs Tibbs to have another look through the hearing file.

29. In the event Mr Feldman only called Mr O'Connor to give oral evidence because there were no accounting matters in issue for Mr Cutler to assist with.

30. From the evidence we have read and heard we make the findings of fact set out below in relation to this claim.

31. Gradedial is controlled and beneficially owned by the Shea family. Richard Shea is its director and Lisa Shea is its company secretary. The address given for both of them is Cambridge House, 27 Cambridge Park, Wanstead, London E11 2PU.

32. During 2012 the managing agents were Shea Properties Limited, of which Richard Shea is its director and Lisa Shea its company secretary.

33. It appears that a receiver may have been appointed over one or some properties owned by Shea Properties.

34. In December 2012 Rylands Associates were appointed managing agents in place of Shea Properties. A budget for service charges for 2013 was prepared and first demands for the instalments of on account payments went out in January 2013. The budget and the actual expenditure for 2013 are shown at [207].

35. Mrs Tibbs learned that flat 14, the subject property was for sale and made arrangements through the vendors selling agents to view it in May 2012. The entrance door to this flat is located on an upper floor. The flat itself is laid out over three floors. The entrance door leads to a small lobby area. An internal stairway leads to an upper floor on which there is a living room and kitchen. A further stairway leads to a small landing above which there is a roof light and off which there are two bedrooms and a bathroom/wc. This floor is immediately beneath the flat roof of the building.

37. Mrs Tibbs said on her inspection in May 2012 the walls of the main bedroom were papered and she did not notice any areas of damp. Mrs Tibbs decided to purchase the flat, instructed solicitors and completed the transaction in August 2012. Mrs Tibbs did not have a professional valuation or building survey carried out on her behalf.

38. When Mrs Tibbs decided to purchase the flat she did not have a settled intention as to what she might do with it. It was not to be her main home. She thought she might use it as a week-end home, or might live in it for several months a year or she might let it out from time to time. She did not have a settled plan and was content to see how things panned out. She did however know that whatever she decided the flat would require redecoration and a new or replacement central heating system to be installed.

39. In August 2012 Mrs Tibbs was given the keys and went to the Property. On this occasion she did notice that there was severe damp on one of the walls in the main bedroom. She touched the wall and found it full of damp. Mrs Tibbs reported this to the caretaker, Mrs Doyle, who came along to see the position for herself and who told Mrs Tibbs that she would report it to Mrs Shea in the office.

40. In the first or second week of September 2012 Mrs Tibbs again spoke to Mrs Doyle about the dampness. Mrs Doyle assured her that she had reported it to Mrs Shea in the office and said that they owned and managed the building. Mrs Doyle gave to Mrs Tibbs Mrs Shea' mobile telephone number so that Mrs Tibbs could speak direct with Mrs Shea. Mrs Tibbs did so and explained the position to her. Mrs Shea informed Mrs Tibbs that she would get someone along to deal with it. Mrs Tibbs does not know what, if any, remedial works were carried out.

41. In January 2013 Mrs Tibbs spoke with someone at Rylands Associates to obtain details of the insurers because she thought it might be possible to make a claim for the costs of remedial works and redecoration required in the main bedroom.

42. An insurance claim was duly made. A company named South Essex Builders were sent along to investigate, possibly at the behest of the insurers or assessors. The insurers rejected the claim because it considered the water ingress was due to lack of maintenance and repair rather than due to an insurable event.

43. In April 2013 Mr Barry Clark of Clark Building Contractors Limited was working in the flat installing a new central heating system. He too noticed the wall in the main bedroom was very damp, he said you could smell it as you walked in and there were several crust formations on the wall. He reported the dampness to Mrs Doyle on several occasions who told him that she knew about it and knew that it had got worse. Mrs Doyle told him that a repair had been carried out to the threshold of a doorway situated on the roof. Mr Clark went up onto the roof with Mrs Doyle and she pointed out the doorway to him. The doorway led to a

water tank house located on the roof. Mr Clark noted that no making good had been carried out properly and that some brickwork had not been reinstated and he thought that was where the water might be getting in. Mrs Doyle also told Mr Clark that a company Patience Roofing had carried out the repair in March 2013 and had also repaired a 2sq m repair to the asphalt roof covering which he noticed had a number of 'mole hills' due to contraction/expansion and some of which showed cracks and splits.

44. On 30 May 2013 Mr O'Connor and a colleague, a Mr Webb, believed to be a surveyor visited the flat following several requests by Mrs Tibbs for some action. They inspected the damp area in the bedroom. Mrs Tibbs claimed they looked puzzled but they mentioned some works had been carried out but it takes time for damp walls to dry out. They authorised Mrs Tibbs to hire a humidifier to dry out the wall and for Mr Clark to hack off the damp and damaged plaster and to re-plaster as required.

45. Mr Clark prepared an estimate for Mrs Tibbs. It is dated 26 June 2013 [65]. It is in the total sum of £620.00.

46. In July 2013 Mr Clark arranged the hire of the humidifier, collected it from the hire company, installed it in the flat, supervised its operation and then returned the equipment to the hirer some 10 days later when he thought the wall had dried out. The bill for the hire is dated 31 July 2013 [64].

47. Mr Clark then hacked off the damaged plaster and re-plastered as required. He said this required careful work because there were services running behind the wall which required to be protected and worked around. This work took him some two days. What has still to be done is the redecoration. This has not yet been done because in August 2013 it was noticed that the wall was damp again. The wall still remains damp and this was very obvious to us during the course of our site visit and was confirmed by a damp meter reading taken by Mr Clark.

48. Mr Russell O'Connor gave evidence. Mr O'Connor confirmed that Rylands Associates were appointed as managing agents in December 2012 and have, effectively, managed the building since 1 January 2013.

49. Mr O'Connor said he was unable to give any evidence as to what repairs, if any, were carried out by Gradedial in 2012 after Mrs Tibbs first reported the defect in August 2012.

50. Mr O'Connor confirmed that the first he and Rylands knew of the defect was in January 2013 when Mrs Tibbs reported it. Mr O'Connor confirmed that an insurance claim was made. Assessors sent South Essex Builders to investigate it. Mr O'Connor confirmed that the claim was rejected on the basis that the water ingress was due to lack of maintenance and repair as opposed to an insurable event. Mr O'Connor did not know if South Essex Builders had effected any form of repair whilst on site.

51. Mr O'Connor said that in January 2013 two estimates for a repair were obtained and the job placed with J Patient (Roofing) Limited. Mr O'Connor did not know who had inspected the job prior to obtaining the two estimates nor did he know what information had been given to the two contractors about the nature and scope of the repair.

Mr O'Connor believed that a repair was carried out to the threshold of a door frame set on the roof. Evidently water tanks providing air conditioning for the offices are housed on the roof. Mr O'Connor was not sure exactly what work was carried out. He said the job took two days and the bill was in the region of £300. Mr O'Connor was not sure when the repair was carried out, he thought perhaps sometime in March 2013. No re-inspection was carried out by Rylands Associates after the works had been completed.

[We observe at this point that although Gradedial has provided [202 – 260] what are said to be the final accounts for and supporting invoices for 2013, there is no invoice disclosed from J Patient (Roofing) for a repair to the threshold of the door to the water tanks room. The only invoice form that company that we can see is at [238] being an invoice for £564.00 dated 30 August 2013 evidently concerning a repair to the flat roof of flat 32.]

52. Mr O'Connor agreed that he was present on 30 May 2013 when the instruction was given to Mrs Tibbs to get a humidifier in to dry out the damp and for the defective plaster to be hacked-off and the wall re-plastered. Mr O'Connor and his colleague had assumed that the damp noted on this occasion was simply drying out.

53. At [302] is a letter dated 7 August 2013 sent by Mr O'Connor to Mrs Tibbs in reply to her letter of 21 July 2013. Much of the letter is concerned with the outstanding service charges but there are several references to the continuing damp problems as follows:

> *"Moving on to the subject of the roof, whilst I appreciate that the flat may be in an uninhabitable condition you are aware that the buildings insurers have repudiated your claim for repairs due to the cause of damage has been determined as a graduated operating cause. This meaning that the damage has occurred over a period of time. You have admitted to my colleague and myself when visiting your property to inspect the damage that no survey was carried out when you were buying the property. The resultant damage has occurred due to the damage being covered up.*
>
> *From speaking to your builder it was recommended that the plaster be removed from the wall and a dehumidifier be placed in the flat to draw the water from the concrete. As*

the flat is empty with no real ventilation the problem has been compacted by the humidity in the flat.

...

Returning back to the repair works under the terms and conditions of the lease the four walls and any sub dividing walls within your flat are demised to you for the unexpired term of the lease. It is therefore your responsibility to maintain them. Without a survey carried out at the time of the purchase flat (sic) you would have purchased the flat on the basis of 'buyers beware'. Therefore your repeated requests for remuneration for the repair works, costs of council tax and any other disbursements will not be considered.

...

I advise you of this, as your lease does not make any provision for the service charge to be withheld regarding the circumstances and as advised the issue falls to your responsibility to maintain and resolve."

54. Mr O'Connor confirmed that other than whatever J Patient (Roofing) may have done in or about March 2013 Gradedial has not taken any other steps or carried out any other repairs to deal with the continuing water ingress from the defective roof.

55. Mr O'Connor said that Rylands Associates and Gradedial have looked at replacing the roof. He said that this part of the block houses 45 flats, 11 offices and shops and 45 parking spaces. He said that there had been a number of reported defects with the roof and whilst several spot repairs in different sections of the roof had been carried out successfully Gradedial has accepted that the roof is at the end of its useful lifespan.

56. At [84] is a copy of the first stage consultation notice required by section 20 of the Act. The notice states that the works to be carried out are:

"To replace the expired flat roof and install safety rails re conform to currently legislation (sic)"

Mr O'Connor went on to say that although no specification of a new roof had been prepared by a building surveyor, they had spoken with six contractors who have put forward a range of proposals to deal with the roof. Gradedial has decided to accept the proposal put forward by J Patient (Roofing) estimated at some £80,000. Further Mr O'Connor said that no contract has yet been placed with the contractor and that Gradedial will not do so until it has collected in funds on account from

all the lessees and this is not something which is likely to happen any time soon.

Discussion

57. On the evidence, which is not really contested to any material extent, the roof is in disrepair. The consequences of that disrepair are that there is water ingress to a wall to the main bedroom of the subject flat. Part of the wall is extremely damp after rainfall such that the room is uninhabitable.

58. The disrepair was reported to Gradedial in August 2012. Gradedial is entitled to a reasonable period in which to investigate the defect and effect remedial works. In the circumstances prevailing here and drawing on the accumulated experience and expertise of the members of the Tribunal we find that a period of three months is a more than reasonable period such that certainly remedial works should have been completed by 31 December 2012.

59. There was no evidence put before us by Gradedial as to any investigations or works being carried out in 2012.

60. It was not in dispute that Rylands Associates were notified of the defect in January 2013. There was limited evidence as to what steps were taken save that some form of work to the threshold of the door to a tank room on the roof may have been carried out in March 2013. Gradedial has not provided any evidence as to what works were carried out and why and no invoice from the contractor has been produced.

61. Whatever remedial works may have been carried out in March 2013 they were not effective and water ingress has continued with the consequence that the wall in the bedroom remained very damp after rainfall. This was drawn to the attention of Mr O'Connor and his colleague on 30 May 2013 but no effective remedial works were put in hand.

62. By letter dated 21 July 2013 Rylands Associates were reminded of the continuing problem. Its response dated 7 August 2013, parts of which are quoted in paragraph 53 above, is wholly inadequate and unhelpful. Not only is there no reference to any proactive steps to be taken by the landlord to comply with its obligations to keep the roof in repair the letter appears to suggest that the fault lies with Mrs Tibbs for not having a survey carried out prior to purchase and she has responsibility to maintain and repair the internal walls of the flat. This letter from Rylands Associates is bordering on the outrageous. Further the suggestion that the four walls and any sub dividing walls are demised and thus the responsibility of Mrs Tibbs to maintain is inaccurate. The definition of the demised premises is set out in the First Schedule to the lease [267] and includes only *"the internal plastered coverings and the plasterwork of the walls bounding the Demised Premises"* are demised. The walls themselves are not.

63. Despite being reminded of the continuing water ingress problem in July 2013 Gradedial has not taken any or any effective steps to identify the problem and to deal with it properly. The passing suggestion that installing a new roof might resolve the matter might, in some circumstances, justify a delay in expensive works if the new roof is to be installed fairly soon. However, the clear evidence from Mr O'Connor is that is that Gradedial does not propose to place a contract for the new roof any time soon. In these circumstances we find it is the responsibility of Gradedial to effect spot repairs as and when required pending the installation of the new roof.

64. Accordingly and on this evidence we find that Gradedial was and continues to be in breach of its covenant to keep the roof in good repair. Mrs Tibbs has suffered loss and damage as a direct result of that breach of covenant and is thus entitled to damages.

The assessment of damages

The humidifier

65. As noted above there is no challenge to the claim to the cost of hiring the humidifier. We thus allow the claim of £68.58.

Repair and redecoration costs

66. In principle there was no challenge to the work covered by Mr Clark's estimate, but there was a challenge to the quantum. Mr Feldman submitted that we should award only £200 to £300.

67. Mr Clark, who confirmed that Mrs Tibbs has paid him the £620.00, was cross-examined closely on the work he has carried out to date and the time spent on it. Mr Clark said that he generally worked on the basis of £200 per day. His estimate was inclusive of materials. Mr Clark gave his evidence in a careful and measured way. We find him to be a witness upon whom we can rely with confidence. We consider the amount of his estimate to be reasonable. Although the repainting work has not yet been undertaken it will plainly be required once the cause of the water ingress has been dealt by Gradedial. Further we find that £200 per day for a tradesman such as Mr Clark and with his experience is within the range that can be regarded as reasonable for south east Essex. We thus allow the claim for £620.00

Council tax

68. The claim in respect of council tax was challenged. Mrs Tibbs only produced evidence as to the amount of council tax in respect of the year 2012/13., that is to March 2013. Mrs Tibbs had included a broad rounded figure of £911 to arrive at £1,600 to cover these three heads of damage.

69. We need not dwell on what might be the correct figure because we reject the principle of the claim. Council tax is payable whether the flat is occupied or not. If Mrs Tibbs had used the flat as a holiday home she would be obliged to pay the tax. If Mrs Tibbs had let the flat the

occupier would have been liable to pay the tax. The condition of the property has been such that Mrs Tibbs has not felt able to move in, even on a temporary basis. We note from paragraph 33-31 of *Dowding & Reynolds : Dilapidations : The Modern Law and Practice* Fifth edition 2013-14 that where a tenant is out of occupation of premises the running costs and outgoings are not generally recoverable. We disallow the claim.

Loss of use

70. Mrs Tibbs had plainly claimed damages under this head in her counterclaim. As a litigant in person she said she had no experience as to how to quantify the claim and was content for the Tribunal to award what it considered to be right.

71. Mr Feldman submitted the claim should be dismissed as it was an unparticularised and loose allegation of loss. He also complained that Mrs Tibbs had provided no evidence of mitigation of loss; the area of damp was small taken the overall size of the flat and that the evidence of Mrs Tibbs was too vague.

72. We reject those submissions. The claim was plainly made at the outset. If it was too vague it was open to Gradedial to seek further particulars but it chose not to do so. It was too late to complain about that at the hearing. Further Mrs Tibbs was not cross-examined about an alleged failure to mitigate her loss and Mr Feldman did not suggest steps that Mrs Tibbs could and should have taken but had failed to take. We were not persuaded that it was for Mrs Tibbs to discharge the burden of proof that she has mitigated her losses.

73. Whilst we accept that the severe dampness was to a relatively small area to one wall of the bedroom we find that it did render that room uninhabitable. We note that in his letter of 7 August 2013 Mr O'Connor appeared to accept that the whole flat was uninhabitable.

74. The evidence of Mrs Tibbs was that the current asking price for rent of a two-bedroom flat in Tolhurst House is £650 pcm. Mrs Tibbs was closely cross-examined about that and produced a cutting from a local newspaper. Gradedial did not produce any evidence to support a different figure. Members of the Tribunal regularly carry out determinations of rentals of residential properties in and around Southend. An asking rental of £650 pcm strikes a chord with the experience and expertise of members. For present purposes we are prepared to work on that figure.

75. It is plain to us that Mrs Tibbs has acquired and paid for an asset. She is entitled to enjoy it. She is entitled to do that in a number of different ways which can include use as a home on a full time or part-time basis, use as a holiday home or use to provide an income from rentals. By reason of the breach of covenant on the part of Gradedial Mrs Tibbs has been deprived of the use and enjoyment of the asset.

76. The breach is a continuing one. The roof remains in disrepair. It is not known when Gradedial will effect a repair. Gradedial will continue to be at risk to pay damages for breach up to the time when it complies with its obligations. In these circumstances and given the history to this matter we have decided to assess damages for the period 1 January to 30 September 2013, which is a few days after Mrs Tibbs issued her court proceedings. It is those proceedings which have been referred to this Tribunal. Thus we will assess damages for loss of use for that nine-month period. If the parties cannot agree the quantum of damages payable from 1 October 2013 onwards the claim will have to be taken up with the court.

77. During the course of the hearing we drew attention to passages from *Dowding & Reynolds* and, in particular, the judgment of HHJ Marshall QC in *Langham Estate Management Ltd v Hardy* [2008] 3 EGLR 125 in which the Judge helpfully summarised the principles to be derived from the Court of Appeal decision in *Wallace v Manchester City Council* [1998] 3 EGLR 38. Drawing on this learning and guidance we find that we have to assess what sum of money will place the tenant in the position he would have been in if the obligation to repair had been performed by the landlord. Having considered the actual state of the premises and the state they should have been in one can approach the issue from two standpoints. One is a global figure for the loss and damage suffered and one is placing an adjustment to the rental value. HHJ Marshall QC said it was entirely a matter for the trial judge which approach it is more appropriate to adopt, and it is even permissible to combine the two, although care must be taken to avoid double counting. The judge also advised to cross-check the result of either approach against the other as a reality check.

78. We acknowledge that it was the main bedroom which was uninhabitable. The remainder of the flat was habitable even though the loss of the main bedroom may cause a significant inconvenience and it would certainly affect the market rental value if the flat was to be rented out in that condition.

79. We find that in good condition an achievable rent for the subject flat would be in the order of £625 pcm. For the nine-month period in question that would amount to £5,625. Allowing a discount of 40% for the loss of the main bedroom a figure of £2,250 emerges. Standing back and taking stock and considering a global figure we find there is some harmony. Thus we arrive at a figure of general damages of £2,250 for the period in question.

80. To summarise we assess damages as follows:

Humidifier	£ 68.58
Repairs	£ 620.00
Loss of use	£2,250.00
Total	**£2,938.58**

81. The lease does not exclude the equitable right of set-off and thus Mrs Tibbs is entitled to set-off the amount of damages against service charges otherwise payable under the lease.

Costs

82. Generally Tribunals are reluctant to make orders for costs and the starting point is that each party shall pay its own costs, unless there are special circumstances. Rule 13 enables a tribunal to make an order for costs if it considers that a person has acted unreasonably in bringing, defending, or conducting proceedings. We find that Gradedial has so acted in these proceedings. Gradedial so acted in failing to engage in the process and all it did was to file (but not serve) poorly prepared hearing files late in the day. Gradedial also put Mrs Tibbs to the trouble and expense of bringing Mr Clark to the hearing to give evidence. We find that Gradedial acting reasonably would have either accepted Mr Clark's estimate as being reasonable or, at least, given prior notice to Mrs Tibbs that it considered the amount recoverable should be limited to £200 to £300. Mrs Tibbs could than have taken a view about the cost of calling Mr Clark.

83. Mr Clark told us that his daily rate was in the order of £200 and thus we consider it fair and just that Gradedial should pay costs to Mrs Tibbs assessed at £200.

Section 20C

84. We have made an order under section 20C. We find it would be wholly unjust if Mrs Tibbs were to be required to contribute to any costs incurred by Gradedial in connection with these proceedings. Gradedial withdrew significant sums from its claims made in its court proceedings, has accepted in principle two of the claims made by Mrs Tibbs in her court proceedings, succeeded on its challenge as regards council tax but failed in its challenge on the loss of use claim. Taken in the round Gradedial has lost and Mrs Tibbs has succeeded.

Judge John Hewitt
2 April 2014