Case No: B02BS101

IN THE CARDIFF COUNTY COURT

Cardiff Civil and Family Justice Centre
2 Park Street, Cardiff, CF10 1ET

Date: 30/01/2019

Before :

HIS HONOUR JUDGE JARMAN QC

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Between :

ANDREW SMAILES **STACEY POYNER-SMAILES**	**Claimant**
- and -	
CLEWER COURT RESIDENTS LIMITED	**Defendant**

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Miss Schona Jolly and Miss Bethan Harris (instructed by **Weightmans LLP**) for the **claimants**
Miss Cerys Walters (instructed by **Jacklyn Dawson**) for the **defendant**

Hearing dates: 4 and 5 December 2018

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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HIS HONOUR JUDGE JARMAN QC

HH JUDGE JARMAN QC :

1. The claimants, who are now married with a young son, purchased a two-bedroom flat (No 14) in Clewer Court Newport in March 2014 by way of assignment of a long lease (the lease). The lease contains a prohibition of any alteration to the flat. Clewer Court is a large Victorian building which was converted into flats in the 1980s. No 14 has a long narrow corridor between the kitchen and the dining area. The residents at Clewer Court are the shareholders of the defendant, which is administered by an elected group of the residents and funded out of service charges provided for in the leases of the dwellings there. Mrs Poyner-Smailes suffers from various conditions affecting her health, including Ehlers-Danlos Syndrome, which is characterised by generalised joint hypermobility, joint instability complications, and widespread musculoskeletal pain which give rise to difficulties in walking, standing and using one or both of her upper limbs. The severity of these difficulties varies from day to day.

2. In April 2014 the claimants engaged builders to carry out work to No 14, much of which was intended to make it more suitable for Mrs Poyner-Smailes' needs. This included relocating the kitchen to the lounge and relocating the latter to a bedroom, and necessitated the creation of one internal doorway, and the stopping up of another (the works). After these works commenced the claimants were served with a notice to stop these works by the defendant as being in contravention of the lease. Works stopped and, despite efforts by both parties to resolve the impasse, including mediation, unhappily a resolution has not been found. The claimants finally moved out in May 2017 and No 14 remains in an unfinished state. They now bring claims under the Equality Act 2010 (the 2010 Act) for discrimination, harassment, and victimisation. These claims are vigorously denied by the defendant.

3. There are some direct factual issues between the parties which I shall need to resolve but, broadly, the background to the dispute is uncontentious. An assessor was appointed under section 114(7) of the 2010 Act to assist in the evaluation of the evidence. That assessor was Judith Kiely, who sits as a Non-Legal member of the Employment Tribunal and is a Disability Qualified Member for the Disability Appeals Tribunal and has expertise in disability claims. Mrs Kiely sat with me throughout the two-day hearing, and I have availed myself of her valuable assistance and expertise in assessing the evidence.

4. The claimants and their witness Anthony Crowhurst filed witness statements, and each were called to give oral evidence. The latter is a quantity surveyor who provides advice for a voluntary disability group called the Disability Advice Project and who supported the claimants in the aftermath of the works being put on hold.

5. Witness statements were filed from a number of directors of the defendant, each of whom is or was also a resident at Clewer Court. When the claimants moved in, the chair of the directors was Brian Connolly. He has since moved out and suffers ill-health, so his statement was admitted under the Civil Evidence Act. The others who were called to give oral evidence were Eve Williams, Peter Tizzard, Barbara Slack, Heather Hutchings, and Louis Chicot, who latterly became company secretary of the defendant. Catherine Gwilliam, a partner in the firm of solicitors which the defendant instructed, and still instructs in the dispute, also filed a witness statement and gave oral evidence.

6. I shall set out the background to the dispute, and in doing so shall indicate those few direct factual issues and where appropriate resolve them. It is not surprising given the lapse of time and lack of records in respect of some conversations between the parties,

that there should be some differences of recollection. Nor is it surprising, given the unfortunate impasse which now pertains, that those differences tend to divide into party lines. In my judgment each of the witnesses was trying his or her best to recall events.

7. The claimants instructed a solicitor to act for them in the purchase. It is clear, as may readily be expected, that prior to purchase a letter from their solicitor did point out the absolute prohibition against alteration, whether structural or otherwise, although there was some difficulty initially in cross-examination in recalling that. The prohibition was set out in clause 4.7 as follows:

> "The Tenant will not alter the internal planning or the height, elevation or appearance of [No 14] nor will at any time make any alteration or addition thereto nor cut, maim or remove any of the party or other walls or the principal or load bearing timbers or iron, steel or other supports thereof nor carry out any development thereto nor change the user thereof (within the meaning of any legislation for the time being relating to Town and Country Planning)."

8. However, it is not in dispute that there had been several previous occasions when residents had carried out structural alterations of individual flats with the defendant's permission, such as removal of a pantry wall or a wall between the toilet and the bathroom. The claimants recall that the estate agent who showed them No 14 prior to purchase said something about many of the flats having been altered, which in light of the defendant's policy of giving permission in some cases, was not surprising.

9. The initial relationships between the claimants and other residents when they first took up residence were friendly. However, that changed during a meeting between Mrs Poyner-Smailes, Mr Connolly and Mrs Williams at No 14 on 28 March 2014 to discuss a satellite dish on an external wall of the flat. There was a communal dish which the claimants assumed was working and had taken out a 12-month contract on that basis, only to find that the dish was not working. They wanted to install their own dish. Mr Connolly said that he thought this was prohibited by the lease and would go and check. He came back with Mr Tizzard, who came into No 14 with him but without an express invitation. He occupied the flat above No 14. The satellite dish issue was eventually resolved by agreement to allow one for 12 months, the duration of the contract.

10. However, this led to a discussion at that meeting about the works which the claimants intended to carry out in No 14. Mr Tizzard accepted in cross-examination that as it was intended to relocate the kitchen directly underneath his lounge, he was concerned about noise and fumes that might come from such a relocated kitchen, and he recalls that he commented as such. Mrs Poyner-Smailes does not recall any specific details, but recalls that he raised objections, and she became upset. Mrs Williams had already left. After the men left Mrs Poyner-Smailes sent a text to Mrs Williams saying that she did not want the men to come back when she was alone.

11. Mr Smailes on returning home from work that day and finding his wife upset, telephoned Mr Connolly and later met with him and Mrs Williams. His recollection is that Mr Connolly told him that permission would not be required as long as the works did not affect the structural integrity of the building, although in his first witness statement the phrase he used was "structural works." He said in cross-examination that, to his mind, the phrases meant the same thing. He did not regard the works as coming within these categories.

12. The recollection of Mr Connolly and Mrs Williams is different. They recall that when the relocation of the kitchen was discussed Mr Connolly said nothing should be done without the defendant's permission, to which Mr Smailes said that he would get plans and he hoped that the response would be sympathetic. Mrs Williams says that Mr Smailes promised to obtain plans of the works and seek permission. He denies such a promise, saying that he did not intend to have plans of the work drawn up so would not have promised to do so.

13. The claimants instructed a consulting engineer, Steve Morgan, to advise on the best way to adapt No 14 to accommodate Mrs Poyner-Smailes' needs. He had worked with other residents at Clewer Court previously and told the claimants that residents had in the past been given permission by the defendant to knock down structural walls and to alter the layout of other flats there. He initially suggested creating a large open-plan living space by removing the walls between the original living room and one of the bedrooms. Because of their concerns as to whether permission would be forthcoming for the removal of walls, the claimants did not choose this option, but instead decided simply to change one of the bedrooms into the living room, and the original living room into the kitchen. That scheme did not involve the removal of any walls but did involve the cutting of a single doorway from the other bedroom into a wall which was not a structural wall.

14. There are no written contractual documents relating to these works. The claimants gave oral instructions to their contractors and the following month the works commenced. In her oral evidence, Mrs Williams came across as particularly indignant that the works, which she said involved noise which was "horrendous," were commenced without permission. Shortly thereafter she made a note of her recollection as to what had been said in the previous March, which provides support for her recollection although the note is not contemporaneous to those conversations.

15. There is little other documentary evidence as to the detail of those conversations. Mr Tizzard and Mrs Slack made short diary entries of when conversations and meetings took place, but these contain little detail. After the works commenced, Mr Tizzard emailed Mr Connolly on 12 May 2014, in which he said;

> "When you and I were speaking to Stacy (new owner) about her aerial and you mentioned the kitchen to her she said she [knew] she would have to seek approval from Clewer Court. So if I am honest I do not know what to think, except there is a lot of banging, drilling and chiselling of walls (even on weekends) going on. I only hope she is not removing load bearing walls."

16. Mr Tizzard ended the email by referring to the need for Building Regulations approval and suggested that a director should speak to Mrs Poyner-Smailes to find out what her intentions were.

17. On 17 May 2014 Mr Connolly wrote to the claimants asking them about their intentions regarding the works "and whether you intend to get building regulations approval and seek approval from Clewer Court Residents Ltd for any changes to your property." He ended by saying he would be away for two weeks from the next day and to contact any director.

18. The claimants sent an email to him on the same day in which it was confirmed that they were not making any structural changes which would necessitate Building Regulations approval. The email continued:

> "We have had to have the whole property rewired and are now in the position of having to put in a false ceiling in to conceal the cabling due to our apartment being on the ground floor and having a concrete floor which prevented us running cables though the floor…This was work that has been discussed with yourself and various directors prior to it's commencement and we were told that as long as we weren't making any structural changes we could make whatever changes we deem necessary which was our understanding of the lease."

19. At the end of the email, the claimants accepted that the channelling-out of walls for cabling and the battening of ceilings had been noisy but stated it was their intention only to restore the apartment and that they had taken all steps to minimise disruption to their neighbours.

20. Mrs Slack replied on behalf of the defendant by letter dated 19 May 2014, in which she said:

> "Directors have discussed your reply and should appreciate if you were to instruct your builder to provide a comprehensive and accurate report of all proposed changes, *prior to further work being undertaken*.
>
> At this time we seek your patience and understanding and would stress that it is no ones deliberate intention to block or prevent such improvements. Indeed, all empathise with your desire to sympathetically renovate your apartment.
>
> However, Directors believe presented with an accurate report of all building work will help to avoid misunderstandings until such time that this matter is investigated further."

21. That brought forth a response from the claimants on 23 May 2014, which commenced as follows:

> "We were somewhat surprised by your letter of 19 May 2014 given that we had discussed the intended work at our property with Brian and a number of the Committee prior to beginning work. We were told that as long as we were not making any structural changes we were fine to carry out the work without the need to make a formal application. Therefore we were taken aback to receive a letter to the contrary several weeks later and at such a later stage in the works.
>
> Again we would like to reassure you that we are not undertaking any structural work which would necessitate an application to either the council in relation to building regulations or to yourselves."

22. The response then went on to specify the intended works as decoration, minor plumbing and electrical work, new central heating system, upgrading kitchen and bathroom, change of use of a room, and new interior doors. The claimants stated that they failed to see the need for a detailed report of these works but, in the spirit of "openness and transparency", had requested their project manager to provide one. They also stated that, whilst their position was that no consent was necessary from the defendants in order to avoid further unnecessary disputes they requested confirmation that there were no objections to their proposals. Reference was then made to the European Convention on Human Rights and to the 2010 Act, and in that context the following passage was included:

> "As a number of the committee members are aware Stacey is registered disabled and has considerable limitations of her motor functions. The proposed changes to the use of rooms seek to make our home more accessible and to promote Stacey's ability to function independently. This is particularly important as the progression of Stacey's condition may result in her using a wheelchair in the future and therefore the apartment must be renovated with this in mind."

23. It is convenient at this stage to make a finding of fact as to the differing recollection of the parties as to how matters had been left in March. As already indicated, each of the witnesses in giving his or her account came across in a genuine and straightforward manner. However, there was in my judgment room for a good deal of confusion at that time and a number of factors contributed to this.

24. First, clause 4.7 is not free from ambiguity and on one view prohibits the cutting of only load-bearing supports. It is clear however that it prohibits the alteration of the internal planning and, on its correct interpretation, the cutting of any wall whether load-bearing or not. Second, whatever the correct interpretation, the defendant had in the past given permission to the occupiers of other flats for such works as the removal of walls. Third, the conversations on 28 March arose from an issue regarding a satellite dish, which was resolved. Fourth, when Mr Tizzard raised any objection, Mrs Poyner-Smailes became upset. As a result, it was only Mr Smailes (who had not been at the earlier meeting), Mr Connolly and Mrs Williams who attended the subsequent meeting.

25. In my judgment it is likely in those circumstances that the tone of Mr Connolly and Mrs Williams was more conciliatory in the meeting with Mr Smailes, as hinted at in Mrs Slack's letter of 19 May. It is likely also that Mr Smailes was left with the impression that, as long as the works did not potentially impact upon the structural integrity of the building as a whole, then there would be no problem. Mr Tizzard's reference in his email of 12 May to the removal of load-bearing walls suggests that, apart from the noise, this was his main concern. It is also likely that Mrs Williams gained the impression that plans would be forthcoming. In my judgment it is unlikely that Mr Smailes made a promise to this effect, as the claimants did not have plans, but I accept that such was Mrs Williams' genuine recollection.

26. Accordingly, my conclusion is that after the meetings in March, the parties had differing perceptions as to what had been agreed and differing expectations as to what would happen in the future. The subsequent exchange of emails and letters in May lend some support to that conclusion. Unfortunately, these differences set the scene for what was to come.

27. The claimants wasted no time in obtaining the requested report. They instructed a design consultant, Stuart Murray, who visited No 14 on 22 May and the next day set out in a letter to the defendant the works completed and to be completed. In summary, the former included re-routing electrical and plumbing systems to facilitate the relocation of the rooms, which had been carried out by certified electricians and plumbers. It was said that insulation would be installed in the suspended ceilings providing sound and heat insulation. It was confirmed that the new door had been installed in a non-load-bearing wall. These works remained to be completed and sanitary fix, plasterwork, installation of the kitchen and decoration remained to be carried out. Mr Murray indicated that these works would assist Mrs Poyner-Smailes if and when she would need to use a wheelchair in the home.

28. The claimants also obtained written confirmation dated 9 June from a consultant engineer, Ashley Rogers, that the new door had been adequately constructed in a non-load-bearing wall and did not affect any structure over. They sent a copy of the reports to the directors by email dated 10 June, and requested them to confirm consent to the completion of the works. They stated that they would install acoustic insulation to all party walls. It was arranged for Mr Connelly and another director to visit No 14, which they did on 11 June. However, when the directors met on 30 June, they agreed to instruct Miss Gwilliam to enforce the lease if the works were recommenced.

29. Some weeks later, the defendant's directors called a meeting on the basis that a number of residents had expressed concerns regarding the works, still on hold, which were to be completed at No 14. A note dated 17 August was circulated to residents beforehand setting out the updated position with regard to the works. Miss Gwilliam accepts that the note might well have been drafted by her on instruction by the defendant and Mrs Slack confirmed that such was indeed the case. The note set out the background, clause 4.7 of the lease, and the nature of the works. It also included the following passages:

> "The new tenants have, via their solicitors, suggested that these changes are needed due to the disability of one of the tenants, who we understand uses a wheelchair, and that those works are necessary to accommodate the flat [to] her needs.
>
> Your board of directors are aware of a number of flats which remain in their original configuration, and where wheelchair users either reside or are frequent visitors there, and that the configuration, and indeed placement of the doors, does not present an obstacle or prevent them from using the flat in any way. It would seem therefore that the works being undertaken arise out of a wish to apply their own design for their [own] personal use, and yet will create difficulties for the flats around them, where, for example, a bedroom which would have been next to a quiet sitting room lounge area is now immediately adjacent to the kitchen and its attendant noise level."

30. The note ended as follows:

> "Whilst the directors have every sympathy with these tenants and in particular any disability, it has obligations to ensure that other tenants are not affected particularly in circumstances where the flats original configuration is no bar to occupation, and indeed that configuration would have been known to the tenants

> at the time that they purchased the flat. They would also, or course, been aware of the limitations and restrictions contained under the lease.
>
> The directors are committed to taking further action, so therefore a meeting has been called so that all tenants can be made aware of the current position, and in order to respond to a number of queries raised. The decision remains that of the board of directors."

31. Miss Gwilliam in cross-examination was initially reluctant to accept that the reference in the note to a "wish" to apply the claimants' own design to the flat suggested that there was no need to do so on account of disability. She was then referred to a letter which she subsequently wrote to Mr Smailes on 1 December 2016, when these proceedings were in progress, in which she said:

> "I am not persuaded by the evidence put forward to date that you are able to overcome the hurdles as set out in the legislation, and in particular whether these adaptations are necessitated by Mrs Poyner-Smailes' disabilities (such as they may prove to be) or whether these are simply a desire on your part to use the flat for your lifestyle, rather than it being the only way in which the flat can be used. You will also, of course, have to provide evidence to the judge as to why you purchased a flat which was so clearly inappropriate for Mrs Poyner-Smailes at a time when her illness had been diagnosed for many years, and where the lease does not allow those adaptions."

32. Miss Gwilliam then accepted that it was a concern of the defendant that the claimants were simply seeking to make a lifestyle choice, and that the view taken was why buy an unsuitable flat which needed works when there was a prohibition against such works in the lease. Several of the defendant's witnesses in cross-examination also went some way in accepting that was the concern.

33. The claimants felt the need to respond to the note, as they took the view that it was inaccurate in some respects. They wrote to all residents on 17 August, enclosing inter-parties' correspondence and copies of the reports which they had obtained. Their letter summarised the medical conditions of Mrs Poyner-Smailes, which it was said had an impact upon her needs in her home. The sole reason for the works, it was said, was to allow her to move around the flat independently. The following passages were included:

> " We are not clear on the exact complaints made against the works. We are only aware of one resident who has complained about the works and have addressed the concerns raised by the additional works we have done.
>
> In order to ensure that the initial complaint issues were addressed and permission was granted we have installed acoustic insulation throughout our property at great cost and have even offered to further insulate the party walls and chimneys to ensure there was no disruption to other residents.

> Also we have offered to use whichever waste pipe that is stipulated to dispose of our kitchen waste to ensure that there is no impact on the plumbing as there are a number of waste pipes in the locality of the proposed kitchen as many kitchens already face the courtyard."

34. Under a heading "Moving Forward" it was stated;

> "We note from the memo that a number of residents have concerns regarding the work. This concerns us greatly as we have not been made aware of this by the committee and in fact everyone we have discussed the works with have been extremely supportive and understanding, especially about the need for them. We are more than happy to alleviate any concerns, so if you do have any concerns about the works we would be happy to sit down and talk to you about them and show you around our property. Please do come and speak with us if you see us around, or feel free to knock but at present due to the delays and the absence of a functioning kitchen we are living in a rented apartment a short distance away but would be happy to come and meet with anyone who wishes to discuss the matter at a time that is convenient to them."

35. Written notice of the meeting, described therein as an extraordinary general meeting and also as an informal meeting, was sent out at short notice for 19 August at 7.00pm. It was held in the main hall of Clewer Court, and a table and chairs were set out. About 25 people attended, including the claimants and, to assist them, Mr Crowhurst.

36. Amongst the defendant's witnesses who attended the meeting were Miss Gwilliam, Mr Connolly, Mrs Williams, Mr Tizzard, Mrs Slack and Mrs Hutchings. These witnesses said in evidence that there was considerable sympathy for the claimants and their predicament. However, there was general acceptance by these witnesses that residents voiced concerns over the works. There were no minutes retained, but Mr Crowhurst made some written notes about the meeting shortly thereafter.

37. In the notes he says that, after introductory remarks from Mr Connolly, the residents were asked to comment. The main concerns voiced in response related to noise, not from the works but from the use of No 14 in the reconfigured room allocation: namely, that high levels of noise would be made in rooms which were previously quiet. Miss Gwilliam made reference to the absolute nature of clause 4.7. At some stage, Mrs Poyner-Smailes became visibly upset. Mr Crowhurst felt that thus far the meeting had focussed on reinforcing the opinions of residents rather than giving the claimants an opportunity to state their case. When he tried to redress the balance, the chair initially took the view that he should not be allowed to speak as it was only an informal meeting, but he persisted. The key points he made related to the 2010 Act, that there are different needs amongst disabled people, and that such people have a right to expect reasonable adjustments for the use of their property. There then followed more comments from residents along much the same lines as before. These did not address specifically the disability issues and Mrs Poyner-Smailes became extremely upset. The meeting was drawn to a close with the chair indicating that the directors would have a further meeting. Mr Crowhurst handed copies of a paper which he had prepared on the 2010 Act to Miss Gwilliam.

38. Mr Crowhurst was tested in cross-examination about his recollection and he accepted that now it was not that clear. However, he confirmed that he didn't feel that a balanced approach was achieved at the meeting. When he was re-examined, he described the meeting as "spikey" and said that he did not feel that equality issues were at the heart of the discussion. He was trying to deal with these, but he did not get the impression that there was any real understanding of these issues at the meeting.

39. In my judgment Mr Crowhurst was an impressive witness. He gave his evidence in a straightforward way and made appropriate concessions. His evidence was supported by a full note which he wrote shortly after the meeting. Although he was there to assist the claimants in a voluntary capacity he had had no prior involvement and no vested interest. In my judgment his note is likely to represent a fair recollection of the main points of discussion, and the tone of the discussion, at the meeting. Miss Gwilliam accepted in cross-examination that it was unlikely that the issue of disability was clearly in the minds of the residents at this meeting, and that their principal concern was the effect on other flats. I accept the evidence of Mr Crowhurst about the meeting.

40. After the meeting, the claimants instructed solicitors who wrote to Miss Gwilliam's firm in late August and early September because they were concerned that a stalemate seemed to have been reached. They offered mediation as a way forward but received no response. Accordingly, their solicitors wrote again on 23 September saying they wanted the matter to proceed amicably but, should no response be received within 7 days, they would proceed with court action. On 2 February 2015, the claimants' solicitor again requested permission for the works to be completed.

41. The proposal for mediation was accepted and correspondence ensued between solicitors. A date was eventually set for 22 July 2015. A month or so beforehand the claimants sent to Miss Gwilliam copies of the reports previously sent but also a copy of an occupational therapist's report containing sensitive information on Mrs Poyner-Smailes' disability expressly for the purposes of mediation and any subsequent litigation only. That set out why she would be at a considerable disadvantage in using No 14 without the changes brought about by the works.

42. In July 2015, the claimants issued the present proceedings to protect their position, but immediately sought and obtained a stay on the proceedings.

43. Following mediation, which did not bring a resolution, the claimants agreed to commission further reports, on drainage and noise. The former, dated 9 September 2015, was again from Mr Rogers. It was after he had paid another visit to No 14 on 1 September and met with Mr Chicot, who had by then become company secretary and wanted reassurances on two points. First, that the proposed relocation would not overload the drain run in the immediate vicinity or into the main drain. Second, that Building Regulation approval would be obtained or confirmed as not required. The report of Mr Rogers gave those assurances and confirmed that such approval was not required.

44. The latter report was dated 4 January 2016 from an acoustic engineer, Phil Trew. The report concluded that the works would achieve a significantly higher standard of sound resistance than previously achieved. The level of sound transmitted through the floor to the apartment above would be reduced by 75%. The party walls were of 9inch bound brickwork and the transmission of noise though them after the completion of the works would be no worse. There would be no adverse effect from the proposed works.

45. After the directors had considered these reports, Mr Chicot represented the defendant at a meeting with Mr Smailes later that month. He asked for more detail of how the works would be implemented and raised for the first time the costs of the defendant in monitoring such implementation. He suggested that the claimants contacted Mr Crowhurst, which they did. Mr Crowhurst's background was quantity surveying and he suggested an independent surveyor.

46. Mr Chicot was cross-examined as to why it was being suggested that yet another professional be engaged. He said that he accepted that the reports on drainage and noise which the claimants had obtained indicated that the works could be completed without harm to other residents. However, he wanted those reports reviewed, and the completion of the works monitored, by a surveyor engaged on behalf of the defendant but paid for by the claimant. He could not point to a previous occasion when such a report had been requested at the occupier's expense when permission for alteration had been sought.

47. In March 2016 the claimants obtained Building Regulation approval for relocation of "kitchen to existing living room for disabled person."

48. The costs of professional input on behalf of the defendant was dealt with by Miss Gwilliam in a letter to Mr Smailes dated 14 June 2016. Reference was made to clause 4.14 of the lease, which reads:

> "The Tenant will pay all reasonable costs and expenses of the Landlord (including all solicitor's and surveyor's costs and fees) incurred in granting any consent under this Lease."

49. In her letter Miss Gwilliam set out the costs of a surveyor as £750 plus VAT, "together with a possible disbursement of an acoustic engineer report, as yet unknown, pending sight of the works. Her firm's costs were estimated as £1,170 including VAT.

50. A course of correspondence ensued on the issue, in which Mr Smailes reminded Miss Gwilliam that it was the defendant who suggested the drainage and acoustic experts for the claimants to instruct. Mr Chicot accepted this in cross-examination and also accepted that it was not indicated then that the defendant may wish to instruct further experts at the further cost of the claimants. Mr Smailes also stated in correspondence that he had checked with these experts and each had professional indemnity insurance. He confirmed that the claimants would undertake to exercise their rights against them if necessary. As for monitoring the implementation of the works, Mr Smailes emphasised that as Building Regulations approval had been given, the control officer would monitor the works.

51. When he was cross-examined about obtaining further reports, Mr Smailes said that each time they obtained a report, they did so in good faith thinking that that would be the final report which was necessary. They had spent a good deal of money in obtaining such reports. When the request was made for reports on behalf of the defendant to be paid for by the claimants, the couple thought at the time that this was shifting the goal-posts, to use his phrase.

52. The claimants asked the defendant to call another extraordinary general meeting to consider their proposed resolutions that, by reason of the disability of Mrs Poyner-Smailes, the alterations set out in schedule 1 (which comprised the works) be allowed subject to their undertakings set out in schedule 2. These included undertakings to

complete the works as detailed in the reports of the drainage and acoustic experts. The meeting was held in a local church hall at 7pm on 1 July 2016. Just before the meeting the stay on the proceedings expired.

53. At this meeting Mr Smailes explained aspects of the disability of his wife and referred to the occupational therapist's report. Mr Chicot indicated that as this had been disclosed for limited purposes, not all of the residents were familiar with its contents. Mr Smailes felt constrained to read excerpts from it, including such personal details as difficulties in going to the bathroom. This caused upset to his wife. Mr Chicot responded by saying that the directors did not support the resolutions because of the lack of clarity on the details of the proposals and the claimants' refusal to pay for the defendant to appoint professional advisors as provided for in the lease. Mrs Poyner-Smailes raised the need for such advisors as the defendant could rely on the reports obtained by the claimants, and there was an issue of reasonableness in incurring further costs. A poll was taken and it was announced that the resolutions had not been passed. The claimants were the only residents who voted in favour of the resolution.

54. Efforts by the parties to find a solution continued. A further mediation was agreed for May 2017. The claimants agreed that the occupational therapist's report could be circulated to residents in order better to explain Mrs Poyner-Smailes' complex disabilities, and a redacted version was circulated at the beginning of 2017. By this time, she was pregnant and disclosed this to Miss Gwilliam, who wrote to Mr Smailes on 15 May 2017 pressing him to give permission to disclose that fact to the residents as some had guessed the position. Mr Smailes replied saying that as the issue would arise during the mediation, they did not object to the directors knowing, but any queries from the residents should be directed to him and his wife. The further mediation took place that month but did not result in a settlement.

55. These proceedings also progressed, as the stay had been lifted. Case management directions were given for the progress of the claim but at that same time the court ordered that at all stages the parties should consider settling this litigation by alternative dispute resolution, including mediation. Pursuant to directions, the parties jointly instructed medical, occupational therapy and structural experts in the proceedings. Unfortunately, the parties were not able to settle the proceedings.

56. However, at a late stage, it has been admitted on behalf of the defendant that Mrs Poyner-Smailes has a disability within the meaning of the 2010 Act, that as a result she was at a substantial disadvantage when occupying No 14 in its original state, and that the adaptions comprised in the works were both reasonable and necessary to lessen that disadvantage. It is, to say the least, highly regrettable that it has taken some four years for that position to be recognised. As a result, it is not necessary to deal in detail with the expert evidence filed in these proceedings.

57. Nevertheless, it is pertinent to cite extracts from paragraph 4.3 of the joint report of Alex French, a Chartered Building Surveyor who specialises in adaptions to the accommodation of disabled persons, as to how the completion of the works and the use of No 14 thereafter might impact on other residents, and how such use may be to the advantage to Mrs Poyner-Smailes:

> "As there was minimal structural work necessary for the proposed adaptation works, the impact from the works already completed and on any future works was and would be minor. The proposed works involve no more disruption than any other

> periodic, general refurbishment work that may be carried out to any of the adjacent flats…
>
> Following the completion of the proposed works the 2nd Claimant would have a greatly enhanced quality of life with a reduced risk of falls and of accidents during food preparation. She will also have easier and faster access to her son and to the bathroom during the night…
>
> As stated above, the impact, either visually or from noise and/or odours, would be negligible for the other residents of Clewer Court."

58. The main claim, and the only claim originally advanced, is that the defendant as controller of let premises (referred to as A in the relevant statutory provisions) is in breach of its duty under section 20 (3) of the 2010 Act, as further provided for in Schedule 4 thereof, to make reasonable adjustments in respect of that disability.

59. That subsection imposes a requirement:

> "…where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage."

60. Schedule 4 then makes further provision. By paragraph 2(3) the above reference to a provision, criterion or practice includes a reference to a term of the letting. By paragraph 2(7) if such a term that prohibits the tenant from making alterations puts the disabled person at such a disadvantage, A is required to change the term only so far as is necessary to enable the tenant to make alterations to the let premises so as to avoid the disadvantage.

61. There is no dispute that these provisions apply to clause 4.7. However, the defendant relies on the next sub-paragraph, 2(8), in submitting that it is not in breach of the duty by refusing to give consent to the works. That provides:

> "It is never reasonable for A to have to take a step which would involve the removal or alteration of a physical feature."

62. It is not in dispute that elements of the works do involve removal or alteration of physical features. Paragraph 2 (9) provides for limited exceptions such as the provision of a door entry system or the replacement of a tap or door handle, but the works go far beyond these exceptions.

63. Miss Jolly QC for the claimants submits that as all that is required of the defendants is to consent to the carrying out of the works by the claimants, the step which the defendant has to take does not involve the removal or alteration of a physical feature. Such an interpretation is consistent with the clear intention shown in paragraph 2(7) which is to enable the disabled tenant to make necessary alterations to remove any substantial disadvantage in the enjoyment of the tenant's home.

64. Miss Walters for the defendant submits that such consent does involve such removal or alteration, even though the removal or alteration or removal will be carried out by or on behalf of the claimants. Had it been the intention to provide only that it was unreasonable for A to have to remove or alter a physical feature then it would have been very simple to word the provision accordingly.

65. In order to consider these opposing submissions, it is necessary to have regard to the legislative history of paragraph 2(8). The first provision dealing with the matter was introduced by the Disability Discrimination Act 2005 (the 2005 Act) which inserted section 24(E) into the 1995 Act of the same name (the 1995 Act) as follows:

> "..it is never reasonable for a controller of let premises to have to take steps consisting of, or including, the removal or alteration of a physical feature."

66. The Explanatory Notes to the 2005 Act explained the extent of the duty thus, with original emphasis:

> "These duties would <u>not</u> require the making of any alteration to the physical features of premises by a landlord or manager (see new sections 24E (1) and 24J(5)). However they may place a controller of premises, in any appropriate case, under a duty to change or waive a term of the letting which prohibits any alteration to the premises, to the extent necessary to allow a tenant, with the consent of the landlord to make (at his own expense and subject to reasonable conditions including conditions as to reinstatement) alterations needed by reason of the disabled occupier's disability."

67. The Disability Discrimination (Premises) Regulations 2006 SI 2006/887 were then enacted to set out the circumstances in which it was reasonable for a landlord to have to modify or waive such a term. The Explanatory Memorandum thereto stated that the policy intention was to enable disabled people to rent and enjoy premises in a similar way as non-disabled people, by removing barriers to such enjoyment. It was again emphasised that the duty did not extend to steps that would involve the removal or alteration of a physical feature "by the controller of premises." The applicable guidance to this legislation, the Disability Rights Commission Code of Practice, emphasised that the 2006 Regulations provided that such change may have to be made where it would be reasonable for a disabled tenant to make an improvement, and gave the example of a landlord changing a prohibition against alteration to allow the tenant to install a stairlift.

68. Accordingly, it is clear, and in the end there was no real dispute about this, that the scheme in force immediately prior to the 2010 Act required a landlord, where the other requirements were fulfilled, to consent to alteration of the demised premises by a disabled tenant at the tenant's own expense.

69. Miss Jolly submits, that notwithstanding a change of wording in paragraph 2(8), the clear intention is to continue the previous scheme. This is clear from the Explanatory Note thereto which states that it has two main purposes – to harmonise discrimination law, and to strengthen the law to support progress on equality. There is nothing to indicate that a narrower duty than previously obtained was intended, so that it is now never reasonable for a landlord to have to consent to the removal or alteration of a

physical feature even where the removal or alteration was to be carried out by the disabled tenant at his or her own expense.

70. Moreover, the submission continues, there is a strong presumption that the legislative intention in enacting paragraph 2(8) was to comply with UK international treaty obligations (see, for example, *Assange v Swedish Prosecution Authority* [2012] 1 AC 471 at paragraph 122).

71. Such obligations arise under the UN Convention on the Rights of Persons with Disabilities, ratified by the UK in 2009 and directly applicable. The Convention recognises that barriers to independent living are a significant obstacle to disability equality. In particular, Articles 19 and 28 respectively recognise the right of persons with disabilities to choose their place of residence on an equal basis with others, and to an adequate standard of living and continuous improvement of living conditions.

72. Such obligations also arise under the European Convention on Human Rights (EHRC) incorporated into UK law by the Human Rights Act 1998 (the 1998 Act). The right of individuals to the right of respect for the home under Article 8 has been interpreted as including occupation of premises and enjoyment of the home without interference. Article 14 provides a right of non-discrimination on the grounds of disability in this regard. By sections 3 and 6 of the 1998 Act, the court must read and give effect to the 2010 Act in a way which is compatible with the EHRC.

73. Miss Walters, on the contrary, submits that the duty imposed by the 2005 Act was described as of limited nature by the Court of Appeal in *Dee Thomas-Ashley v Drum Housing Association Limited* [2010] EWCA Civ 265, as was said to be apparent from the predecessor to paragraph 2(8). I do not derive a great deal of assistance in this case from those observations, which were made on very difference facts involving not the alteration or removal of physical features, but the keeping of pets.

74. Moreover, Miss Walters mainly relies upon the change of wording brought about by paragraph 2(8), from the previous "take steps consisting of, or including, the removal or alteration of a physical feature" to "take steps which would involve the removal or alteration of a physical feature." She describes this as a fundamental and deliberate change which can only be read as a widening of the exception to the duty to make reasonable adjustments. Any other interpretation would impermissibly stretch the meaning of the express words. She points out that the Explanatory Notes to the 2010 Act provides that the duty " does not require the removal or alteration of a physical feature, and makes clear what are not "physical features" for these purposes." She relies also upon the deliberate omission of the words "by a landlord or manager," which were expressly included in such notes to the 2005 Act.

75. She further submits that if the claimants' contention is correct, then far too high a burden would be placed upon landlords who could find their own interests put at risk to accommodate the needs of those who have voluntarily chosen to purchase a property they know not to be suitable for their needs and with knowledge of the prohibition. Once a disabled tenant could show that the works were reasonably required so as to avoid a relevant disadvantage, the landlord would have to permit such alteration irrespective of the impact upon his or her own interest or that of neighbouring residents. That cannot have been the intention and that was the reasons for the deliberate change of wording.

76. The starting point to the correct interpretation of paragraph 2(8) in my judgment is to recognise that it is an exception to the statutory duty under the 2010 Act for a controller of let premises to change a prohibition against alteration insofar as is necessary to enable a disabled tenant to make alterations so as to avoid substantial disadvantage. Moreover, the exception is absolute in its terms, in that is never reasonable for such a controller to have to take the excepted step. The excepted step is one which would involve the removal or alteration of a physical feature.

77. In my judgment, the ordinary meaning of the word "involve" is wide enough to embrace the meanings of "include" and "comprise." These meanings are also listed in the Oxford English Dictionary under the word "involve.". Accordingly, I do not accept that the change of wording is fundamentally different to that in the previous scheme. On an ordinary reading of paragraph 2(8), the position remains that the exclusion is limited to circumstances where the step to be taken by the controller would involve the removal or alteration of a physical feature. Consent for the claimants to carry out the works does not involve such removal or alteration. It involves only a decision to consent to such works.

78. Furthermore, the express purpose of the 2010 Act, to harmonise discrimination law and to strengthen the law to support progress on equality, is a further indication that the claimants' interpretation is to be preferred. The achievement of those purposes would be hindered, rather than promoted, if paragraph 2(8) were to be construed in the way contended for by the defendant, which would impact significantly and adversely on the choice of accommodation by those with disabilities. Conversely, in my judgment there is no basis for concluding that the purpose in the change of wording was a recognition that the previous scheme put too high a burden on landlords. The duty under section 20(3) is only to take such steps as is reasonable to avoid the disadvantage. In arriving at the value judgment as to what is reasonable, the interests of the landlord and neighbouring residents will continue to be taken into account.

79. If further support for the claimants' interpretation is needed, it is in my judgment to be found in the international obligations referred to in paragraphs 70 and 71 above and in the strong presumption that the legislative intention is to comply with those obligations. The defendant's interpretation of paragraph 2(8) would in my judgment place an undue restriction on the claimants' rights to choose and enjoy their home under those articles.

80. In order to consider whether clause 4.7, or the defendant's practice in respect of it, puts Mrs Poyner-Smailes at a substantial disadvantage within the meaning of section 20(3), a comparison must be made with persons who are not disabled. It is clear in my judgment from the report of Mr French that the prohibition on alteration deprives her of a greatly enhanced quality of life in the enjoyment of her home. Compared to how a person who is not disabled would be able to enjoy No 14 as his or her home without the works, that amounts to a significant disadvantage.

81. In conclusion on this main part of the claim, therefore, in my judgment the defendant is and was in breach of its duty under section 20(3). Consent should have been given for the works at the latest when the drainage and acoustic expert reports were made available in 2016. I do not consider it was reasonable for the defendant then to require the claimants to pay for further professional input to review these reports or to monitor the works. I do not consider such costs would have been reasonable within the meaning of clause 4.14, for several reasons. First, the reports already obtained by the claimants at significant costs were obtained at the request of the defendant. Second, the drainage

and acoustic reports were obtained from certified and insured professionals suggested by the defendant. Third, there was no suggestion at that time that the claimants may be required to pay for further input from professionals engaged on behalf of the defendant. Fourth, the ambit of the works was relatively limited. Fifth, such a requirement had not previously been imposed by the defendant when dealing with applications for permission. Sixth, the defendant did not raise any concerns about the reliability of the reports.

82. I turn now to consider the other claims under the 2010 Act, which were first raised in amended particulars of claim dated 9 September 2017. These are:

    i) That the defendant unlawfully discriminated against Mrs Poyner-Smailes by refusing to consent to the works when they had given permission in respect of other flats in similar circumstances, contrary to section 13 or 15;

    ii) That the defendant unlawfully harassed her contrary to section 26 by creating an intimidating, hostile, degrading and humiliating environment for her;

    iii) That the refusal of permission, requiring the works to be stopped, and unreasonable delay in dealing with the issue amounted to victimisation of Mrs Poyner-Smailes contrary to section 27.

83. Section 13(1), so far as relevant, provides that a person (A) discriminates against another (B) if, because of disability, A treats B less favourably than A treats or would treat others. Section 15(1) provides that A discriminates against a disabled person (B) if (a) A treats B unfavourably because of something arising in consequence of B's disability, and (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

84. Section 26(1), so far as relevant, provides that A harasses B if (a) A engages in unwanted conduct related to disability and (b) the conduct has the purpose or effect of – (i) violating B's dignity, or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B. Section 26(4) provides that in deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account – (a) the perception of B; (b) the other circumstances of the case; (c) whether it is reasonable for the conduct to have that effect.

85. Section 27 (1) provides that A victimises B if A subjects B to a detriment because (a) B does a protected act, or (b) A believes that B has done, or may do a protected act. The following subsection provides that a number of acts amount to a protected act, including bringing proceedings under the 2010 Act or giving information in connection therewith or making an allegation, express or otherwise, that A or another person has contravened the 2010 Act.

86. A limitation point is raised by the defendant in respect of these additional claims which were first made in September 2017. Section 118(1) of the 2010 Act, so far as relevant, provides that such claims may not be brought after the end of – (a) the period of 6 months starting with the date of the act to which the claim relates, or (b) such other period as the court thinks just and equitable. By virtue of subsection (6) for the purposes of the section – (a) conduct extending over a period is to be treated as done at the end of the period; (b) failure to do something is to be treated as occurring when the person in question decided on it.

87. The defendant submits that the refusal of permission is a single act and the last date on which this can be said to have occurred is at the EGM in July 2016. The negative vote was a defined act in response to the claimants' request in February 2015 for permission. These claims should have been commenced by December 2016. Although the court has discretion to extend the time which is to be widely interpreted and whilst there is no list of factors to be taken into account, the length of and reason for the delay, and any prejudice to the other party will usually be relevant (see *Hewlett v Chief Constable of Hampshire* [2018] 10 WLUK 209). The defendant relies upon the fact that while the claim form was issued by the claimants in person, the particulars of claim which set out the original claim only was settled by counsel. However, apart from the fact that the defendant would be faced with claims substantially more extensive than the original claim, no specific prejudice is relied upon.

88. For the claimants, it is submitted that the defendant was responsible for an ongoing situation in which the refusal has continued to the present day. The substance of the claim must be focused upon, rather than individual allegations. A relevant factor is whether the same individuals were involved (see for example *Aziz v FDA* [2010] EWCA Civ 340). With particular reference to the harassment claim, the claimants were forced to move out of No 14 in May 2017.

89. I prefer the submissions of the defendant as to whether the additional claims have been brought in time. In my judgment the vote taken in July 2016 was clear and decisive. Although efforts continued to find a solution, the refusal as I have found amounted to a breach of the duty under section 20 (3) and that is recognised by the claimants progressing these proceedings and filing particulars of claim in September 2016. Each of the acts on the part of the defendant (as opposed to consequences and apart from the letter in May 2017 concerning Mrs Poyner-Smailes' pregnancy) in the additional claims had occurred by then. In my judgment they should have been included in those particulars and are out of time.

90. The next question is whether I should extend time. In my judgment it is significant that the additional claims are between the same parties and in essence arise from the same facts, namely the refusal to consent. Although in the harassment claim there are specific acts relied upon, the heart of that case remains the refusal. The delay is a matter of months, but that is in the context of a very tight primary period for claims to be brought. In my judgment there is little if any reason why the additional claims were not included with the original claim. The fact that both parties have been continuing efforts to find a solution is a factor which mitigates in favour of the exercise of discretion, as does the fact of and nature of Mrs Poyner-Smailes' disability (see *Department of Constitutional Affairs v Jones* [2008] IRLR 128). An important factor is the lack of any specific prejudice to the defendant, other than the general one identified.

91. Balancing all these factors, I have come to the conclusion that it is just and equitable to extend the period to the time when the additional claims were added by amendment.

92. In respect of the direct discrimination claim under section 13, the first question is whether the defendant has treated Mrs Poyner-Smailes less favourably than it has treated others, and in particular other residents to whom it has granted permission for structural alterations without the requirement to pay for professional input on behalf of the defendant.

93. Documentation was included in the bundle relating to such permissions from 1988 to 2017. As indicated, permissions were given in some instances for the removal of walls,

although most were for more minor alterations. However, on the face of the documents, in none of the cases was permission given to relocate a kitchen into another room in the flat. In his oral evidence, Mr Chicot suggested that in each of the flats in Clewer Court the kitchen is placed below or above the kitchen of another flat, so that a quiet room is not above or below a kitchen. The way that Mr Tizzard put it was that "most flats have kitchens above kitchens," and that in my judgment is the more likely situation where a large Victorian building has been converted into flats.

94. The most substantial permission given in respect of other flats was that in respect of Flat 17 where permission was given to sub-divide the flat into two separate flats. There is scant documentation available to show how the new kitchens were to be positioned. Mr Chicot in oral evidence said that the kitchens in the two new sub-divided flats were underneath the kitchen in the flat above.

95. In my judgment, in respect of the works in these proceedings, the residents had a genuine and reasonable concern that the relocation of the kitchen would have an unacceptable adverse impact in terms or noise and drainage. In the end the reports obtained by the claimants showed that that concern was unjustified. Once that position was obtained, the refusal could no longer be justified on those grounds. From then on, the defendant's treatment of Mrs Poyner-Smailes position was less favourable than treatment given to the occupier of Flat 17.

96. However, in my judgment it is likely that that treatment arose from focussing too much upon the residents' concerns about the impact on them rather than because of Mrs Poyner-Smailes' disability. The claimants' case is that the defendant in dealing with those concerns gave no adequate consideration to that disability and it is my judgment it did not. The treatment was also due in part to undue reliance upon the prohibition in clause 4.7 and a failure to accept that the 2010 Act might require the defendant to give permission for the works despite that clause.

97. In my judgment, the defendant's witnesses when they gave evidence that the attitude of the directors towards Mrs Poyner-Smailes' disability was one of sympathy came across sincerely. The difficulty was that not enough was done to demonstrate that sympathy or to act in way that was required by the 2010 Act.

98. Miss Jolly's submission is that it can and should be inferred from a number of factors that the unfavourable treatment was because of disability. The factors are: the doubts (until very late in these proceedings) of some of the defendant's witnesses as to the severity of the disability and the need as opposed to the wish for the works; the way in which the August 2014 and July 2016 meetings were conducted; and the suggestion that the claimants should never have bought the flat. In my judgment there is force in each of these criticisms. However, these arose in the context of a misunderstanding of the need for consent, the commencement of the works without consent, genuine and reasonable concerns about noise and drainage issues arising from a relocated kitchen and a genuine (but unreasonable) view that the claimants should, under the lease, pay for the defendant to review and monitor the reports and implementation of the works. It is also clear that the view taken as to the absolute terms of the lease and, later, on the meaning of paragraph 2(8) was taken after the defendant had sought legal advice. In my judgment, it is not in these circumstances proper or fair to infer direct discrimination, and accordingly, the section 13 claim has not been made out.

99. Similar considerations apply to the section 15 claim. Miss Jolly submits that the question for the court is whether reliance on the lease is genuine, or as she submits "a

fig leaf for the underlying decision that these adaptions would simply not be permitted." That proposition was put to the defendant's witnesses and denied. Most impressive on this point was Mrs Hutchings who made a number of concessions in cross-examination. When this was put to her, she replied in a quiet and measured but firm way " I won't have that." I accept her evidence, and that of the defendant's other witnesses on this point.

100. It is right to say, as Miss Jolly does, that the defendant could at any time have said that the prohibition in clause 4.7 would be waived subject to a condition that a surveyor signed off the final works. The fact that it did not can be criticised but, again, in my judgment it is not proper or fair to infer discrimination for the purposes of section 15.

101. As for harassment, the unwanted conduct relied upon is, in essence: the way in which Mr Tizzard came uninvited into Flat 14 in March 2014; the defendant's attitude to her disability and the need for the works; the way in which the August 2014 meeting was conducted; an abusive phone call from a neighbour after that meeting; the actions of some of the directors thereafter at various times staring at Mrs Poyner-Smailes or stopping conversations as she passed; looking through the window of Flat 14 and talking outside; the manner in which the occupational therapist's report was dealt with at the July 2016 meeting; and the disclosure of her pregnancy to the residents.

102. As Miss Walters submits, it is the conduct of the defendant which is relevant rather than that of any individual not acting for the defendant. Nevertheless, I am satisfied that the way that aspects of how the matter was dealt with by the defendant amount to unwanted conduct related to the disability.

103. In particular, the way in which the August 2014 meeting was conducted by or on behalf of the defendant and the failure to give the claimants an adequate opportunity to deal with the need for the works in the light of Mrs Poyner-Smailes' disability, in my judgment amounted to unwanted conduct related to that disability. In deciding whether that conduct had the effect referred to in section 26, regard must be had to the factors set out in section 26 (4). I accept that that was her genuine perception and that it was reasonable for the conduct to have that effect. But regard must be had to other circumstances of the case. Those circumstances include the genesis of the dispute, in respect of which I have already made findings. There was a genuine misunderstanding in March 2014 which gave rise to a good deal of frustration and possibly some resentment on both sides when the works were commenced by the claimants without permission and then summarily stopped by the defendant.

104. Nevertheless, I have come to the conclusion that the conduct of the meeting as set out above had the effect (although, as I have found, not the purpose) of creating a humiliating environment for Mrs Poyner-Smailes. This in turn caused her real upset.

105. Although now, with hindsight, the claimants see events which took place prior to that meeting as part of such conduct, I am not satisfied that at the time these had the effect of creating the sort of environment within the meaning of section 26 (1) (b) (ii). The claimants in their note prior to the meeting talked of sympathy and understanding which they had been shown in discussing the works up to that date. That changed in the meeting.

106. The conduct of individuals thereafter may be seen as the result of such an environment. However, I am not satisfied, that this amounted to conduct which the defendant can be said to have engaged in. As for the July 2016 meeting, Mrs Poyner-Smailes also became

upset in that meeting, and I am satisfied that aspects of how the meeting was conducted caused her some humiliation. However, in my judgment the claimants, understandably, wanted their proposed resolutions voted upon by residents. In order properly to consider those resolutions and to address the inadequacies of the August 2014 meeting, it was necessary for the residents to know details of her disability. Although this could have been handled more sensitively, I am not satisfied that when Mr Chicot pointed out that not all of the residents had read the occupational therapist's report, that amounted to unwanted conduct within the meaning of section 26. Similar considerations apply to the disclosure of Mrs Poyner-Smailes' pregnancy. As the claimants realistically accepted at the time, and as referred to in the report of Mr French, this was a relevant factor in the need for the works. Again, this could have been handled more sensitively, but I am not satisfied that the defendant's handling of it amounted to unwanted conduct which had the effect referred to in section 26.

107. As for victimisation within the meaning of section 27, it is clear that the defendants were aware shortly after the August 2014 meeting, that the claimants may bring proceedings. It is also clear that the fact that proceedings had been commenced had an influence on the defendant in the run up to the July 2016 meeting. Some of its witnesses admitted as much. Again, in my judgment it is not a proper and fair inference that that resulted in victimisation of Mrs Poyner-Smailes by the defendant.

108. Finally, a claim is made that the defendant is estopped from denying the claimants' right to carry out the works because of representations they say were made to them in March 2014. In light of my finding that the refusal amounts to a breach of the defendant's duty under section 20(3), this part of the claim is now not so important. For the sake of completeness, I shall deal with it but will do so shortly.

109. I have already made findings as to what occurred on 28 March 2014. I am not satisfied that there was a sufficiently clear representation on that day to found an estoppel claim. It is also said that Mrs Slack, a director, told Mrs Poyner-Smailes at about the same time that the lease was old and vague and would not prevent alteration as long as it had no effect on structural integrity. Mrs Slack accepted that she did have a conversation with Mrs Poyner-Smailes at the time when the latter said she thought the lease was old-fashioned and should be rewritten. She accepts that she may have joked about some of the terminology used in the lease, such as "persons of immoral character," but firmly denied making the representation alleged. In my judgment it is likely something was said about the prohibition, but this appears to have been an informal and light-hearted conversation and I am not satisfied that a representation was made on behalf of the defendant which was sufficiently clear to found an estoppel.

110. Therefore, the main claim succeeds, as does the claim under section 26 as to the conduct of the August 2014 meeting by or on behalf of the defendant. Apart from that however, the additional claims do not succeed. It was agreed at the end of the hearing that, if necessary, arrangements will be made for another hearing to deal with consequential matters including the question of relief and those arrangements have been made.

111. I am grateful to counsel for their respective presentations during the hearing and their subsequent thorough written submissions which I have found to be very helpful in coming to this determination.