

IN THE COUNTY COURT AT OXFORD

Case No: J00RG332

Date: 24 September 2024

B e f o r e:

HER HONOUR JUDGE MELISSA CLARKE

B e t w e e n :

MISS HELEN JILLIANS

Claimant

- and -

RED KITE COMMUNITY HOUSING

Defendant

Mr George Murray (instructed by Satchell Moran) for the Claimant
Mr Simon Strelitz (instructed by IBB Law) for the Defendant

Hearing dates: 13-14 February 2024
Circulated in draft 1 August 2024

JUDGMENT

Her Honour Judge Melissa Clarke:

INTRODUCTION

1. This is a judgment following a two-day trial of a claim brought by Miss Helen Jillians against her social landlord, Red Kite Community Housing (“**Red Kite**”), for damages arising from alleged housing disrepair of her home, and Red Kite’s counterclaim for damages for Ms Jillians’ alleged breach of tenancy.
2. Mr George Murray, counsel, represents Ms Jillians and Mr Simon Strelitz, counsel, represents Red Kite. I am very grateful to them both for their skeleton arguments, submissions and assistance in this matter.

PLEADED CASES

The claim

3. The property in which Ms Jillians lives is 22 Horsenden Road, High Wycombe, Bucks HP13 7TQ (the “**Property**”). This is a three-bedroom semi-detached house of 1970s construction. She has been living there since 2001 pursuant to a tenancy agreement with Red Kite’s predecessors in title, Wycombe District Council, dated 20 August 2001. At this time she had two daughters Georgia born in 1998 and Maisey born in 2001, who also lived there.
4. Ms Jillians entered into an assured (non-shorthold) tenancy agreement with Red Kite on 10 May 2013 (the “**Tenancy Agreement**”). She is a secure tenant. By this time, she had eight children, all of whom were living with her. The Tenancy Agreement stated on internal page 3 that the permitted (maximum) number of people allowed to live in the Property was 6, but Ms Jillians added a manuscript amendment stating “*I have 8 children and myself who live here. I’ve been trying to get a bigger property for years, an[d] I was told that I am not overcrowded.*”. On the same page as this manuscript amendment the Tenancy Agreement was signed both Ms Jillians as tenant and a ‘T Morrow’ on behalf of Red Kite, so it appears that Red Kite both knew and

accepted that occupancy, as was conceded by Red Kite's witness Mr Haines in cross-examination.

5. On 16 January 2018, apparently in response to a manuscript letter signed by Ms Jillians of 9 January 2018, a Maria Morris of Red Kite made a request for amendment to the rent account on a pro-forma document of Red Kite, which appears to be an internal document. This contains the typed request "*Please remove Georgina Jillians [the eldest child of Ms Jillians] from tenancy record. Please add Paige Morris DOB [...] 2002, Garry Bailey Morris DOB [...] 2005, Brooklyn Edwards DOB [...] 2008, Patience Edwards DOB [...] 2010, Christopher Allen DOB [...] 2011, Harvey Allen DOB [...] 2013 and Rocco Allen DOB [...] 2017.*" Underneath this there is a manuscript note in blue ink which says "*[Carol?] has discussed with Maria, Family are applying for larger accommodation. No tenancy Action.*" It is then countersigned in blue ink by Helen Pye, in the space for Manager/Senior Officer Approval. Accordingly, by that date there appear to have been seven of Ms Jillians' nine children living with her, the eldest two having left home, and I am satisfied, as Mr Haines accepted in cross-examination, that document shows that Red Kite both knew and accepted that occupancy.
6. Ms Jillians in oral evidence said that when she sent a letter of claim to Red Kite on 10 August 2021, she was living in the Property with six of her children. She says that her partner, although he didn't live there, was there "*all the time*" caring for her, caring for the children, taking the children to school, and cooking. She continues to occupy the Property with 6 of her 9 children, the other three being adults who have left home.
7. Ms Jillians' pleaded claim is that Red Kite has breached its express and/or implied repairing obligations in relation to specified defects at the property in relation to which Red Kite has been on notice. At trial, Ms Jillians focussed on implied repairing obligations.
8. There is no dispute that at as a matter of law, and by virtue of the Landlord and Tenant Act 1985 ("**LTA**"), Red Kite is subject to two statutory covenants implied into the tenancy: the first has applied for the duration of the tenancy,

and that is an obligation under section 11 LTA, to keep the structure and exterior in repair and certain specified installations in repair and proper working order. The second only came into effect on 20 March 2020 as a variation to the LTA by the Homes (Fitness for Human Habitation) Act 2018, and that is an obligation under section 9A to keep the property fit for human habitation.

9. Ms Jillians alleges that Red Kite has breached the statutory covenants in respect of a number of defects in the condition of the property, which are listed in a Scott Schedule produced in the first instance by her expert buildings surveyor Mr Tom Smitheringale, BSc (Hons) in Building Surveying, Lead Surveyor at AIS Consultants Ltd, who also produced a report, both dated 19 October 2021. These were produced following his inspection of the Property on 22 September 2021. The complaints maintained at trial are those listed below:

- i) First bedroom (large, front, upper level)— Mould growth (section 9A only) (Item 1 Scott Schedule);
- ii) Third bedroom (smaller, front, upper level)— Mould growth (section 9A only) (Item 3 Scott Schedule);
- iii) Bathroom—
 - a) Mould growth (section 9A only) (Item 5 Scott Schedule);
 - b) Faulty electric shower (section 9A/ section 11) (not pleaded);
- iv) Kitchen—
 - a) Water damage and damp to ceiling (section 9A/section 11) (Item 6 Scott Schedule);
 - b) Water damage and damp to kitchen units (section 9A) (Item 6 Scott Schedule);
 - c) Faulty electric socket (section 9A/ section 11) (Item 6 Scott Schedule);

- v) Exterior—
 - a) Defective rear door (section 9A/11) (Item 7 Scott Schedule);
 - b) Leaning and damaged fencing (section 9A only) (Item 7 Scott Schedule).
10. Ms Jillians' case is that:
- i) these are actionable defects within the scope of section 9A LTA or section 11 LTA, as the case may be;
 - ii) she either notified Red Kite of each defect or Red Kite was on notice in some other way; and
 - iii) Red Kite failed to remedy each defect within a reasonable time of being on notice of the defect.
11. Ms Jillians seeks damages limited to £5000 and an order for specific performance requiring Red Kite to remedy the defects listed at paragraphs 9(iv)(a) and (b) and paragraph 9(v)(a) above. Although she prays for special damages, these have not been particularised and Mr Murray confirmed that she does not pursue them.

The Defence and Counterclaim

12. Red Kite puts Ms Jillians to proof both that the defects are actionable and that it was on notice of any actionable defect. It denies any breach of covenant. It relies on the defence to liability contained in section 11(2)(a) LTA because of alleged failures of Ms Jillians to occupy the property in a “*tenant-like manner*”, namely failing to permit Red Kite or its contractors access to the Property and failing to control condensation in the Property. It denies that the Property is, or at any time during the tenancy has been, unfit for human habitation.
13. Red Kite has issued a counterclaim for damages for twenty-three allegations of breach of paragraph 29.1 of the Tenancy Agreement, as set out at paragraph 27

of the Defence. It seeks damages for which it pleads Ms Jillians is liable under the Tenancy Agreement and Red Kite's Recharges Policy of February 2021.

14. Red Kite further counterclaimed for a small sum in rent arrears but at closing Mr Strelitz confirmed that the rent account was in modest credit and so it does not pursue that.
15. Red Kite relies on an expert surveying report of Mr Ramesh Halai, BSc (Hons) MRICS, a Chartered Surveyor and director of Si Property Consultants Ltd, dated 3 April 2023. He inspected the Property on 21 March 2023. He provided his comments on the Scott Schedule produced by Mr Smitheringale, and the experts met and produced a Joint Scott Schedule dated 16 May 2023 and a joint statement dated 17 May 2023.

Reply and Defence to Counterclaim

16. In Ms Jillians' Reply to Defence, which also stands as a Defence to Counterclaim, she issues a bare denial of the allegations of breach of the tenancy agreement. In oral evidence she resiled from that in part, accepting that many of the allegations of damage had been caused by her or members of her household, but had, she said, been fixed at her own expense.

LAW

17. I do not discern any difference between the parties on the law or the authorities which should guide me. I have gratefully and extensively borrowed from the summary of the law contained in Mr Murray's skeleton argument, in producing this section.
18. Section 11 (1) LTA requires a landlord to:
 - i) keep in repair the structure and exterior of the dwelling-house (including drains, gutters and external pipes): section 11(1)(a);
 - ii) keep in repair and proper working order and installations for sanitation, water, electricity and gas: section 11(1)(b); and

iii) keep in repair and proper working order the installations for space heating and heating water: section 11(1)(c).

19. The scope of a landlord's obligation under section 11(1)(a) LTA is well-established:

- i) Only damage or deterioration to the structure or exterior of a dwelling-house can constitute disrepair (*Quick v Taff-Ely BC* [1986] QB 809);
- ii) An inherent defect in the design of a dwelling, no matter how serious, does not constitute disrepair (*Quick*);
- iii) The "structure" of the dwelling-house includes windows, window frames and external doors (*Irvine's Estate v Moran* [1991] 1 EGLR 261 (QB)) and plasterwork (*Grand v Gill* [2011] EWCA Civ 554);
- iv) Before a party can be liable under the implied repairing covenant, the subject matter of the covenant must have deteriorated so that it is in a condition which calls for repair: *Quick* at 821, per Lawton LJ (a case where badly-designed window frames were said to cause condensation but no disrepair);
- v) A landlord is not liable to carry out any repair until they have been put on notice of the need for repair and has failed to carry out the repair within a reasonable time thereafter: *Makin v. Watkinson* [1870] LR 6 Ex 25; *O'Brien v. Robinson* [1973] AC 912; *Morris v. Liverpool* (1987) 20 HLR 498; *Earle v. Charalambous* [2006] EWCA Civ 1090;
- vi) Once the landlord has notice of the need for repairs, he has a reasonable time in which to carry out the work: *Green v. Eales* (1841) 2 Q.B. 255; *O'Brien v Robinson*; *Caldabar Properties Ltd v Sticher* [1984] 1 W.L.R. 287;
- vii) A tenant has a responsibility to allow a landlord access to carry out repairs as long as the landlord gives reasonable notice: *Saner v. Bilton* [1878] 7 Ch D 815; *Granada Theatres v. Freehold Investment (Leytonstone) Ltd* [1959] Ch 592.

20. Pursuant to section 11(2)(a) LTA, a landlord is not liable by virtue of the above implied covenants “*to carry out works or repairs for which the lessee is liable by virtue of his duty to use the premises in a tenant-like manner, or would be so liable but for an express covenant on his part*”.
21. It is common ground that the Tenancy Agreement is a lease to which section 9A LTA applies. The scope of section 9A LTA is less established, having only had effect in new tenancies from 20 March 2019 and in existing tenancies from 20 March 2020. However, the statute itself and earlier case law from its statutory predecessors provides a degree of assistance. Section 9A provides so far as is relevant:

9A Fitness for human habitation of dwellings in England

(1) In a lease to which this section applies of a dwelling in England (see section 9B), there is implied a covenant by the lessor that the dwelling—

(a) is fit for human habitation at the time the lease is granted or otherwise created or, if later, at the beginning of the term of the lease, and

(b) will remain fit for human habitation during the term of the lease.

(2) The implied covenant is not to be taken as requiring the lessor—

(a) to carry out works or repairs for which the lessee is liable by virtue of—

(i) the duty of the lessee to use the premises in a tenant-like manner, or

(ii) an express covenant of the lessee of substantially the same effect as that duty;

(b) to rebuild or reinstate the dwelling in the case of destruction or damage by fire, storm, flood or other inevitable accident;

(c) to keep in repair or maintain anything which the lessee is entitled to remove from the dwelling;

(d) to carry out works or repairs which, if carried out, would put the lessor in breach of any obligation imposed by any enactment (whenever passed or made);

(e) to carry out works or repairs requiring the consent of a superior landlord or other third party in circumstances where consent has not been obtained following reasonable endeavours to obtain it.

(3) The implied covenant is also not to be taken as imposing on the lessor any liability in respect of the dwelling being unfit for human habitation if the unfitness is wholly or mainly attributable to—

(a) the lessee’s own breach of covenant, or

(b) ...

(4) ...

(5) Where in any proceedings before a court it is alleged that a lessor is in breach of an obligation under the implied covenant, the court may order specific performance of the obligation (regardless of any equitable rule restricting the scope of that remedy).

(6) ...

(7) In a lease to which this section applies of a dwelling in England, there is also implied a covenant by the lessee that the lessor, or a person authorised in writing by the lessor, may enter the dwelling for the purpose of viewing its condition and state of repair.

(8) The covenant implied by subsection (7) requires entry to the dwelling to be permitted—

(a) only at reasonable times of the day, and

(b) only if at least 24 hours’ notice in writing has been given to the occupier of the dwelling.

...

22. Section 10 LTA provides further detail on the meaning of “*fit for human habitation*”:

10 Fitness for human habitation.

(1) In determining for the purposes of this Act whether a house or dwelling is unfit for human habitation, regard shall be had to its condition in respect of the following matters—

- repair,
- stability,
- freedom from damp,
- internal arrangement,
- natural lighting,
- ventilation,
- water supply,

- drainage and sanitary conveniences,
- facilities for preparation and cooking of food and for the disposal of waste water;
- in relation to a dwelling in England, any prescribed hazard;

and the house or dwelling shall be regarded as unfit for human habitation if, and only if, it is so far defective in one or more of those matters that it is not reasonably suitable for occupation in that condition.

(2) In subsection (1) “prescribed hazard” means any matter or circumstance amounting to a hazard for the time being prescribed in regulations made by the Secretary of State under section 2 of the Housing Act 2004.

(3) The definition of “hazard” in section 2(1) of the Housing Act 2004 applies for the purposes of subsection (2) as though the reference to a potential occupier were omitted.

23. Section 2(1) of the Housing Act 2004, removing the reference to a potential occupier as section 10(3) LTA requires, defines “hazard” as *“any risk of harm to the health or safety of an actual... occupier of a dwelling or HMO which arises from a deficiency in the dwelling or HMO or in any building or land in the vicinity (whether the deficiency arises as a result of the construction of any building, and absence of maintenance or repair or otherwise)”*. It distinguishes between category 1 hazards and category 2 hazards as being hazards of a prescribed description falling within a prescribed band by means of regulations. There is a list of prescribed hazards in Schedule 1 of the Housing Health and Safety Rating System (England) Regulations (“**HHSRS Regulations**”). These include, so far is relevant to this case, at paragraph 1 *“Exposure to... damp, mould or fungal growths”* and at paragraph 16 *“an inadequate provision of facilities for the storage, preparation and cooking of food”* and at paragraph 28 *“the position, location and operability of amenities, fittings and equipment”*.
24. Ms Jillians relies upon *Summers v Salford Corporation* [1942] AC 283 (HL), *Bole v Huntsbuild Ltd* [2009] EWCA Civ 1146 and *Rendlesham Estates v Barr* [2014] EWHC 3968 (TCC); 1 WLR 3663 as providing some assistance to the Court in assessing fitness for human habitation.

25. *Summers* considered an implied term in the letting of low-value properties at that time that a house will “*be kept reasonably fit for human habitation*”. In this case a broken sash cord meant that a window could not be moved without risk of injury. The court held that this amounted to a breach of the implied undertaking on the facts of the case, which included that the house was a small one and the jammed window impaired the ventilation of the room.
26. *Bole v Huntsbuild*, was a claim brought under s1 Defective Premises Act 1972 which imposed a duty on a person constructing or converting or enlarging a building to, inter alia, “*see that the work which he takes on is done in a workmanlike or, as the case may be, professional manner, with proper materials and so that as regards that work the dwelling will be fit for habitation when completed.*” (my emphasis). The first instance judge had set out and applied a number of principles which he said guided the issue of unfitness for habitation, at [38] of his judgment. Those are repeated at [10] in the judgment of the Court of Appeal, which approved them, albeit finding that his use of the concept “*unsuitable for its purpose*” did not add anything to the phrase “*unfit for habitation*” which was neither esoteric nor obscure [29], and holding that both phrases had the same meaning, as “*the obvious purpose of a dwelling is for it to be occupied and inhabited safely and without inconvenience*” [28]. With that change to the wording of the principles, then, they are:
- i) The finding of unfitness for habitation when built is a matter of fact in each case.
 - ii) Unfitness for habitation extends to what Lord Bridge described as “*defects of quality*” as well as to “*dangerous defects*”.
 - iii) Unfitness for habitation relates to defects preventing the dwelling from being occupied and inhabited safely and not to minor defects.
 - iv) Such a defect in one part of the dwelling may render the dwelling unfit for habitation as a dwelling house even if the defect does not apply to other parts of the dwelling. This is also the case under the Housing Act - see *Summers*.

- v) The Defective Premises Act will apply to such defects even if the effects of the defect were not evident at the time when the dwelling was completed.
 - vi) In considering whether or not a dwelling is unfit for habitation as built one must consider the effect of the defects as a whole.
27. In relation to the last point, at [34] the Court of Appeal held that the correct approach to an assessment of unfitness is *not* to consider each individual defect and decide if they, individually or taken in conjunction with other defects, rendered the dwelling unfit for habitation, but that a judge is “*entitled to ask himself whether the dwelling as a whole was unfit for habitation*”.
28. *Rendlesham* was another case under section 1 Defective Premises Act 1972. The judgment cited the *Bole v Huntsbuild* principles set out above. The Court of Appeal then provided at [68] the following guidance:
- In my judgment, for a dwelling to be fit for habitation within the meaning of the Act, it must, on completion (without any remedial works being carried out):
- (a) be capable of occupation for a reasonable time without risk to the health or safety of the occupants: where a dwelling is or is part of a newly constructed building, what is a reasonable time will be a question of fact (it may or may not be as long as the design life of the building); and
 - (b) be capable of occupation for a reasonable time without undue inconvenience or discomfort to the occupants.
29. It gave a number of examples of matters which could give rise to unfitness for habitation, saying at [79] “*I have no doubt that the presence of mould and damp in living rooms or bedrooms, if persistent and more than minor, renders an apartment unfit for habitation. Damp living conditions are well known to pose a risk to health, and there is evidence from some witnesses of actual risks to health or concern about the potential risk, either to themselves or children*”. On the facts of that case, it was found that the damp and mould arose from a number of causes including defects to the roof, lack of insulation, and leaks from a shower.

30. I accept Mr Murray’s submission that the Defective Premises Act authorities are of relevance to claims made pursuant to section 9A LTA. The requirements under section 1 Defective Premises Act (“*fit for habitation*”) and section 9A LTA (“*fit for human habitation*”) are not identical but given the Court of Appeal’s definition set out above, which is tied to the health, safety, inconvenience or discomfort to the *occupants*, it appears to be a distinction without a material difference. Similarly, the guidance of the Court of Appeal in *Rendlesham* relating to section 1 Defective Premises Act, that dwellings which are not fit for habitation are those ‘capable of occupation without risk to the health and safety of, and without undue inconvenience or discomfort to the occupants’ (I paraphrase) seems also to fall within the test in section 10 LTA as neither case could it be said that such dwellings are “*reasonably suitable for occupation in that condition*”, and section 10 LTA includes within it long-established concept of “hazards” under the Housing Act 2004, being any “*risk of harm to the health or safety of an actual... occupier of a dwelling*”, and ‘prescribed hazards’ under section 2 of that Act. Of course, as Mr Murray submits, the Defective Premises Act was concerned with fitness for habitation at the time of completion of the building of a dwelling, and for a reasonable time afterwards, and section 9A LTA is a continuing obligation during the period of a lease, but I am satisfied that the principles set out in *Bole v Huntsbuild* and *Rendlesham* are applicable to section 9A LTA, save that they must be applied taking into account that difference.

LAY WITNESSES

For Ms Jillians

31. Ms Jillians produced a witness statement dated 16 May 2023. She attended Court, was cross-examined and re-examined. I also asked her a few questions to seek clarification of her evidence.
32. Ms Jillians was clearly unhappy to find herself giving evidence in Court, saying a few times words to the effect that, “*It didn’t need to come to this, I just wanted Red Kite to fix the problems*”. She was undoubtedly defensive,

quick to react to what she perceived as accusatory or unfair questioning, very often sought to provide answers before Mr Strelitz had articulated his questions, or tried to turn the questioning onto him. She made some admissions against her pleaded case, particularly in relation to allegations of breach of tenancy by damage to the Property. However, I am nonetheless satisfied that Ms Jillians was an honest witness who had come to court to assist it to the best of her ability, and I am also satisfied that her oral evidence was reliable once she had properly focussed on and answered the question asked. She made a number of concessions and admissions against her own case and I am satisfied that her indignation and upset at some of the lines of questioning which Mr Strelitz properly put to her was her genuine and unfiltered reaction and not any form of obfuscation or playacting.

33. I will deal with Ms Jillians' evidence about the specific defects complained of when I deal with the issues below. However a summary of additional relevant evidence is as follows.
34. Ms Jillians' evidence was that there had been longstanding issues with mould in the rooms at the front of the house (two upper front bedrooms and lower bedroom), kitchen and bathroom. In oral evidence she said that she cleaned the frames and sills of these rooms of condensation and mould every day and with usual cleaning she could keep the condensation and mould under control in the back rooms, but not in those at the front. I accept her evidence on this point. Both experts (and Red Kite's surveyor Ms Monika Singh) saw and noted more extensive mould in the front rooms of the house than the back, and I am satisfied her evidence of cleaning regularly was honestly given.
35. Ms Jillians said that she kept the windows open at the Property every day, saying "*There are always windows open, I sleep with the windows open*". This is borne out by the fact that Mr Halai found most of the windows open when he went to visit, as did Ms Monika Singh when carrying out a works post-inspection visit in January 2024. I accept her evidence on this point.
36. Ms Jillians said in oral evidence that she had a washing machine and had brought in her own condenser tumble dryer but was obliged by Red Kite to

remove it. I have seen evidence that the condenser tumble dryer was noted at an inspection by Ms Singh on 18 August 2023 and correspondence from Red Kite's solicitors referring to it being in breach of the Tenancy Agreement in the bundle, so I accept this evidence. Until then, she said, she either line-dried or tumble dried the laundry. Since then, and because of the mould issue, she no longer washed laundry in the house, and instead took it to a launderette, which was costly. She was taken in cross-examination to Mr Halai's report in which he noted rust on radiators, which he said was consistent with them being used for drying laundry, but Ms Jillians denied that she ever put laundry to dry on the radiators, saying that the children would knock them off. She said that she might hang a towel on a radiator in a bathroom, but that was all. She said that she thought the radiators were rusty because of the leaks and the dampness in the house, and in particular what she described as continuous leaks under the bath for three years. I accept her evidence that she was never in the habit of hanging damp laundry in the house and now does not even do laundry in the house. She has had multiple home inspections over the years and I have not seen any reference to damp laundry being seen on radiators. I cannot see why she would have brought in a tumble dryer and then not used it. Her evidence about now using a laundrette (because "*after all the home inspections I don't feel I can do anything else*") was, in my assessment, heartfelt and honest.

37. Ms Jillians was asked about her use of heating in the Property. She said that she used the heating and her gas and electric bill was about £2,000 per year. She said that she was using less gas more recently as she had brought in two electric heaters which she used in the living room and the downstairs bedroom. She said that since the thermostat had been replaced, which was reliant on Wi-Fi and did not always connect, she turned the heating on and off manually rather than keep it on a timer, as she didn't know how to use it. She said it otherwise turned itself on automatically at 14C. Mr Strelitz took her to a note in Red Kite's documents which stated on 14 November 2023 "*Tenant explained she does not put the heating on*", but Ms Jillians said that she had never said that to anybody, and she did heat the house when required. During the course of the trial, she provided some late disclosure of her gas bills

covering the years 2021-22, 2022-23 and 2023-24, which Red Kite did not object to. These showed that in those years she used circa 16,100, 12,400 and 11,500 kWh of gas respectively, at costs varying from £1,100 to £1,400 per annum. Mr Strelitz directed my attention to the Ofgem website which suggests that typical gas consumption, with medium use, for a 2-3 bed house is 11,500 kWh, and that for a 4-bed house is 17,000 kWh. To the extent that Mr Strelitz submitted that the number of occupants suggested that the 4-bed house is the more appropriate comparator I do not agree. It is not the number of occupants that makes a typical 4-bedroom house more gas-consuming than a typical 3-bedroom house, but the greater volume of the space to be heated and the greater surface area (walls, roof) and windows from which heat is lost. I am satisfied the former is the appropriate comparator, the Property being a 3 bedroom house in size and construction. That supports Ms Jillians' evidence that she does use the heating appropriately, in my judgment.

38. It was put to Ms Jillians in cross-examination that she was overfilling the loft and this was in part the reason for the uneven displacement of the loft insulation found by the experts. She said that she barely used the loft, which did not have a loft ladder, save that she put a few boxes around the hatch. She told the Court that Red Kite informed her after accessing the loft that there was too much in it and it needed to be emptied, but she said on clearing it at her own expense, she found that it was full of things which previous tenants must have left behind, which took a good day to clear. She removed her own belongings to her shed, but the rest of it she said did not belong to her, had not been put there by her, and she disposed of them. Mr Strelitz took her to some photographs of the loft and asked if various items visible in them were hers or those of her children, and she denied it. I accept her evidence.
39. Ms Jillians said that she had made numerous complaints to Red Kite in relation to mould and leaks over many years, but had not kept records of complaints, and nobody had asked her to. She said she did not send emails, as she didn't really use the internet (and this is borne out by Red Kite's documents) but she did make telephone complaints. She said that she relied on

the records of complaints recorded on Red Kite's systems to prove that she had phoned with complaints, but said "*a lot of it isn't there*".

For Red Kite

40. Red Kite relies on the witness statements of Mr Mark Haines dated 17 May 2022, Mr William Walker dated 17 May 2022 and Mr Wayne Richardson dated 17 May 2022.
41. Mr Haines is the Director of Property at Red Kite. He attended Court, was examined in chief, cross-examined and re-examined. He too was defensive, and was seeking the "point" of some questions before answering them. Overall, however, I found him to be a poor witness unlike Ms Jillians. In evidence in chief he said that he was familiar with the Property, and allowed me to question him on the layout of the external fencing, giving the impression in his answers that he had been there, but in cross-examination admitting almost reluctantly that he had never visited it and was relying on what he had seen in documentation or what he had been told by others.
42. Mr Haines provided some evidence in his witness statement which he conceded was not in his direct knowledge and in relation to which he: struggled to identify the source; or identified it as coming from an IT system he had interrogated but from which he not exhibited printouts to his witness statement and which were not in the bundle; or said that he was told for the purposes of including as evidence in his witness statement. I can place little weight on such evidence, and it leads me to infer that there is potentially relevant evidence in the hands of Red Kite which has not been properly disclosed.
43. Although much of his witness statement was about matters to do with what Red Kite characterises as overcrowding at the Property, he said that he did not look up Ms Jillians' tenancy file as "*overcrowding is not my job*". When Mr Murray pointed out that inconsistency, he snapped, "*If that's the point you are trying to prove, you've scored a point*", which to my mind showed a defensive attitude. However, he did make a number of concessions and admissions

which undermined his own witness evidence and were fatal to Red Kite's counterclaim, for reasons I will explain, although he later resiled from one of those in the last moments of his oral evidence.

44. I do not believe Mr Haines to be a dishonest witness or one who was deliberately trying to mislead the court, but I am satisfied that his witness statement was made not with the intention of assisting the Court with evidence from his own knowledge that was true to the best of his belief, but with the intention of presenting an account which would support Red Kite's case whether the evidence it contained was within his own knowledge or not. It seemed to me that he views this case through the prism of his belief that it is unmeritorious, and both the actions of Red Kite during the course of the proceedings (particularly in the failure to follow its own Recharges Policy and in the timing of the bringing of the counterclaim, as I will explain), and his evidence, have been framed through that prism. Where Mr Haines' evidence conflicts with that of Ms Jillians, in the absence of other credible or reliable evidence in support, I prefer the evidence of Ms Jillians.
45. At the time Mr Richardson made his witness statement he was the Repairs and Voids Manager of Red Kite. Since then, he has left the employ of Red Kite and did not attend at trial. Mr Murray for Ms Jillians submits that his witness statement contains no evidence of fact save for the introduction of documentation from Red Kite's files and records, and if he had attended Court he would have had no questions for him. Mr Strelitz agrees, correctly in my view, that his witness statement is a vehicle for introducing relevant evidence to the Court but little more. Accordingly I take account of it to that extent. To the large extent, however, that it contains inadmissible advocacy or commentary on documents (which appears to track Red Kites' solicitors' previous correspondence quite closely), I give it no weight.
46. I set out below a bare chronology of events discernible from the documents disclosed, following receipt of Ms Jillians' letter of claim, as follows:
 - i) 19 August 2021 Red Kite arranged to inspect the Property;

- ii) Mr Richardson's predecessor Repairs and Voids Manager, Anthony Reid, produced a detailed letter of response to the letter of claim on 10 September 2021;
- iii) Red Kite raised repair orders arising from the 19 August 2021 inspection;
- iv) Mr Smitheringale's report was disclosed to Red Kite in November 2021;
- v) Mr Reid commented on Mr Smitheringale's Scott Schedule and sent a proposed works schedule to Ms Jillian's solicitors on 10 January 2022;
- vi) Some works were carried out in relation to some of the matters notified in the letter of claim;
- vii) This work was inspected on 2 February 2022 by Ms Monika Singh, Red Kite's surveyor;
- viii) Red Kite's solicitors sent a further letter of response to Ms Jillians' solicitors on 11 February 2022;
- ix) Ms Jillians' solicitors agreed the proposed works on 22 February 2022 (also raising other issues not contained in the proposed works);
- x) The claim was issued on 1 March 2022;
- xi) A further specification of works was provided by Red Kite on 15 March 2023;
- xii) Works were carried out by arrangement between Red Kite and Ms Jillians directly;
- xiii) Mr Richardson joined Red Kite in May 2022 working under Anthony Reid;
- xiv) Red Kite carried out a home check on 6 July 2022, during which it was noted that Ms Jillians said that her solicitors had told her not to allow Red Kite's contractors into the Property without first going through them;
- xv) Mr Reid left Red Kite in August 2022 and Mr Richardson took over his role in January 2023;
- xvi) A further inspection of the Property was carried out by Red Kite in September 2022 resulting in a technical officer's inspection report dated 21 September 2022, which identified further required works;

- xvii) Mould washes were carried out at the Property on 6 December 2022 in the bedrooms, bathroom, living room and a stain block was carried out in the kitchen;
 - xviii) On 3 January 2023 Red Kite sent Ms Jillians’ solicitors a list of works completed and due to be completed by 13 January 2023;
 - xix) Works were carried out on 9 and 13 January 2023 which resulted in complaints from Ms Jillians about the state the contractors had left the Property, with photographs, being made to Red Kite’s solicitors on 27 January 2023;
 - xx) Red Kite moved outstanding works from one contractor (SCN) to another (Gilmartins);
 - xxi) At the time of his witness statement (17 May 2023) “most” works were said to have been completed. However:
 - a) a further schedule of works was produced on 22 August 2023
 - b) Ms Jillians provided a list of outstanding works orally to Red Kite on 6 November 2023 (set out in an email from Ms Singh to Gilmartins of the same date) which included all the kitchen works, repairs to the shower, the installation of the bathroom extractor, and a broken pipe in the bathroom;
 - c) Red Kite produced a “Work in Progress Inspection Report” dated 17 November 2023;
 - d) It produced an updated job log on 21 December 2023 and another dated 23 January 2024;
 - e) Ms Singh produced a post-inspection report dated 23 January 2024 which required significant works to be done again as they did not pass inspection;
 - f) Red Kite requested its contractor to replace three radiators in the Property due to poor condition, including one in the WC which was leaking, on 31 January 2024. They were replaced on 5 February 2024;
 - g) Final sign-off was not obtained until after that installation.
47. Mr William Walker joined Red Kite in May 2022 as the Head of Property. His witness statement simply provides a chronology of the proceedings and exhibits relevant correspondence between the parties’ solicitors and other

documents. He made himself available to attend Court, but Mr Murray indicated that he had no questions for him and so he was not called. I accept his evidence, which is unchallenged.

EXPERT EVIDENCE

48. Mr Smitheringale's expert report dated 19 October 2021, following inspection of the Property on 22 September 2021, was served on Red Kite on 3 November 2021 after Red Kite refused, by letter of 10 September 2021, Ms Jillians' proposal in her letter of claim of 10 August 2021 that a single joint expert surveyor be appointed. Red Kite also declined to appoint their own expert at that time. The claim was issued on 1 March 2022. Mr Halai was only appointed on 8 March 2023. Accordingly Mr Smitheringale's report provides the only expert evidence on the condition of the Property at the beginning of these proceedings.
49. The expert surveyors were not called to give evidence. As will be seen, there is little between them on the condition of the property and less between them on causation than there appears on first reading of their reports. Nor were Part 35 questions asked by either party of either expert.
50. Mr Strelitz for the Defendant criticises Mr Smitheringale for what he describes as deficiencies in his report and the methodology he employs.
51. Mr Murray submits, relying on the Supreme Court decision in *TUI UK Ltd v Griffiths* [2023] UKSC 48, that the Court should not entertain such criticisms in circumstances where they have not been put to Mr Smitheringale so that he has a chance to answer them.
52. In *TUI*, a key question was the scope of the rule, based on fairness, that a party should challenge by cross-examination evidence that it wishes to impugn in its submissions at the end of a trial, and in particular, whether the rule extended to the reasoning of an expert witness. Lord Hodge delivered a single judgment of the Supreme Court, overturning the decision of the Court of Appeal. He characterised the question of the requirements of a fair trial as being "At the

heart of this appeal” and set out a number of principles which he characterised as trite law in civil proceedings at [36]:

- i) As a generality in civil proceedings, the claimant bears the burden of proof in establishing his or her case;
 - ii) The role of an expert is to *assist* the court in relation to matters of scientific, technical or other specialised knowledge which are outside the judge’s expertise by giving evidence of fact or opinion, but the expert must not usurp the functions of the judge as ultimate decision-maker on matters that are central to the outcome of the case. Thus, as a general rule, the judge has the task of assessing the evidence of an expert for its adequacy and persuasiveness;
 - iii) English law operates an adversarial system, and the parties frame the issues for the judge to decide in their pleadings and their conduct of the trial;
 - iv) In that context, it is an important part of a judge’s role to make sure the proceedings are fair.
53. Lord Hodge went on to consider how the authorities relating to the correct approach for judicial evaluation of expert evidence had developed over time, and at [42] drew attention to the statement in *Phipson on Evidence* (20th edition, 2022) at para 12-12, which he said he was satisfied was correct and “*summarises a longstanding rule of general application*”:

In general a party is required to challenge in cross-examination the evidence of any witness of the opposing party if he wishes to submit to the court that the evidence should not be accepted on that point. The rule applies in civil cases ... In general the CPR does not alter that position. This rule serves the important function of giving the witness the opportunity of explaining any contradiction or alleged problem with his evidence. If a party has decided not to cross-examine on a particular important point, he will be in difficulty in submitting that the evidence should be rejected.

54. He summarised the relevant law and principles at [70] as follows:

In conclusion, the status and application of the rule in *Browne v Dunn* and the other cases which I have discussed can be summarised in the following propositions:

(i) The general rule in civil cases, as stated in Phipson, 20th ed, para 12-12, is that a party is required to challenge by cross-examination the evidence of any witness of the opposing party on a material point which he or she wishes to submit to the court should not be accepted. That rule extends to both witnesses as to fact and expert witnesses.

(ii) In an adversarial system of justice, the purpose of the rule is to make sure that the trial is fair.

(iii) The rationale of the rule, i.e. preserving the fairness of the trial, includes fairness to the party who has adduced the evidence of the impugned witness.

(iv) Maintaining the fairness of the trial includes fairness to the witness whose evidence is being impugned, whether on the basis of dishonesty, inaccuracy or other inadequacy. An expert witness, in particular, may have a strong professional interest in maintaining his or her reputation from a challenge of inaccuracy or inadequacy as well as from a challenge to the expert's honesty.

(v) Maintaining such fairness also includes enabling the judge to make a proper assessment of all the evidence to achieve justice in the cause. The rule is directed to the integrity of the court process itself.

(vi) Cross-examination gives the witness the opportunity to explain or clarify his or her evidence. That opportunity is particularly important when the opposing party intends to accuse the witness of dishonesty, but there is no principled basis for confining the rule to cases of dishonesty.

(vii) The rule should not be applied rigidly. It is not an inflexible rule and there is bound to be some relaxation of the rule, as the current edition of Phipson recognises in para 12.12 in sub-paragraphs which follow those which I have quoted in para 42 above. Its application depends upon the circumstances of the case as the criterion is the overall fairness of the trial. Thus, where it would be disproportionate to cross-examine at length or where, as in *Chen v Ng*, the trial judge has set a limit on the time for cross-examination, those circumstances would be relevant considerations in the court's decision on the application of the rule.

(viii) There are also circumstances in which the rule may not apply: see paras 61-68 above for examples of such circumstances.

55. In the interests of brevity I will not set out the circumstances in which the rule does not apply, because neither party relies on such exceptions.
56. Mr Strelitz criticises the fact that Mr Smitheringale has not specified the instrument that he has used to measure moisture content in the property. I can see no unfairness here given that it can be seen from photographs in his report that it is the same instrument that Mr Halai has used, namely a Protimeter MMS3 moisture meter. Mr Strelitz notes that Mr Smitheringale is not a member of RICS (the Royal Institute of Chartered Surveyors) or any professional body, unlike Mr Halai, and submits that Mr Smitheringale has had no training on the appropriate use of moisture meters “*which will likely explain his lack of understanding as to their appropriate use or how they actually work... his evidence as to what the readings signify is confused where not blantly (sic) misleading*”. There is no evidence before me that Mr Smitheringale has had no such training. He has had no opportunity to answer such criticism either by Part 35 question or by cross-examination. It does not follow that because Mr Smitheringale is not a Chartered Surveyor, albeit that he is a buildings surveyor with a degree in Building Surveying, he has had no training on tools used in buildings survey. Accordingly I decline to draw that inference.
57. Mr Strelitz puts before me the Protimeter MM2 instruction manual and some marketing material relating to that instrument and relies on those to submit that Mr Smitheringale “*has no understanding of the proper approach that should be taken to diagnosing dampness or any understanding of the limitations of readings taken from so-called, but inaccurately labelled, ‘moisture meters’*” and that he “*plainly has no understanding of the interplay between household occupancy and humidity, and of the need for occupiers of residential property to adopt a tripartite process of cleaning, heating and ventilating a property (especially a high occupancy dwelling such as the Property)*”. Mr Smitheringale in his CV says that he specialises “*in building pathology issues including dampness*” and has “*inspected countless properties for cavity wall issues as well as damp and defects and have come to understand fully the problems and the tell-tale signs of issues*”. Per Tui, I consider that any

question of Mr Smitheringale's understanding of both of these points are matters which he should have been given an opportunity to answer, both because they are both important in the context of this case and because these criticisms go directly to Mr Smitheringale's professional competency, and are a challenge to his evidence of his expertise. Fairness dictates that he must be allowed to answer to such criticisms.

58. Mr Strelitz in closing sought to argue that Mr Smitheringale's interpretation of data obtained from his Protimeter measurements was not justifiable, but Mr Halai does not make any such criticism in his report, although he clearly had and considered Mr Smitheringale's full report (see para 4.5 on internal page 5 of Mr Halai's report). Accordingly I do not accept these criticisms which are not, in my judgment, supported by expert evidence.
59. Mr Strelitz further criticises Mr Smitheringale for failing to offer his opinion on the question of whether the Property is unfit for human habitation by reason of mould growth or any other defect, but goes on to submit that although this is a matter of fact and degree which calls for expert judgment, Mr Smitheringale should not be entrusted with exercising such expert judgment "*given his lack of relevant qualifications*". The latter point is an argument that Mr Smitheringale is not competent to act as an expert in this case, hung entirely on the fact that he has not obtained Chartered Surveyor status, and so is a matter which should have been put to Mr Smitheringale either by Part 35 questions or in cross-examinations as it goes towards his professional competency. In relation to the former, as Mr Murray submits, Mr Smitheringale has set out the scope of his instructions in his report and they do not include a request for him to opine on whether the Property is unfit for human habitation. That is a matter of fact to be determined by the Court.
60. Mr Murray does not criticise Mr Halai's credentials. Mr Halai noted that in the time between Mr Smitheringale's inspection (22 September 2021) and his (21 March 2023), areas of defects previously identified by Mr Smitheringale had been rectified, particularly in the kitchen and bathroom. There were still some defects outstanding, which he noted in the Scott Schedule, but opined that none were structural.

61. Mr Halai noted that all the room windows had been left open to ventilate the Property during and prior to his visit and recorded an internal temperature of 18.1C with a relative humidity at the entrance porch of 61.8%. He noted at paragraph 5.3.2 that there was mould present at isolated areas of most rooms, that this is caused by high humidity “*generated by the tenant’s own lifestyle use at the property*” and that in a comfortable home environment the relative humidity level is expected to be 45-55%. He said that a humidity level of 61.8%, even when windows were open, would naturally cause mould to occur at isolated cold surfaces, usually at cold corners that are not well ventilated or areas hidden behind furniture and condensation would arise on glazing. He said that he believed the mould identified at the Property “*is... within the control of the tenant occupants*” and suggested that they reduce humidity at the property by doing the following:

- Keep windows open and doors closed during peak cooking, bathing and laundry;
- Avoid drying clothes inside the flat and certainly not over radiators
- Keep front and rear windows open regularly (at least daily approx. 5 minutes in the winter) to allow cross-ventilation and fresh air across the entire house
- Keep window trickle vents open permanently
- Wipe down any signs of mould with light detergent mould spray (he noted Mr Smitheringale recommended Bactdet and Halophen treatments to high risk areas)
- Red Kite should ensure the bathroom and kitchen fans are working and set to maximum extract time period.

62. Of course I have accepted Ms Jillians’ evidence that she kept windows open every day including at night; she no longer did any laundry at the Property, taking it all to a launderette; when she did laundry at the Property she used a condenser tumble dryer and did not dry laundry over radiators; she wipes down mould and condensation daily, and this is and was sufficient to keep on top of mould in the upper level back bedrooms, but not the rooms at the front of the house.

63. I further note that Red Kite’s inspection in September 2022, after the claim was issued, identified that almost all the windows in the Property were in a state of disrepair or required overhaul, including the need to replace of rubber seals, replace trickle vents, reseal external frames, etc. This work was all carried out in 2023 and 2024, as Ms Jillians confirmed.
64. I also note there was no functioning extractor fan in the bathroom until Red Kite installed it after the claim was brought, in late 2023. I have seen a Red Kite inspection report dated 21 September 2022 which notes that the bathroom “*extract fan needs to be overhauled, there is no ducting connected to it, allowing the extracted damp and humid air to be distributed throughout the roof space, adding further condensation to the ceilings beneath*”.
65. Both experts noted in the Joint Scott Schedule comments for item 1 and item 3 that “*the bathroom mechanical extract fan recently installed will assist to alleviate moisture levels at the property, but the tenant is encouraged to also reduce moisture levels by good housekeeping*”. Mr Halai also noted that there were “*minor leaks*” at the Property on his inspection: (i) behind the WC pan of the upper level WC, where he observed “*droplets of water*”; and (ii) at the kitchen radiator thermostatic valve pipe (“*small droplets of water*”)

DETERMINATION BY ISSUE

Has Ms Jillians satisfied the Court on the balance of probabilities that the following are actionable defects pursuant to section 9A LTA or section 11 LTA as the case may be?

First bedroom (large, front, upper level)— Mould growth (section 9A only) (Item 1 Scott Schedule)

66. Ms Jillians says that there has been a major problem with damp and mould to the ceilings and walls in the first bedroom since she moved into the Property, particularly on the external window wall and ceiling but on the other walls as well. She says that despite numerous complaints about the mould issues in the bedrooms, Red Kite has sent contractors out to inspect the Property who sometimes washed the walls and spray-painted them, but they never

addressed any underlying cause of the mould, damp and drafts so the issue kept returning. She says in carrying out the spray painting, they have damaged her curtains on a number of occasions and her current curtains are now covered in spray paint and require replacing again.

67. Ms Jillians says that Red Kite's last action before she instructed solicitors to bring these proceedings was to send a contractor to wash the walls in 2021.

68. In her witness statement she says the first bedroom remains in a terrible state with walls and ceiling covered with mould, the window frame is still covered in mould despite her cleaning it constantly, the walls have been repeatedly been patched up "*so they now look like they have been vandalised in addition to the mould*", and contractors working for the landlord have told her that the plaster and plasterboard will need replacing. After the claim was issued Red Kite again stain blocked the room and painted over the area, following the inspection report in September 2022 which noted that there was "*damp throughout*" the first bedroom and "*severe mould on damp*" throughout what I have been referring to as the third bedroom.

69. Mr Smitheringale in his report and as set out at item 1 of the Scott Schedule found on inspection in 2021 that Bedroom 1 had "*severe mould and dampness to the ceilings and walls*". This is illustrated in photographs in his report, particularly in those found at internal pages 11 and 13 and I am satisfied that shows both extensive and severe mould. He noted that on inspecting the loft, he found that the loft insulation was pulled away from the edges of the eaves and was generally not providing equal cover, which created cold spot areas where "*high humidity levels not in the property, of around 68%, were allowing to condense on the surfaces creating the condensation*". He also photographed this which is at internal page 25 of his report, and this shows not only missing and uneven insulation, but also daylight visible along the eaves-line, close to an outlet duct. He recommended that the loft insulation be topped up and tucked down to the eaves level at a cost of £150 and that there be a Bactdet and Halophen treatment to the walls and ceilings. He also found that there was a "*large gap*" in cavity wall insulation of an external wall, underneath the windows,

which corresponded with where mould was found in this bedroom. In his opinion, this had caused temperature differentials leading to cold spots and was responsible for causing excess mould. He recommended a thermal board insulation to this area. Mr Smitheringale did not provide details of the ambient temperature in the Property at the date of his inspection and did not quantify the temperature differentials, if any, that he found. His evidence is the only expert evidence that I have about the damp and mould issue in the property in September 2021.

70. Mr Halai some 18 months later also noted mould to the front elevation wall in the corner of the room, causing detachment of wallpaper due to surface condensation, but he put this down to *“the tenant’s previous high humidity levels in the room”*, saying that control of humidity and mould is within tenant’s control for the reasons set out in his main report, summarised above. He did not provide a photograph of this bedroom in his report so I cannot assess the level of mould that he found. In his comments on the Scott Schedule he did not acknowledge that any work was required. However, in his report at page 16 he provided a photograph of the roof void captioned *“Roof void has thermal insulation, but daylight seen at extract duct and also ripped sarking felt; both allowing additional air infiltration into the roof void”* and in the joint statement he agreed that the landlord should reinstate loose insulation to avoid cold patches, by which, in my judgment, he appeared to accept Mr Smitheringale’s view that there were inadequacies in the roof insulation which Red Kite should rectify, and that was a problem which was in part causative of mould. He also accepted that Red Kite should clean down the bedroom wall corner staining, which suggests to me that is some acknowledgment that the mould which caused such staining was, at least in part, the landlord’s responsibility.

71. Taking all of the evidence into account, I am satisfied that there was a severe mould issue in this room on Mr Smitheringale’s inspection in 2021 caused at least in part by the deficiencies in roof insulation and cavity wall insulation and gaps in the roof eaves identified by Mr Smitheringale, which caused cold spots in which condensation arose providing conditions for mould to grow

and proliferate, exacerbated by the failure of Red Kite to provide adequate ventilation in the bathroom which raised humidity levels in the Property. I am also satisfied on the balance of probabilities that this problem mould growth continued, for the same reasons, until Mr Halai inspected and was more likely than not to be worse at this time, given that he noted it had caused the wallpaper to detach which was not the case when Mr Smitheringale inspected. I consider that this continued until the works were finally signed off in February 2024. **I am satisfied that this is a hazard for the purposes of section 9A LTA pursuant to section 10(3) LTA and Schedule 1 to the Housing Act 2004 (“Exposure to... damp, mould or fungal growths”).**

***Third bedroom (smaller, front, upper level)— Mould growth (section 9A only)
(Item 3 Scott Schedule)***

72. Ms Jillians has similar complaints about this room as for the first bedroom: that she cannot keep on top of the mould despite daily cleaning and airing, and that she has complained about it many times to Red Kite who have sent contractors around to treat and paint the walls but have not dealt with the underlying issues. Ms Jillians’ evidence in her witness statement is that the damp and mould in the third bedroom is even worse than in the first bedroom, with the external wall being the worst affected. She says the wallpaper here was hanging off due to the damp.
73. Ms Jillians says that although she repeatedly complained about the damp and mould in bedroom three, Red Kite did nothing about it until early in 2023 when contractors washed and painted the affected walls but, she says, left the room “*in a mess with wallpaper stripped from the walls*”. She says that the mould returned within weeks.
74. Mr Smitheringale noted that there were “*small amounts of condensation related mould to the corner*” of this room, which he again attributed to lack of insulation at the eaves level, per the first bedroom. He recommended a Bactdet and Halophen treatment to the room “*to remove the high risk items*

of mould”. He has provided a photograph which shows a small amount of mould to a front corner of the third bedroom.

75. Mr Halai also noted mould to condensation on the front flank wall corner of the house, around the windows and the frame of the window head. He photographs the same corner of bedroom 3 as Mr Smitheringale, which, in my judgment, shows an increase in the spread and severity of mould growth to that shown in Mr Smitheringale’s photograph. He again put causation down to “*the tenant’s previous high humidity levels in the room*”, saying that control of humidity and mould was within the tenant’s control, but in the joint statement again accepted that loose insulation in the loft should be reinstated to avoid cold patches, which I am again satisfied is an acceptance of Mr Smitheringale’s view that there were inadequacies in the roof insulation and that was a problem which was in part causative of mould. He mentioned Mr Smitheringale’s recommendation of Bactdet treatment and did not either criticise it or endorse it but I think it is more likely than not if he thought it was unnecessary he would have said so.

76. I am also satisfied that there was significant mould growth at the time of Mr Smitheringale’s inspection in 2021 and severe mould growth at the time of Mr Halai’s inspection in 2023, in the third bedroom. I find that was more likely than not caused at least in part by the same deficiencies in roof insulation (but not cavity wall insulation in this case) and gaps in the roof eaves giving rise to mould growth as for the first bedroom, and also exacerbated by the lack of extracted ventilation in the bathroom. I consider this continued until finally signed off in February 2024. **I am satisfied that this is a hazard for the purposes of section 9A LTA pursuant to section 10(3) LTA and Schedule 1 to the Housing Act 2004 (“Exposure to... damp, mould or fungal growths”).**

Bathroom— (a) Mould growth (section 9A only) (Item 5 Scott Schedule)

77. Ms Jillians’ evidence is that the bathroom has been a regular problem for many years, with leaks from the shower and the radiator causing significant damp damage to the floor requiring its reinstatement by Red Kite (as can be

seen in the documentation), and a perennial problem with mould despite her efforts to clean it and keep the bathroom ventilated, albeit without the benefit of ventilated extraction until after the claim was served. She describes it as “*riddled with damp and mould*” and “*in a horrendous state*”. She said that Red Kite started to instal an extractor fan but did not connect it properly so that water poured through the pipe which resulted in water pouring into the bathroom. She said it was not properly installed until early 2023. She says the leaks in the bathroom from the extractor fan pipe and pipework below the bath have caused the floorboards to be rotten and damp such that at the time of her witness statement she was concerned that they were going to give way.

78. After the claim was issued, Red Kite renewed the flooring. It also renewed the pipework, electric shower and the toilet cistern as well as installing the extractor fan. After the flooring works (and others) were carried out, it failed two post-works inspections undertaken by Ms Singh, a surveyor of Red Kite and her emails and notes about this are contained in the bundle. In the second failure of 23 January 2024 she notes that the contractor was required to replace a section of rotten flooring in the bathroom and supply and fit a suitable floor covering, but although the works had purportedly been carried out one joist had been completely missed. Ms Jillians said that they had to rip up the bathroom and redo it.
79. This work, and other works carried out (and photographed by Ms Singh) appear to show an overall very low quality of work carried out by the contractors, Gilmartins. She has photographed an example of “repointing” work carried out to the exterior of the Property which looks as though someone has smeared a dirty protest over an extensive crack in a white wall, with the substance smeared not even filling the crack. I have never seen a “repair” so inept and pointless and to my mind it shows a contractor without the slightest interest in doing even a barely adequate job. Ms Singh comments “*...the tenant told me that when Gilmartins operative was completing the below, he was watching a YouTube ‘how to’ video. I am sure you would agree that it is worth investigating and most certainly a re-*

attendance to avoid professional embarrassment at court". This, and the fact that even with the pressure of litigation hanging over them the work carried out was of such poor quality that post-works inspections were failed twice, is strongly corroborative of Ms Jillians' complaints that works carried out by Gilmartins for Red Kite previously were bodged, or left half done, or did not resolve problems. I accept her evidence that leaks in the bathroom arose from such failures and shortcomings, including from a failed attempt to instal an extractor fan.

80. It was put to Ms Jillians in cross-examination that the damage to the floor was caused by the occupants of the Property being careless about water on the floor when using the shower and bath, and Ms Jillians denied it, saying she used a bathmat and was careful to wipe up. The photograph of the rotten floor at page 502 of the bundle appears to show a sodden and mouldy floor across all of the bathroom, and at its most mouldy not by the bath but under the radiator. I note that Red Kite appears to have accepted that the renewal of the rotten floor is a matter for them and not the tenant's responsibility and I accept her evidence. At paragraph 40 and 57 of her witness statement Ms Jillians says that she has repeatedly complained about the condition of the bathroom, and relies on Red Kite's own documentation which show her complaints as far back as 2018.
81. Ms Jillians points to damage to the kitchen ceiling, immediately below the bathroom, as evidence that there have been multiple leaks from the bathroom. Leaks from the bathroom/WC and through the kitchen ceiling are also evidenced in Red Kite's repair records going back to 2010 but also in November 2016 and October 2020, before the claim was issued, and as recently as 29 March 2022, shortly after the claim was issued.
82. Mr Smitheringale found that there was condensation related mould to the ceiling, which he photographed at internal page 15 of his report. This shows fairly extensive but light growth of mould around the central light. He describes this as condensation related mould to the ceiling likely due to the lack of and poor laying of loft insulation, as for the first and third bedrooms. He recommends a Bactdet and Halophen treatment, and notes the problem is

compounded by the fact that the bathroom does not have a working extractor fan. He recommends a 15l per second extraction fan “*to abate this high risk item of mould re-occurring*”. By the time Mr Halai inspected, an extraction fan had been installed by Red Kite, but the mould on the bathroom ceiling visible in the photograph on internal page 16 of Mr Halai’s report was significantly worse, appearing to have spread further across almost all of the ceiling visible in that photograph and heavier in growth. I think it is more likely than not that mould had become appreciably worse even after the ventilation fan was installed, given that there still appears to have been significant work required in the bathroom after this time, including the replacement of the sodden and mouldy bathroom floor, photographed at 502 of the bundle.

83. Mr Halai notes on the Scott Schedule that “*the roof above has loose laid thermal insulation over the entire roof void sufficient for thermal resistivity. Bathrooms create greater levels of moisture that will naturally sit on any surface (whether cold or not), prolong condensation that is unable to dry out creates mould to develop.*”. However he later notes in the Scott Schedule that “*Within the roof void directly above the ...fan some thermal insulation has been moved apart around the vent duct and daylight can be seen and also some sloping roof sarking felt has been torn; this is allowing unnecessary additional air migration over the bathroom ceiling area – close insulation gap*”. Despite noting this issue, which I am satisfied is an acceptance by Mr Halai that there are likely cold spots or patches on the ceiling causing condensation to develop, as he accepted was the case for the first and third bedrooms as already discussed, and despite also noting in the Scott Schedule that he had found a water leak behind the toilet pan which required investigating and repair, he went on to say that “*Mould and condensation likely to be caused by the tenant’s high humidity levels and lack of opening windows after hot showers to allow moisture to escape from the room. Tenant should be encouraged to ventilate room more regularly and reduce accumulation of humidity by good housekeeping*”. He does not explain why he considers the tenant’s actions to be solely causative of high humidity levels when there are at least two other potential causes known to

him, or three if you include the lack of extracted ventilation for a significant period of time before he inspected, during which time Mr Smitheringale identified significant mould growth and condensation.

84. I am satisfied that there was a significant mould issue in this room on Mr Smitheringale’s inspection in 2021 caused at least in part by deficiencies in roof insulation and gaps in the roof eaves identified by the experts, which caused cold spots in which condensation arose providing conditions for mould to grow and proliferate, exacerbated by (i) the failure of Red Kite to provide fan ventilation in the bathroom and (ii) a history of leaks in the bathroom which were sufficiently severe to rot the flooring in the bathroom and cause damp and damage to the kitchen ceiling directly beneath it (see my findings in respect of the kitchen set out below). I am satisfied that this mould growth had become severe by the time that Mr Halai inspected in in 2023, despite some works having been carried out including the installation of an extractor fan, and at this time another likely contributor to the high humidity levels and condensation was the leak identified by Mr Halai. I consider that continued until the works were finally signed off in February 2024. **I am satisfied that this is a hazard for the purposes of section 9A pursuant to section 10(3) and Schedule 1 to the Housing Act 2004 (“Exposure to... damp, mould or fungal growths”).**

Bathroom— (b) Faulty electric shower (section 9A/ section 11);

85. This is not pleaded. Mr Smitheringale mentioned in the original Scott Schedule that it was “*found to be faulty and not working as design (sic)*” and he recommended it to be “*overhauled*” at a cost of £80. Red Kite replaced it after the claim was issued, as part of the works carried out in late 2023. However, Mr Halai noted that Ms Jillians did not identify any defect to him. As it is not pleaded and not really particularised in the Scott Schedule, I make no finding about it.

Kitchen— Water damage and damp to ceiling (section 9A/section 11) (Item 6 Scott Schedule)

86. Ms Jillians' evidence in her witness statement is that the kitchen is in poor condition, with leaks from the pipework under the kitchen sink, a damp and stained kitchen ceiling due to leaking from the bathroom above, mould behind the cupboards due to constant leaks, and damaged kitchen units from those leaks. She said that some of the ceiling had fallen and hit her about 6 years previously because of the leaks from the bathroom, despite already complaining *"repeatedly that the ceiling was going to collapse for years before this"*. She said that Red Kite replastered the ceiling but did not address the leaks above. She said *"I was forced to make two small holes in the ceiling to allow the water to drain out as it was so dangerous and I was worried that it would fall on my children or cause electric shock. I was criticised by my landlord for doing this and they refilled the holes last year but they failed to repair the leak."* She says that she continued to report the issue to Red Kite by way of phone calls, and always pointed out the problem Red Kite's agents and contractors who visited the property, but nothing had been done about it.
87. She was cross-examined about this but was unshaken. She said there were two areas of the ceiling where leaks had come through. One was by the backdoor which she thought was from the leak from the failed extractor fan installation and one further in from the bath/shower. Red Kite's records show that on inspection after the claim was issued, a roof inspection found 4 tiles above the bathroom loosely fitted, and she said in re-examination that this was where they had damaged the roof by trying to install the hose for the fan. I accept that this is more likely than not a source of ingress of water. Another source is likely to be leaks from the bathroom pipes, in particular the radiator but also the under bath pipes complained about by Ms Jillians and later renewed by Red Kite after the claim was made. Red Kite's repair records show that *"the tenant has water coming through kitchen"* (12 April 2010), *"repair/replace water damaged kitchen unit/cupboard"* (12 July 2010), *"make safe kitchen ceiling"* (18 April 2012), which although more than 6 years ago shows that this was a long-standing issue. There are also references to leaks from WC/toilets in 2016 and a flurry of plumbing-related activity in February – April 2022 after the claim was brought, including *"water leak*

through ceiling” (29 March 2022). Ms Jillians says that although the leaks have been dealt with, the ceiling itself remains in a poor state of repair.

88. Mr Smitheringale found that the kitchen ceiling was “*damp damaged*” which he said was “*believed to be from a bathroom leak*”. He did not investigate the source of the leak, but recommended that this be done to ensure that it is not recurring. His evidence was that “*damp meter readings would suggest this leak is still ongoing*” and he included at internal page 18 of his report a photograph of a Protimeter MMS2 apparently pressed to the kitchen ceiling displaying a ‘relative value’ of 246 and indicating ‘wet’, which he captioned “*Kitchen ceiling showing high damp readings from leak*”. Mr Strelitz criticises this conclusion but I have explained why I do not accept that criticism. I accept Mr Smitheringale’s findings, which are supported the repair records appear to show that there was still a water leak through the ceiling in March 2022, after his inspection. Mr Smitheringale also exhibited a photo of some damp patches on the ceiling captioned “*Kitchen showing damaged ceiling from upstairs leak*”. He recommended taking down the ceiling board, skimming and decorating the damaged ceiling area. Mr Halai noted that “*the leak stain caused by a previous leak from the bathroom is now dry when tested with a damp meter. The bathroom leak appear[s] to have been resolved*”. Mr Smitheringale agreed with this in the Joint Scott Schedule. However there is evidence that there were further leaks from the bathroom and WC radiators after this time. Mr Halai did not criticise Mr Smitheringale’s evidence summarised above and nor did he include in his report any photographs of the then-current state of the kitchen ceiling. I note that the kitchen also did not have any mechanical ventilation at the time both experts inspected it.

89. **I am satisfied that the damp saturating the kitchen ceiling at the time of Mr Smitheringale’s inspection in 2021 was both a hazard for the purposes of section 9A pursuant to section 10(3) and Schedule 1 to the Housing Act 2004 (“*Exposure to... damp, mould or fungal growths*”) and a defect in a relevant condition (“*freedom from damp*”) in section 10(1) LTA, for the purposes of section 9A LTA.** I am satisfied that it is no longer

a hazard and a defect following the repairs which were finally signed off in February 2024 which means that there is no longer damp in the ceiling.

90. **I am also satisfied that the kitchen ceiling was at the time of Mr Smitheringale’s inspection in 2021, and remains, in disrepair pursuant to section 11 LTA as the leaks caused damage to the plasterwork of the ceiling which had deteriorated so as to be in a condition which called for repair at that time.** The structure of a dwelling-house includes plasterwork. Although the damp has been dealt with following the repairs which were carried out in 2022, the ceiling itself has not been repaired.

Kitchen— Water damage and damp to kitchen units (section 9A) (Item 6 Scott Schedule)

91. Mr Smitheringale found that the kitchen and sink units were found to be damp and damaged due to previous leaks from the sink as well as poor seals from around the back of the sink unit. He shows a photograph of the poor seals around the sink at internal page 21 of his report, and damage to a kitchen unit which he says is from a previous sink leak, which also appears to show damp damage to the adjacent wall, at internal page 19 of his report. He recommended replacement of the sink unit and sealing in correctly in the Joint Scott Schedule. Mr Halai agreed with that. Mr Halai also noted that there was a ‘very small drip’ from a radiator pipe in the kitchen, and recommended that the pipe connector required renewal, which Mr Smitheringale agreed was necessary.
92. Mr Smitheringale did not see any issue of mould behind the cupboards, but opined that it was *“likely due to the saturated levels that this will be saturated with mould and dampness once this is removed”*. Mr Halai did not opine on the point. Ms Jillians says that it is there and I am satisfied on the balance of probabilities that it is.
93. **I am satisfied that the mould behind the cupboards is a hazard for the purposes of section 9A pursuant to section 10(3) and Schedule 1 to the Housing Act 2004 (“Exposure to... damp, mould or fungal growths”), and**

was caused by humidity in the room mainly from leaks into the kitchen from the bathroom and WC above, a sodden ceiling, leaks within the kitchen itself, and exacerbated by the lack of mechanical ventilation in the kitchen. I am satisfied that the water damage to the sink unit and other kitchen unit identified by Mr Smitheringale is a defect in a relevant condition (*“facilities for preparation and cooking of food and for the disposal of waste water”*) in section 10(1) LTA, for the purposes of section 9A LTA. Both of these are continuing.

Kitchen— Faulty electric socket (section 9A/ section 11) (Item 6 Scott Schedule)

94. Mr Smitheringale found faulty electric sockets in the kitchen which he recommended should be replaced and retested. Mr Halai did not address this in his comments to the Scott Schedule but following the joint discussion the experts agreed that Red Kite should *“check last electrical certificate”*. Red Kite replaced the sockets at some point after the claim was issued. Mr Murray submits that I can rely on Mr Smitheringale’s evidence to find that at the time of his inspection they were not in proper working order. I do make that finding.
95. **I am satisfied that this was at the time of Mr Smitheringale’s inspection in 2021 a disrepair pursuant to section 11 LTA, which requires in section 11(1)(b) a landlord to *“keep in repair and proper working order and installations for sanitation, water, electricity and gas. I am also satisfied that it was a hazard for the purposes of section 9A pursuant to section 10(3) and Schedule 1 to the Housing Act 2004 (*“the position, location and operability of amenities, fittings and equipment”*).***

Exterior— Defective rear door (section 9A/11) (Item 7 Scott Schedule)

96. Ms Jillians says that the problem with the rear door has arisen because *“...there was not proper step to the back door which has caused the door frame to drop... As a result the locking mechanism to the back door doesn’t work”*. She says that she is frequently unable to open it. She says that

following complaints, Red Kite has adjusted the doors on numerous occasions but it remains defective.

97. Mr Smitheringale said *“The back door was found to have a poor repair in which the top locking mechanism has been sawed off, effectively rendering the door ineffective and unfit for purpose with its original locking design”*. He recommended replacement. Mr Halai agreed, described it as *“haphazardly reused”*, also with cracked glazing and questioned if it had been installed by the tenant. He said the glazing should be removed and made safe. The experts agreed that the ownership and installation responsibility as between Ms Jillians and Red Kite was unknown. However, I have seen that Ms Singh noted in her disrepair inspection report of 18 August 2023 that *“brick step needed at back door”*, and she raised a work request and this was carried out. I have also seen reference to the front and rear doors being overhauled, and resealed around, in March 2023 in the tenancy repair record. This is marked as not being for recharge to the tenant (“FALSE” in the appropriate column) and so appears to be a matter which Red Kite has accepted responsibility for. Given that, I do not consider that resealing around the glazing in the rear door meets the problems identified by Mr Smitheringale. It requires replacement.

98. **On the balance of probabilities I find that the problems with the rear door identified by Mr Smitheringale are defects in a relevant condition (“repair”) in section 10(1) LTA, for the purposes of section 9A LTA and were, and remain, in disrepair pursuant to section 11 LTA as damage to the structure of the dwelling-house (which includes, inter alia, external doors) which were and are in a condition which calls for repair.**

Exterior— Leaning and damaged fencing (section 9A only) (Item 7 Scott Schedule)

99. Ms Jillians’ evidence is that the condition of the fencing of the Property had deteriorated over the years. She said that it was leaning over damaged and dangerous. She said that she had complained about the fencing but Red Kite had refused to repair it, although they had repaired the fencing to the private

house next door. Accordingly, she says, she paid for the fencing to be repaired herself.

100. Mr Haines in his evidence points to clause 25 of the Tenancy Agreement which provides that the tenant is responsible for maintaining the garden of the Property. He said that as part of that she was required to maintain the fencing around the Property except that which meets the boundary of a road, footpath or common area. That is not a submission which is adopted by Mr Strelitz before me, and I do not accept it. He said that “*he understood*” that it required repair, and the fence itself “*needed reinforcing with support spurs given that it is leaning heavily into the neighbour’s garden, as evident on inspection on 2 February 2022 and 21 September 2022*”. He denied that Red Kite had replaced a neighbour’s fence. In cross-examination he said that Red Kite would only do so if it had been damaged by anti-social behaviour, or in other special circumstances. It would not do so if a tenant had damaged it. However, there is reference on Red Kite’s final updated Recharges Schedule to £1095 having been spent on “replacing fencing and posts”. When this was drawn to his attention in evidence in chief, he said that was the Property’s fencing which had been installed, but of course the Court later learnt that he had never been there and was not able to say what had been replaced and what had not.
101. Mr Smitheringale found that external fencing to the Property was leaning over dangerously and damaged, and recommended renewal, opining that it was a risk particularly with young children in the property.
102. Mr Halai did not address this issue. Instead he raised a question about the safety of a shared footpath, but both experts agreed that this was not a s11 LTA matter.
103. I prefer Ms Jillians’ evidence, supported by that of Mr Smitheringale, that Red Kite has not replaced the fencing at the Property which remains in a leaning dangerous condition. **I am satisfied that this was a defect in a relevant condition (“repair”) in section 10(1) LTA, for the purposes of section 9A LTA, until Ms Jillians repaired the fence herself.**

Has Red Kite satisfied the Court that any of those defects or repairs are defects or repairs for which Ms Jillians is liable by virtue of breach of the duty to occupy the Property in a tenant-like manner due to (i) overcrowding and (ii) failure to carry out the matters of housekeeping identified by Mr Halai in his report?

104. In relation to overcrowding, I can deal with this shortly in light of Mr Haines' admissions in cross examination, that:

- i) At the time of the 2013 tenancy agreement Red Kite was aware that nine people of the Jillians family were occupying the Property, and they continued to accept rent from her thereafter;
- ii) He had no reason to believe that the tenancy was conditional on a larger property being sought by Ms Jillians, or that at any time since then a larger property was offered to her, or that she had withdrawn her request for a larger property;
- iii) There was no breach of tenancy agreement to her living at the Property with up to eight children;
- iv) The 2018 variation was an updating of Red Kite's records not a variation of the contracted tenancy agreement so far as he knew.

105. As Red Kite was willing to enter into the Tenancy Agreement with Ms Jillians in 2013, without condition, knowing how many people would be willing to occupy it, and accept rent from her thereafter, in my judgment they cannot now say that the same number of people occupying the property is a breach of her obligation to act in a tenant-like manner. She is occupying it exactly how she told Red Kite, and Red Kite accepted, she would.

106. In relation to the housekeeping matters identified by Mr Halai, I have not found that any conduct of Ms Jillians relating to these matters has caused or contributed to the mould growth for the reasons I have given in this judgment, particularly in paragraphs 62, 63 and 64 above. In addition, I have found that Ms Jillians used the heating appropriately. I have found that there are ample

reasons for the high humidity found in the house arising from the various leaks over time from the bathroom radiator and bath pipes, in the kitchen, from the WC, from the previously incorrectly installed extractor fan; from the sodden bathroom floor which I have found to relate to leaks and not to the occupants' use of the bathroom; from the damp kitchen ceiling; and from the cold spots arising from the issues with loft insulation. Mr Strelitz submits that another reason for the mould may be that furniture has been pushed up the walls. Ms Jillians denies that it is, save in the very small box room where there is no way to use it as a bedroom otherwise. I agree that such use cannot be said to be in use of the Property in an un-tenantlike manner or the Property would not be able to sleep the occupants that Red Kite has accepted will be occupying pursuant to the Tenancy Agreement. In any event, the significant mould growth that I have seen is generally on the ceilings and around the windows, not behind pieces of furniture pressed up the walls. His submission that the humidity is also caused by the occupants using the gas cooker and breathing is nothing to the point. Such activities of daily living cannot be said to be failing to occupy in an un-tenantlike manner. It can only be another aspect of overcrowding argument that I have rejected.

Has Ms Jillians satisfied the Court (i) that she notified Red Kite of each defect or that Red Kite was on notice in some other way, and (ii) that Red Kite failed to remedy each defect within a reasonable time of being on notice of the defect?

107. Ms Jillians said in her witness statement that she has repeatedly complained to Red Kite about mould and damp throughout her tenancy. She says that these were "usually" by way of telephone calls to Red Kite's repair line, but that she has also made a couple of complaints through the online system. She also says that Red Kite's employees have been to the Property many times over the duration of her tenancy and have seen for themselves the defects and what she describes as the "abhorrent condition" of the Property. She notes that Red Kite's own documents show that she complained at least as far back as January 2018 about the issue of mould.

108. At paragraphs 40 and 57 of her witness statement she says that she has repeatedly complained about the condition of the bathroom, and again relies

on Red Kite's own documentation which she says show her complaints at least as far back as 2018.

109. She similarly says that she has reported disrepair to the landlord in relation to the kitchen by way of phone calls and by pointing out issue to contractors and agents of Red Kite attending the Property throughout her tenancy, but although contractors have been sent out, and have repaired the ceiling and redecorated, they have failed to sort out the key issue of leaks into the kitchen from the bathroom above, and to deal with leaking pipes in the kitchen itself, including from the kitchen radiator. She says that Red Kite has refused to do anything about the kitchen units and told her she will have to wait for a planned renovation programme.
110. In respect of the electrics, she said that the Red Kite's own electrician sent to test the electrics told her that a lot of the sockets were defective and wrongly installed, and failed to repair or replace them. She does not provide a date for this.
111. Ms Jillians says in her witness statement that the condition of the outside fencing has deteriorated over the years, and she has complained about it but Red Kite has refused to repair it. She says they instead repaired the fencing to the private house next door.
112. In terms of Red Kite's evidence, Mr Haines says that many of the items of repair referred to in Ms Jillians' letter of claim had not previously been reported to Red Kite and exhibits a "repairs log" of Red Kite as evidence of this. However he does not provide any details of what he says had not previously been reported, saying only that *"I do not provide evidence in relation to notice and/or liability in my witness statement as I understand that William's [Mr Walker] and Waynes' [Mr Richardson] witness statement[s] cover the same"*. As I have set out, Mr Walker's witness statement really just exhibits a number of documents and sets out the chronology of the dispute and proceedings. Those documents are the letter of claim, experts' reports and Scott Schedules, certain correspondence between the parties' solicitors, Red Kite's schedule of condition/inspection report of 2

February 2022, a specification of proposed works to be carried out at the property by Red Kite served with a letter dated 15 March 2022, various court documents and orders and pleadings. Accordingly he has nothing to add on the question of notification to Red Kite of issues for repair. He directs the Court to Mr Richardson's witness statement "*on the alleged disrepair and [Red Kite's] position on liability*".

113. I have also noted that Mr Richardson's witness statement is to a large extent inadmissible commentary on documents and advocacy. He has disclosed documentation relating to repair logs and histories, which I will come back to.
114. In a letter to Ms Jillians' solicitors of 10 September 2021 Red Kite notes that condensation issues were reported in the kitchen in February 2012, with no further issues being reported until April 2021, when a mould wash was carried out in May 2021 and lifestyle advice given. Red Kite also accepts that Ms Jillians reported problems of mould in the first and third bedrooms in January 2012 and again in April 2021 but say that it otherwise has no reports of mould made to it by Ms Jillians between those dates. It says on each occasion it carried out mould washes to those rooms, in February 2012 and May 2021. It says that the first report of mould in the bathroom was reported in April 2021 and it carried out a mould wash in May 2021. It says "*our records show very few issues reported to us about the condition of either of these rooms*".
115. I pause to note that I have seen very few records. In particular, I have seen no complaints log at all. None has been disclosed. The only documents relied on by Red Kite's witnesses are repairs logs and a repairs history and associated records, which do not evidence the complaints made to it, but only the visits and repairs which have been made at the Property, whether in response to complaints or otherwise. Of course, evidence of repairs and evidence of complaints are not the same thing. There might be a single complaint resulting in a visit, which is what Red Kite appears to ask me to infer, or multiple complaints over a long period of time which triggers a single visit, which is Ms Jillians' position. Without evidence of the number and dates of

complaints received, I have no way of knowing. There might also be visits that result in no or in inadequate action being taken, which is also Ms Jillians' evidence. To some extent this is borne out by the repairs log which shows, for example, that complaints were made about condensation and damp back in October 2012 to which the repair was "*decorating*". This does not address any of the reasons for the condensation and damp, which I have now found includes deficiencies in the loft insulation and lack of extracted ventilation in the bathroom.

116. Ms Jillians makes the very fair point in her oral evidence that phone calls to the repairs line are said to be recorded, but I have seen no call log let alone any transcript and none of the witnesses provides evidence about whether such a call log or transcripts exist. She also says that she made complaints about mould, damp, leaking pipes and radiators, leaks caused by the failed installation of the extractor fan, etc to contractors and agents of Red Kite who attended at her Property, but there is little evidence that any of this was passed on or actioned at any time before the claim was issued. As set out in my summary of the law, this is sufficient to be actual (where complaints were made to employees of Red Kite) or constructive (where complaints were made to agents) to Red Kite. Mr Strelitz criticises her for failing to provide her own log of complaints made to Red Kite, or evidence of phone calls from phone records, but I do not consider that this is fair. If complaints are made orally to employees, contractors and agents, or by telephone to a telephone line that is said to be recorded, then it is not reasonable to consider that she should have logged all of those. It seems to me more likely than not that there is a log of complaints held by Red Kite – at the very least those made by telephone – but they have not been disclosed. Mr Haines agrees he consulted IT systems which have not been disclosed and this supports my finding. I have not been asked to draw the inference that records of Ms Jillians' complaints have not been disclosed because they would not support Red Kite's case, and this was not put directly to Mr Haines, so I do not draw that inference. However I do take into account that although Ms Jillians has the burden of proof on this point, such records are in Red Kite's control and not hers, and they have not been disclosed to her. In any event, I have noted

the number of visits that contractors and employees have made to the Property from at least 2016 onwards. I am satisfied that the state of mould and damp and leaks and other problems in the house, which these contractors and employees were there to inspect or repair, was sufficient to put Red Kite on notice that they should carry out investigations of the problems.

117. Taking all of the evidence into account, I accept Ms Jillians' evidence that she has repeatedly and often notified the issue of damp and mould in the property (including the first and third bedroom, kitchen and bathroom) in the years before the letter of claim and at least since 2018; that she has notified Red Kite of issues with leaks in the bathroom, in the kitchen and through the kitchen ceiling causing damage to the kitchen units to Red Kite repeatedly and often in the years before the issue of the letter of claim and at least since 2018; that she has done so either by telephone or to employees and agents who have attended at the Property.
118. The damage to the kitchen ceiling and kitchen units are continuing. They have still not been dealt with adequately, and so I am satisfied they have not been dealt with within a reasonable time. The allegations of intermittent refusal of Ms Jillians to allow access to the Property really do not come into it. There has been a refusal by Red Kite to repair the kitchen ceiling and kitchen units which I have found require repair. An order for specific performance is sought, which I will return to.
119. The issue of mould growth in the First Bedroom, Third Bedroom and Bathroom is, I understand, no longer continuing following the works that have been carried out and were signed off in February 2024. No order for specific performance is sought. However given my findings that these were repeatedly reported in the years before the letter of claim, and in the letter of claim in August 2021, and that the mould growth had continued to increase in severity between Mr Smitheringale's report in September 2021 and Mr Halai's report in March 2023, even if I were to accept Red Kite's allegations that Ms Jillians intermittently and unreasonably failed to allow access after the claim was issued, I would still be satisfied that Red Kite failed to address these issues within a reasonable time as there was sufficient time to deal with

them even before Ms Jillians required visits to be arranged through her solicitor. There is no evidence before me that any delay caused by that process was causative of an increase in severity of the damp and mould problems. The other complaints that she did not allow access on one or two occasions when occupants had Covid or suspected Covid are, in my judgment, ill-founded. It seems entirely reasonable not to want contractors in the house at such a time, whether for public health reasons or simply to keep quiet and undisturbed those who are unwell.

120. For the same reasons, given my findings that leaks from the bathroom causing the damp ceiling in the kitchen had been notified to Red Kite for years before the letter of claim, even if I were to accept Red Kite's allegations that Ms Jillians intermittently and unreasonably failed to allow access after the claim was issued, I would still be satisfied that Red Kite failed to repair these leaks within a reasonable time.
121. In respect of the electric socket, Ms Jillians has failed to evidence when she says that Red Kite's contractors first identified the issue. Mr Smitheringale identified it as a problem in his report notified to Red Kite in November 2021, and Ms Jillians agrees that it was then dealt with by replacement of the socket but I cannot locate the timing for that in the papers before me. Mr Murray did not assist me with that in closing, suggesting that this was not the most significant matter. On balance I find that Ms Jillians has not satisfied me to the civil standard that there was a failure to repair the socket within a reasonable time.
122. In relation to the rear door, this was not notified in the letter of claim and appears to be a new matter identified by Mr Smitheringale. There is no real evidence that any complaint was made about it earlier. Accordingly I am satisfied that Red Kite were on notice in November 2021. Although some works were carried out to improve its condition in March 2023, I have found that this is insufficient and it requires replacement. Once again, even if I were to accept Red Kite's allegations that Ms Jillians intermittently refused access to the Property for repairs, I am satisfied that there is still a failure to repair within a reasonable time as Red Kite has declined to replace it at all.

123. That leaves the rear fence. It appears that although Red Kite denied responsibility for the fence, it agreed to replace it on a without prejudice basis, and then replaced the fence of a privately-owning neighbour. I have found that it is an actionable defect and that Red Kite has had notice of that at least since letter of claim of 10 August 2021. There was clearly no difficulty in accessing the Property to carry out works, as it did replace a fence, albeit the wrong one. I am satisfied that Red Kite's failure to replace the correct fence was a failure to repair within a reasonable time.
124. For those reasons I will not deal with the various submissions that I heard on the issue of whether Ms Jillians unreasonably refused access to the Property, as in light of the findings I have made, it is not relevant.

Fitness for human habitation

125. Mr Strelitz submits that it is not open to me to make a finding on unfitness for human habitation as I have no expert evidence on the point. He accepts that I have photographs showing the quantity of mould and where it is, but submits that I lack expert opinion on whether that level of mould in that position is hazardous to health in the quantity it is present and who needs to carry out HHSRS calculations to establish whether it is a Category 1 or Category 2 Hazard. I do not agree. I accept Mr Murray's submission that 'hazard' as defined in section 2 of the Housing Act 2004 is about the **risk** of harm to the health and safety of an occupier of a dwelling, which arises from a deficiency in the dwelling, not measurable and measured harms. He draws a distinction between section 9A LTA and section 11 in this respect, as pursuant to section 11 LTA a 'risk' of disrepair is not actionable. Under section 9A LTA a risk of harm is actionable and that is what I am required to assess by determining whether it is reasonably suitable for occupation.
126. I have stepped back and considered the condition of the Property as a whole, in light of the findings that I have made and in light of the law as I have found it to be. I have also considered all the evidence from Ms Jillians about the inconvenience and discomfort she and her household have suffered during this period, not all of which I have set out in this judgment which is already too

long. I am satisfied that the Property was not reasonably suitable for occupation from early 2018 to February 2024 without risk to the health and safety of the occupants and without both undue inconvenience and discomfort to the occupants such that it was not fit for human habitation during this period. Notwithstanding this finding, it is common ground that this would not constitute a breach of covenant until 20 March 2020, which is the date on which section 9A LTA began to apply to this tenancy (without retrospective effect).

127. Following sign off of the works in February 2024, although I have found that there is a continuing hazard or defect in condition in the form of mould behind the kitchen units which have been damaged by damp, works required the kitchen ceiling and replacement of the rear door, on balance I am satisfied that there is overall no risk to the health and safety of the occupants or undue inconvenience or discomfort and so since then it has been fit for human habitation. Red Kite remains liable to carry out those works.

Remedies

128. Ms Jillians seeks an order for specific performance requiring Red Kite to carry out the works identified in the paragraph above. I will grant such an order and hear submissions on the wording, unless agreed, at the handing down of the judgment.
129. Ms Jillians seeks general damages for distress, discomfort and inconvenience under section 9A LTA and as a result of diminution of her demise during the period that Red Kite has failed to carry out repairs under s11 LTA, limited to £5,000. I am satisfied that she has been put to discomfort and inconvenience and has been distressed by Red Kite's failures and the need to bring these proceedings and so is entitled to an award of damages.
130. In relation to section 9A LTA Mr Murray relies on the case of *Julie Wallace v Manchester City Council* *Wallace v Manchester City Council* (1998) 30 HLR 1111 (CA) (as pleaded by Ms Jillians) and submits the appropriate sum can be determined in a number of ways, including by a notional reduction in

the rent, or by a global award for discomfort and inconvenience, or a mixture of the two. In relation to s11 LTA, he submits that the starting point is a search for the sum which will place Ms Jillians in the position that she would have been in if the obligation to repair had been duly performed, which as she has remained in the Property will include compensation for loss of comfort and convenience which results from living in a property which was not in the state of repair it ought to have been, but was not.

131. Mr Murray in closing made specific submissions on quantum, but I accepted Mr Strelitz's suggestion in response that it would be preferable for those to be made and heard once my determination of the issues was known. Accordingly, unless it can be agreed between the parties, I will hear further submission on the quantum of damages which Ms Jillians seeks at the handing down of this judgment.

Counterclaim

132. Red Kite's final updated Schedule of Recharges seeks damages in the sum of £3,216.84. I can deal with this relatively simply.
133. Mr Haines made the following admissions in cross-examination:
- i) Only a single recharge incident was ever opened in respect of the work the subject of the counterclaim, on 7 March 2022, one week after issue of the Claim ("**The Recharge Incident**");
 - ii) Red Kite should have followed its own Recharges Policy in relation to the Recharge Incident;
 - iii) Red Kite did not follow its Recharges Policy as it had not: (a) advised Ms Jillians that any of the works would be subject to a recharge before the issue of the Counterclaim; (b) raised or sent Ms Jillians an invoice for any of the works before the issue of the Counterclaim; or (c) asked her for payment for those works upfront; each as the Recharges Policy requires;

- iv) Red Kite did not follow its own Recharges Policy “*because there is a court case... it is part of the process of the case*”. If Ms Jillians had not brought her claim for disrepair against Red Kite, it would not have counterclaimed in April 2022;
- v) Red Kite issued the Counterclaim: (a) before it had inspected the Property pursuant to the Recharge Incident on 5 July 2022 (which was the first date that it requested Ms Jillians allow inspection); and therefore (b) at a time when it was not even at the formal stage of issuing invoices and asking for payment upfront;
- vi) At the inspection of the Property on 5 July 2022, Red Kite produced a list of actions that it required Ms Jillians to take, and on further inspection on 8 September 2022 it was noted in the Recharge Incident report by an officer of Red Kite that “*All work asked of the tenant has now been completed... As there is no longer any tenancy breaches I will be closing my case.*” and the case was closed;
- vii) At no time within the Recharge Incident were invoices raised and sent to Ms Jillians;
- viii) At no time during the Recharge Incident had a financial charge been incurred by Red Kite for which Ms Jillians was responsible;
- ix) On a further inspection of the Property on 21 September 2022, nothing was found which caused the Recharge Incident to be re-opened, or which caused another recharge incident to be opened;
- x) In a print-out of repair history at the Property going back to February 2023 produced by Red Kite, in which every repair is logged and valued, in the column headed “Recharge Tenant” every entry reads “FALSE”, which meant that none of the work logged was rechargeable to Ms Jillians;

- x) He knew of no other such document covering the period from 21 September 2022 to February 2023 when the works were finally signed off;
- xii) If any work item at the Property had been recharged in that time, it would be recorded, a record produced and that document disclosed, but no further documents had been disclosed.

134. In re-examination Mr Strelitz asked Mr Haines if the costs contained in the Defendant's final updated Schedule of Recharges had been incurred by Red Kite or not, and Mr Haines said they had. I do not see that answer detracts from the admissions set out above, in particular admission viii.

135. Mr Strelitz submits that I can be satisfied that Red Kite has spent the sums set out in its schedule and so I should order Ms Jillians to repay them. However, given Mr Haines' admissions, Red Kite cannot satisfy me that any of those sums are properly rechargeable to Ms Jillians. Although Mr Haines did not go so far as admitting that the Counterclaim was brought to put pressure on Ms Jillians to drop her Claim in disrepair, his admissions that it was brought:

- i) despite breaches of the Recharge Policy "*because there is a court case*";
- ii) prematurely before Red Kite had inspected the Property and so before it was in a position to issue any invoice to Ms Jillians under the Recharge Policy; and
- iii) only because Ms Jillians had issued the Claim;

come perilously close to an admission that the Counterclaim was brought cynically and specifically to put pressure on Ms Jillians to drop her Claim, and not because Red Kite considered such sums were properly claimable. I dismiss the Counterclaim in its entirety.

CONCLUSION

136. The Claim succeeds in respect of claims under s9A LTA and s11 LTA as set out in this judgment.
137. The Property was unfit for human habitation from at least early 2018 to February 2024.
138. Ms Jillians is entitled to an order for specific performance requiring Red Kite to carry out outstanding works and to general damages.
139. Quantum of damages, the terms of the order for specific performance and consequential matters will be determined at the handing down of the judgment.
140. The Counterclaim is dismissed.