IN THE COUNTY COURT AT BIRMINGHAMClaim No. 3YS66585

Before His Honour Judge Lopez sitting on the 16th and 17th February 2015

BETWEEN:

PAULA WILLIAMSON

Claimant

and

ADALAT KHAN

Defendant

Mr Zia Nabi of counsel instructed by The Community Law Partnership appeared on behalf of the Claimant.

Mr Daniels of counsel instructed by Bourne Jaffa & Co solicitors appeared on behalf of the Defendant.

JUDGMENT

Introduction

1. This is a claim by Miss Paula Williamson, the Claimant, for damages in respect of disrepair in respect of the assured shorthold tenancy of Flat 2, 32 Prospect Road, Moseley, Birmingham, in the West Midlands, which she occupied between October 2002 and April 2013, some 10 ½ years, against her landlord Mr Adalat Khan, the Defendant.

Summary of the Essential Background of the Case

2. Miss Paula Williamson, the Claimant, was born on the 17thDecember, 1969, and is, therefore, 45 years of age. I shall refer to Miss Williamson as "the Claimant" throughout this judgment. She has suffered poor mental health. She has been diagnosed as suffering with Bi-Polar Disorder with has led to both medical and psychiatric intervention and support. He case is that she suffers from depression, agoraphobia, social phobia, extreme anxiety, stress and insomnia. Her problems were

exacerbated by her addiction to heroin. She no longer takes the drug but remains on a prescribed substitute.

3. Mr Adalat Khan, the Defendant, is the owner of 32 Prospect Road, Moseley, Birmingham, a pre-1919 detached house which has been divided into a number of five flats for rental. I shall refer to Mr Khan as "the Defendant" in this judgment. Flat 2 of 32 Prospect Road is a one bed roomed flat on the ground floor of the premises. It consists of a living room, kitchen and bathroom in which is situated a WC. The kitchen and bathroom are contained within a single storey addition at the rear of the premises which has a flat roof. Access to the flat is gained by a communal hallway. The tenant of Flat 2 has access to a garden area at the rear of the property. There is a door in the flat which allows access to a cellar beneath the property. I shall refer to Flat 2 as "the premises" throughout this judgment.

4. The tenancy agreement is found at page 184 of the bundle. There are 16 clauses or provisions to the agreement (although the final clause has three sub-clauses) only one of which is emphasised in bold type namely "Housing Benefit to be paid direct to the landlord without exception".The amount of the rent set out in tenancy agreement is in figures in the Defendant's handwriting.

5. The Claimant's case was that the weekly rent at the commencement of the tenancy was £89.00 per week – £4,628.00 per annum. However, the Defendant's case was that it was £89.50 per week - £4,654 per annum. In support of that figure he drew attention to his schedules of rent due and payments received in which he records the rent as £89.50 per week. The only independent evidence on the point is a Benefit Decision Notice from Birmingham City Council, dated the 17th March 2007 at page 164 of the in respect of an overpayment of £267.00 representing 3 weeks of Housing Benefit at £89.00, suggesting that was the rent.

6. It is the Defendant's case that the rent was increased to £110.00 per week - £5,720.00 per annum, on the 1st October 2008. The Claimant denies (i) that she was ever served with any notice of the increased rent; and, in any event, (b) the Defendant agreed to accept in full and final settlement of any rent liability the maximum amount of Housing Benefit that the Local Housing authority was willing to pay at any given time.

7. It is common ground between the parties that in 2012 the Defendant issued possession proceedings against the Claimant in which he also sought to recover a money judgment in respect of arrears of rent.

8. That action was heard before District Judge Asokan on the 4th October 2012. The order, found at page 188 of the bundle records that Mr Khan (now the Defendant) attended in person but that the Ms Williamson (now the Claimant) did not attend. The parties agree that was the case. The Claimant contends she was informed by the

Defendant that she need no attend but was unaware that a money judgment would be sought. The Defendant denies he informed the Claimant she did not have to attend and contends the Claimant would have been aware from the court papers that a money judgment was sought. The Learned District Judge made an order giving the landlord possession of the premises, pursuant to section 21 of the Housing Act 1988 on or before the 1st November 2012. Further, the court ordered Ms Williamson to pay Mr Khan the sum of £1,237.75 (£1,137.75 for the "*debt to date of judgment*" and £100.00 for costs" to be paid in full by the 18th October 2012.

9. The order does not reveal how the judgment debt was calculated but makes it clear that the sum was for the "debt due to date of the judgment" suggesting the payment was for the totality of the amount owed to the landlord.

10. The Claimant did not vacate the premises on the 1st November 2012 but was allowed to remain and eventually the Defendant applied for a warrant of possession on the 7th March 2013 which was granted and due to be executed on the 2nd April 2013 resulting in the Claimant vacating the premises at that time.

The Claimant's Claim for Disrepair

11. It is agreed by the parties that section 11 of the Landlord and Tenant Act 1985 applied to the tenancy and the Defendant as the owner and landlord of the premises was responsible for keeping in repair the structure and exterior of the premises – including drains, gutters and external pipes, and for keeping in repair and proper working order the installations in the premises for the supply of water, gas and electricity and for sanitation and for keeping in repair and proper working order the installations in the premises for space heating and heating water.

12. It is the Claimant's case that the premises were in a very significant state of disrepair from the outset of her tenancy and that the Defendant was put on notice of those defects and further defects as and when they arose. Therefore, the Claimant contends the Defendant was in breach of his obligations as he failed to carry out, or arrange to have carried out, the necessary repairs within a reasonable time of being notified of the need for the same.

13. The Claimant sets out the particulars of the alleged disrepair of the premises in detail in (a) the section entitled "Particulars of Disrepair" within the Particulars of Claim at paragraph 5.1 to 5.7 inclusive at pages 4 and 5 of the trial bundle; (b) in the inspection report of Mr Wheeler, dated the 8th March 2013 at pages 9 to 17 and the photographs annexed thereto at pages 18-25; (c) the Schedule of Disrepair at pages 26-36 of the bundle; and paragraphs 5-18 of her witness statement at pages 100-103of the bundle. I do not propose to repeat them in this judgment. However, in summary the Claimant alleges:-

(i) There was no hot water in the premises between February 2004 and October 2007 and January 2011 and April 2013;
(ii) There was inadequate and defective heating throughout the period of her tenancy;
(iii) There was rising and penetrating damp;
(iv) There were leaks from the kitchen waste pipe and the bathroom basin and leaks due to defective rainwater;
(v) The premises were invaded by rats each year due to defects in the structure of the premises;
(vi) Plasterwork was perished and defective;
(vii) There were holes in the floorboards;
(viii) External brickwork and rendering and the boundary wall were in disrepair;
(ix) The paving was damaged;
(x) There were drainage problems which resulted in offensive odours in the premises.

14. It is the Claimant's case that the Defendant inspected the premises prior to the letting and so was aware of the disrepair at the date the tenancy began. Further, the Claimant contends that she reported the other disrepair as it occurred to the Defendant, and then repeated her complaints on numerous occasions. The Claimant asserts that the Defendant had cause to inspect the premises on various occasions throughout the tenancy and was put on notice of the disrepair and the need for repair, in addition to the Claimant's complaints, by virtue of his attendance at the premises.

15. In the alternative the Claimant contends that the Defendant owed a duty at common law and our under section 4 of the Defective Premises Act 1972 to her to take all reasonable care to protect the Claimant, her property and possessions.

16. The Claimant alleges that by virtue of the disrepair she suffered distress, inconvenience, embarrassment, loss and damage as set out in paragraphs 10.1 to 10.11 inclusive of the Particulars of Claim at pages 6-7 of the bundle. I do not intend to repeat the same in this judgment but in summary the Claimant contends:-

(i) The premises were cold and uncomfortable and difficult to heat by reason of the inadequate and defective supply of heating causing her physical hardship;
(ii) She suffered depression and during her time in the premises was, on occasions, unable to get out of her bed for prolonged periods – the situation being aggravated by cold conditions;
(iii) She was unable to wash in the premises due the lack of hot water and had to shower at the property of friends;
(iv) The cold conditions were made worse by the damp that affected the wall in the premises. The bedroom walls were extremely damp and so she avoided sleeping in the bedroom;

(v) The dampness caused the plaster on the walls to perish and crumble so that the decorative state of the premises was poor and unsightly causing her embarrassment;

(vi) She had to clean constantly and deal with frequent leaks due to water penetration into the premises- as a result of external leaks and plumbing leaks;

(vii) The premises were infested with rats who entered due to defects in the structure of the premises; and

(viii) There were drainage problems and the odour from raw sewage was at times overpowering.

The Defendant's Case in respect of the Alleged Disrepair

17. By the Amended Defence and Counterclaim, dated the 29th May 2014 at pages 40-47, which was drafted by counsel in substitution for the Defence and Counterclaim, dated the 29th November 2013 at pages 38-39 prepared by the Defendant, the Defendant effectively denies the alleged disrepair and or that he was given notice of the alleged defects and disrepair. There are two exceptions to the denial. Firstly, that he was notified of a lack of hot water in or about January 2011 and repairs were carried out within two days of being notified of the defect. Secondly, he was informed of a leak on one occasion after which the matter was repaired. The Defendant specifically denies that the boundary wall and or the external paving are part of the demised premises so as to be encompassed by the obligations imposed by section 11 of the Landlord and Tenant Act 1985. The Defendant's response to the Claimant's Schedule of Disrepair is set out in the form of a Scott Schedule at pages 72-78 of the bundle.

The Defendant's Counterclaim for Arrears of Rent

18. By way of Counterclaim, as set out in paragraphs 12 and 13 of the Defence and Counterclaim at page 45, the Defendant claims rent arrears in the sum of £4,293.95 and court and bailiffs' fees of £210.00 namely the sum of £4,503.52. The Defendant contends that the arrears arose as until the 10th October 2008 the weekly rent for the premises was £89.50 but thereafter until the end of the tenancy the agreed rent was £110.00 per week. It is the Defendant's case that the Claimant persistently failed to pay the rent on time or at all and the arrears steadily accrued.

19. In support of the Defendant's Counterclaim for rent arrears various documents are attached to the Defence and Counterclaim including what purport to be a schedule of rent due and payments received. Careful and detailed analysis of the same does not reveal how the figure claimed is reached.

The Claimant's Case in Respect of the Alleged Rent Arrears

20. By a Reply to the Defence and Counterclaim, dated the 11th August 2014 at pages 62-64 the Claimant denies the sum claimed by way of Counterclaim or that any money is owed. The Claimant specifically denies that she agreed with the Defendant she would be responsible for any payment of rent in excess of that paid by way of Housing Benefit. The Claimant denies that she was informed that the rent would be increased as from October 2008 or that she agreed to such an increase. It is the Claimant's case that she was in receipt of full Housing Benefit throughout her tenancy, which was paid directly to the Defendant, and at the commencement of the tenancy the Defendant had agreed that payment of the full Housing Benefit would satisfy the rent liability. In addition, the Claimant puts the Defendant to strict proof of any sum alleged to be owed over and above that in the money judgment of the 4th October 2012.

The Law

The Burden of Proof

21. In any civil case the party making the allegation or assertion must prove the same; it is not for the opposing party to disprove the allegation or assertion. Therefore, the Claimant must prove the claim in respect of the alleged disrepair and Defendant must prove his Counterclaim – not only that monies are owed but the amount allegedly due.

The Standard of Proof

22. The standard of proof in any civil case is the simple balance of probabilities, neither more nor less.

23. By virtue of section 11(1)(a) of the Landlord and Tenant Act 1985 the landlord is obliged to keep in repair the structure and exterior of the dwelling house, including drains, gutters and external pipes. He is also obliged by virtue of section 11(1)(b) of the Act to keep in repair and proper working order any installations provided for space heating, water heating and sanitation and for the supply of water, gas and electricity. Further by virtue of section 11(1)(c) of the Act the landlord is obliged to keep in repair and proper working order the installations in the dwelling house for space heating and water heating.

24. By virtue of section 11(1A) of the Act the landlord's duty to keep in repair the structure and exterior extends to any part of the building in which the landlord has an estate or interest.

25. The general rule is that a covenant to keep premises in repair obliges the covenantor to keep them in repair at all times so that there is a breach of the obligation immediately a defect occurs. There is an exception where the obligation is the landlord's and the defect occurs within the demised premises themselves, in which case the landlord is in breach of his obligation only when he has information about the

existence of the defect such as would put a reasonable landlord on inquiry as to whether works of repair are needed and he has failed to carry out the necessary works with reasonable expedition. **BT Plc v Sun Life Plc [1996]Ch 69**

26. In **Edwards v Kumarasamy [2015] EWCA Civ 20** the Court of Appeal held the covenant imposed by section 11 of the Landlord and Tenant Act 1985 applied to the paved area between the front door of the block of flats and the communal bins in the car park and that notice was not required where the defect was not in the demised property.

The Approach to be Adopted when Awarding Damages for Disrepair

27. It is clear that there are three potential approaches to be adopted by a Court in calculating damages for disrepair. Firstly, an award for the diminution in the value of the property to the tenant calculated by reference to a proportion of the rent payable. Secondly, a global assessment of discomfort and inconvenience suffered without any reference to the rent payable. Thirdly, a combination of an award for diminution in value calculated as a percentage of the rent payable and a separate sum for discomfort and inconvenience. It is settled law that the Court may award more than 100% of the rent in damages. **Wallace v Manchester City Council 91998) 30 HLR 1111.**

28. An award of damages under section 11 of the 1985 Act is an award for breach of contract and the award of damages for stress and inconvenience should be related to the fact that the tenant was not getting proper value for the rent payable in respect of the defective premises. **English Churches Housing Group v Avrom Shine [2004] EWCA Civ434,** in which Wall LJ stated:-

> "*Whilst we accept that the guidelines helpfully set out by Morritt LJ in Wallace v Manchester City Council are not to be applied in a mechanistic or dogmatic way and whilst we accept that there will be cases in which the level of distress or inconvenience experienced by a tenant may require an award in excess of the level of rental payable, we take the view that the plain inference of Morritt LJ's judgment and the figures identified in the case itself, demonstrate that if an award of damages for stress and inconvenience arising from a landlord's breach of the implied covenant to repair is to exceed the level of the rental payable, clear reasons need to be given by the court for taking that course and the facts of the case – notably the conduct of the landlord – must warrant such an award*".

The Extent or Scope of the Findings

29. A Court is not required to make findings on every issue in the case. The Court is only required to make findings upon the relevant issues and those which assist in the determination of the matters before it at that time. I have, therefore, followed that

practice and only made those findings which are necessary in order to determine the issues before me.

The Evidence

30. I have had the benefit of reading the trial bundle which includes:-

(i) The Claim Form, Particulars of Claim, dated 11th October, 2013 at pages 1-8 to which is attached an Inspection Report, dated the 8th March 2013 by Steve Wheeler of Steve Wheeler & Co, Environmental Health and Housing Consultants, at pages 9-16 with photographs of the alleged disrepair at pages 18- 25

(ii) A Schedule of Disrepair at pages 26-36;

(iii) The Defence and Counterclaim, dated the 29th November 2013 t pages 38-39;

(iv) An Amended Defence and Counterclaim, dated the 29th May 2014 at pages 40-61;

(v) A Reply to the Defence and Counterclaim, dated the 11th August 2014 at pages 62-65;

(vi) The Defendant's "Reply to the Particulars of Claim and Scott Schedule", which is undated, at pages 66-71;

(vii) The Defendant's Response to the Scott Schedule at pages 72-78;

(viii) The statement of the Claimant, dated the 10th September 2014 at pages 99-107;

(ix) The statement of Mr Michael McIlvaney, the Claimant's solicitor, dated the 10th September, 2014 and photographs of the flat taken on the 17th April 2013 at pages 110-158;

(x) The statement of the Defendant, dated the 22nd September 2014 at pages 159-163 and exhibits at pages 164-182;

(xi) A plan of the layout of Flat 2 32 Prospect Road, Moseley at page 183;

(xii) The tenancy agreement for the flat, dated the 10th October 2002 between the Claimant and the Defendant at page 184;

(xiii) A Notice pursuant to the Housing Act 1988 seeking possession of the flat at page 185;

(xiv) A Notice pursuant to section 21 of the Housing Act 1998, dated the 26th March 2012 requiring possession of a periodic tenancy at page 187; and

(xv) An order by District Judge Asokan, dated the 4th October 2012,for possession of the premises by the 1st November 2012 and judgment against the Claimant in favour of the Defendant in the sum of £1,237.75 (inclusive of £100.00 cost) – in respect of rent, to be paid by the 18th October 2012 at page 188.

31. I also had the benefit of skeleton arguments on behalf of the Claimant and Defendant and a Case Summary and Schedule of Issues prepared on behalf of the Claimant. I heard detailed oral submissions on behalf of both parties.

The Claimant

32. The Claimant gave evidence broadly in line with her statement, dated the 10th September 2014. She corrected an inaccuracy in paragraph 33 of her statement which indicated she had lived at the premises for 14 years whereas it was only 10 ½ years. She was clear that the Defendant had agreed to accept the Housing Benefit she received in full and final satisfaction of the rent due. She was adamant that the Defendant had not informed her of any increase in the rent from £89.50 to £110.00 in or about October 2008 or at all. Further, she was quite clear that she had not agreed to such an increase and had not completed any application for additional Housing Benefit in respect of such an increase. She accepted that she had signed the original application form for Housing Benefit but all the other details thereon were completed by the Defendant who then took the form away with him so that he could submit the same on her behalf.

33. She was adamant that she did not receive warning letters from the Defendant informing her of arrears of rent.

34. As to the condition of her flat the Claimant repeatedly indicated, even under detailed and persistent cross examination, that the condition of her flat was as set out in her detailed statement, the report of Mr Wheeler and the photographs taken by him at the time of his report in March 2013 and the photographs taken by her solicitor on the 17th April 2013. She indicated that she had regularly informed the Defendant of the disrepair, the worst features of which were to lack of hot water supply for prolonged periods, the inadequate heating in the premises and the significant damp. She was particularly concerned about the regular infestation of the premises with rats – that were able to gain access via the defective structure. She was quite clear that despite informing the Defendant repeatedly of the general disrepair and the need for specific repairs nothing was done or on the rare occasion that any repair was undertaken it was poor quality or defective.

35. The Claimant accepted that towards the latter part of her tenancy she would inform the Defendant of a defect or repair that was required but when he failed to take action did not repeatedly complain, as she had done earlier, as she had given up hope that he would undertake the necessary work and repairs.

36. The Claimant accepted that she had a number of mental health problems including Bi-Polar Disorder, depression and Obsessive Compulsive Disorder – all of which although no caused by the state of disrepair were exacerbated by the same. At one point in her evidence before the adjournment for lunch she indicated that the condition of her flat had meant that she was "bedridden" for 5 years - due to a combination of the lack of hot water, heating, damp and the affect on her psychiatric conditions. After the short adjournment she indicated that she had been exaggerating when she had said she was "bedridden" for 5 years and that the period was much less

and more like 3 years. The Claimant told me that she wanted to tell me that as she wanted her evidence to be accurate.

37. The Claimant accepted that she had not worked during the period of her tenancy and was not working today. She did not accept the criticism made on behalf of the Defendant that she was work shy and indicated that she had been unable to work due to her poor health. She accepted that for a period during her tenancy she had been addicted to heroin but she now no longer used the drug. She accepted that she had often found it difficult to interact with others – including other tenants and visitors to her flat. She denied that the reason for the poor state of repair was that she had, on occasions, refused entry to workmen who would carry out repairs or safety checks in respect of the premises. The Claimant accepted that there had been a period during her tenancy when some of those who visited her premises exhibited anti-social behaviour resulting in complaints from other tenants. However, she denied that those visitors had caused the disrepair of which she now complained or that she had avoided the Defendant because she knew he wished to complain to her about her visitors in the light of the other tenants' complaints to him.

38. In short, the Claimant relied upon the report of Mr Wheeler and the photographs both he and her solicitor provided to illustrate the poor state of the premises. She accepted that she had lived in the property for 10 ½ years but had not taken legal action until after she left the tenancy. She accepted that during her tenancy, certainly from about 2008, she had the assistance of a support worker who could have assisted her in that process had she wished. She accepted that on her own account she continued to live in a flat that was in such a poor state it was barely habitable but indicated that was, given all her problems, the best she thought she could achieve.

39. She indicated that on at least one occasion she had reported her concerns about the state of disrepair to the local Council who had sent someone to the premises but "nothing was followed through". She accepted that she had reported the rat infestation to the Council, whose rodent control officers had attended the premises.

40. The Claimant made the point that although the Defendant had obtained possession of the premises under section 21 of the Housing Act 1988 and might, therefore, have been considered "intentionally homeless" by the local Council she was able to obtain local authority accommodation upon leaving the premises due to the state of disrepair of the flat she had occupied.

41. The Claimant denied that the reason the premises were damp and cold and she had no hot water was due to the fact, not of disrepair, but her failure to pay her gas and electricity bills so as to heat the premises and her water supply. She denied that she failed to pay those bills as she was spending her money on heroin. The Claimant informed me that she had had to care for herself since an early age and, despite all her problems and shortfalls, always paid her bills.

42. The Claimant was asked in great detail in cross examination about each and every aspect of the particulars of disrepair. She was adamant that the condition of the premises was as reflected in Mr Wheeler's report – as evidenced by the numerous photographs, and that she had drawn the same to the attention of the Defendant but to no effect. She disagreed that she had not made the Defendant aware of the problems or had refused entry to the premises for the Defendant to inspect the same or facilitate repairs.

Mr Michael McIlvaney – The Claimant's solicitor

43. Mr McIlvaney confirmed that the account he had given in his statement, dated the 10th September 2014 at pages 108-119 in the bundle was accurate and that the photographs of the premises which he had taken on the 17th April 2013 of the premises at pages 110-158 of the bundle were an accurate reflection of the state of the premises at that time. In short, his evidence was that the photographs of the state of disrepair spoke for themselves.

44. He indicated that he had taken the photographs of the property, the day before the Claimant was to leave the premises, not only with the aim of evidencing a claim for disrepair against the Defendant but also to assist the Claimant with her application for alternative accommodation to the local Council. He wished to establish that the Claimant had been forced to leave the premises due to the poor state of repair so that she would not be treated as "voluntarily homeless" by the Council. The Council had subsequently accepted that argument and re-housed the Claimant.

45. Although there was no evidence in the trial bundle about reports by the Claimant to the local Council about rat infestation, counsel on behalf of the Defendant cross examined Mr McIlvaney upon that point suggesting that the Claimant had not notified the Council as she claimed. I warned counsel for the Defendant about the possible consequences of such a course of action. Nevertheless he persisted as a result of which Mr McIlvaney indicated that he had made enquiries with the Council about the rat infestation, to be informed that the Claimant had complained about the rats to the Council on two occasions.

Mr Steve Wheeler – Environmental Health and Housing Consultant

46. The Claimant relied upon the evidence and expert opinion of Mr Steve Wheeler as set out in his report, dated the 8th March 2013 and the photographs of the premises attached to his report. I do not propose to repeat the contents thereof in this judgment.

47. In short, Mr Wheeler opined that the areas of dampness, mould growth, staining or softened plaster were likely to have been caused by a combination of rising style dampness, some penetrating dampness, the leak on the wash hand basin water pipe and possibly condensation. He indicated that some of the holed sections of floor particularly within the kitchen showed evidence of "gnaw marks" where the Claimant

alleged rats had entered the premises. Mr Wheeler noted that there were external defects including perished rendering, a corroded and leaking downpipe and a separate wastepipe for the flat above – at such a location that it would discharge over the roof of the Claimant's premises. He opined that some of the defects were of the type relevant to the landlord's repairing obligation under section 11 of the Landlord and Tenant Act 1985 and section 4 of the Defective Premises Act 1972 and the condition of the premises was such that he was satisfied it was prejudicial to health as defined by section 79(7) of the Environmental Protection Act 1990 and to constitute a statutory nuisance under section 79(1)(a) of the Act.

48. By an order of the Court dated the 24th July 2014 the Claimant was given permission to rely on the written report of Mr Wheeler at the trial. The Defendant was given permission to put questions to Mr Wheeler but failed to do so.

49. By an application, dated the 2nd January 2015 at pages 94-96 the Defendant sought to rely upon expert evidence in the form of a report, dated the 19th January 2014 by Mr Haroon of Portland Environmental Health Solutions. That application was determined by His Honour Judge McKenna on the 5th February 2015 who refused the Defendant's application to rely upon that evidence. Further, the Court confirmed that the Claimant was entitled to rely on the evidence of Mr Wheeler at the trial. The Defendant had not been given permission by the orders of the 24th July or the 29th October 2014 to rely upon Mr Haroon's report.

50. Therefore, Mr Wheeler was not required to give evidence at the trial and the Defendant did not adduce any expert evidence in contradiction of Mr Wheeler's opinion as to the state of disrepair or the reasons for the same.

The Defendant

51. The Defendant gave evidence broadly in line with his statement, dated the 22nd September 2014 at pages 159-163 and the exhibits attached thereto at pages 164-182. He indicated that he was now a landlord of a number of properties. He had a degree in estate management and was a qualified gas engineer, registered to carry out gas safety checks and tests.

52. He was adamant that at the time the tenancy was agreed he had made it clear to the Claimant that any shortfall in the rent not met by Housing Benefit would have to be paid by her. He accepted that although he had assisted the Claimant complete the application for Housing Benefit, it was her application. The Defendant insisted that he had given the Defendant notice of the increase in rent in October 2008 and so she was well aware of the increase in rent. Further, it was her and not him that made subsequent applications for additional Housing Benefit. He stressed that the Claimant had repeatedly failed to pay the shortfall in the rent occasioned by the difference between the rent due and the Housing Benefit received.

53. The Defendant denied that the premises were in a state of disrepair. He indicated that the Reply to the Schedule of Disrepair was accurate. In short, the Defendant denied that the premises were in a poor state of repair when the property was let. He categorically denied that the Claimant had complained to him repeatedly about the state of disrepair and or the need for repairs. He accepted that the Claimant had informed him on a few occasions about a matters which required attention and repair but he had always arranged for repairs within a few days of being informed of the same.

54. He was adamant that the Claimant had not been without hot water and adequate heating for the lengthy periods as she alleged. He asserted that the problem lay with the fact that she did not pay her electricity or gas bills, due to expenditure on illicit drugs, as a result of which she lacked heating or hot water. He contended that any damp was not caused by the poor state of repair of the premises, his lack of repair or water ingress but due to condensation exacerbated by the lack of heating resulting from failure to pay for the same.

55. The Defendant asserted that rather than inform him of the alleged problems the Claimant avoided contacting him as she was aware that other tenants had complained about her anti-social behaviour and that of her unsavoury visitors and his wish to speak to her about the same. The Defendant alleged that some of the matters of which the Claimant now complains were caused by visitors to her premises. The Defendant asserted that the external walls and paving were not part of the Claimant's premises and so were not cover by any obligation to repair.

56. As to the Counterclaim for rent arrears in the sum of £4,293.52 and court and bailiffs' fees of £210.00, the Defendant indicated that the figure of £1,137.75 and £100.00 in costs he claimed and was awarded on the 4th October 2012 did not include all of the arrears he was owed and so sought to recover the outstanding amount by the Counterclaim.

57. He tried by reference to his supporting documents, namely a schedule of monies owed and monies received – with was not prepared contemporaneously but at a unknown date thereafter, to explain the arrears of rent he alleged were still outstanding. Despite it being his claim and he being the author of the supporting documents he was unable, even with the assistance of his counsel, to explain how he had arrived at the figure claimed. At the end of his evidence in chief he indicated that the figure he sought was £3,937.52 in arrears of rent plus the court and bailiffs' fees of £210.00. However, it was clear that he had no real idea how that figure had been calculated.

58. Even after extensive cross examination of the point it was clear that not only did the Defendant have no idea what sums he alleged were outstanding but neither did both counsel or the Court. Despite repeated efforts to understand the Defendant's case on

the point I was, even by the end of the case, still unclear as to how he alleged he had calculated the alleged arrears. Indeed, by the end of the case both the Defendant and his own counsel accepted that they did not understand how the Defendant's counterclaim had been calculated.

59. At the start of his cross examination the Defendant indicated that he managed a relatively small number of properties – in the region of 25, for himself and others. However, he was later forced to accept that in fact he owned or co-owned through a number of companies in the region of 71 to 81 properties. He was asked about his membership of the Midland Landlord Accreditation Scheme and indicated he had left the Scheme. He then indicated he had left as the Scheme had taken the side of a tenant in a dispute. Eventually he was forced to accept that he was expelled from the Scheme in April 2014 as a result of his inaction over an improvement notice. He ultimately accepted that from the thousands of landlords who are members of the scheme he was the only landlord to ever have been expelled.

60. The Defendant was asked if he had ever been prosecuted for an offence relating to any property he lets. At first he indicated that he was unable to recall. Eventually he was forced to concede that he had been prosecuted twice. One occasion was in September 2012 for failing to provide adequate fire safety precautions for the tenants at one of his properties when he was fined £1,700. Further, he was forced to recall an incident at another of his properties at 71 Church Road where a tenant did only 3 or so months ago as a result of fire related causes.

61. Although unable to recall at first the Defendant ultimately recalled that on the 21st December 2010 he was issued with a Notice by the Health and Safety Executive in respect of another of his properties at 150 Summer Road as he had failed to provide evidence of gas fittings being maintained in a safe condition and or being safety checked. He denied that he had a blatant disregard for the safety and comfort of his tenants.

62. The Defendant repeatedly asserted that the Claimant had not informed him of any difficulties and problems in the premises, some of the issues were of her own making in any event and that she would not allow workmen in to carry out safety checks. Further, the lack of gas safety certificates for the property was explained by the fact that the engineer who attended to carry out the same could not check the appliances as the Claimant had not paid her bills and so there was no gas in the system to check the same. He accepted that he had no evidence from an engineer to that effect.

63. When questioned about his inability to provide documents to support his assertions, such as gas safety certificates, he stated that they had been in separate files in the office that were lost or misplaced, perhaps when he was clearing out old and irrelevant material. He was asked why he was unable to produce receipts from the workmen who carried out repairs to the Claimant's premises as he would have had to

keep those records to prove to Her Majesty's Revenue and Customs that he had spent the same so as to set it against his income. The Defendant indicated that he did not always obtain such receipts as it was difficult to do so and, therefore, often did not seek to set, what he described as "casual expenditure", as against his tax liability. It was suggested that was inconceivable and evidenced how he was prepared to embellish a lie with a detailed false explanation. The Defendant denied that he was lying.

64. The Defendant made it clear that he did not accept the evidence or opinion of Mr Wheeler. He refused to say that Mr Wheeler was lying but stressed that Mr Wheeler's evidence was not accurate and he did not agree with the analysis. His case was that there was not a state of disrepair – nor were the premises left or neglected for years. He accepted that he had not kept a diary or any record of notifications by the tenants of any repairs that were required. He stressed that he did not keep invoices or work orders for work he had asked to be carried out on his properties.

65. He could not explain why he had stated in paragraph 4 of the Defence and Counterclaim, which he signed as believing the facts therein to be true, that there was an oral periodic tenancy and no express terms were agreed with regard to repairs when he knew that there was an assured shorthold tenancy of the premises created by an agreement in October 2012.

66. The Defendant accepted that he was unable to recall how he had calculated the figure of £1,137.75 sought in rent arrears or what period that related to. He did not have the court papers relating to the earlier proceedings or his calculations and thought the relevant papers may have been thrown away when he "*thinned the file out*".

67. During cross examination the Defendant was questioned in detail about the Schedules – setting out the rent due and monies received, he had produced purportedly in support of his Counterclaim for rent arrears. He had been asked to produce the original Schedules at Court and did so. From examination of the originals it was apparent, which had not been the case with the copies in the trial bundle, that entries were made in different coloured ink and that entries had been removed by the use of correction fluid.

68. The Defendant had pointed out to him in cross examination a number of errors in his Schedule of monies owing and payments received, some in the Claimant's favour and some in his favour. Firstly, a payment of £358.00 on the 9th June 2008 in the schedule of payments prepared by Housing Benefit does not appear in the Defendant's schedule of payments at page 55. Secondly, a payment of £415.40 on the 7th June 2010 in the Housing Benefit schedule does not appear on the Defendant's schedule at page 57. Thirdly, the payment on the 12th March 2012 in the sum of £415.40 in the schedule of Housing Benefit payments was not included in his schedule of payments at page 59. Fourthly, although two payments of £415.40 are recorded has having been

paid to the Defendant by Housing Benefit in May 2012 at page 59 only one appears in the Defendant's schedule. Fifthly, the entry for the 11th March 2013 in the sum of £415.40 on the Housing Benefit's schedule of payments is missing from the schedule the Defendant prepared, at page 60 of the bundle.

69. The Defendant had also failed to appreciate that his schedule, even on his own account, was defective as it failed to claim as against the Claimant payments for which he had given her credit but had then been reclaimed or "clawed" back namely £445.00 on the 24th February 2006; two payments on the 20th and 28th March 2007; and £260.50 on the 7th June 2008. The Defendant apologized for the defects in his schedule of monies owing and payments made and told me that it was "*the best I could do*". He accepted the criticism of counsel for the Claimant that the Defendant had no idea how he calculated the arrears he claimed were outstanding and the characterization of his schedules as "*not being worth the paper they were written on*".

70. The Defendant denied the suggestion that he had not increased the rent in 2008 or that he had failed to inform the Claimant of the increase. However, he accepted the accuracy of the calculation by the Claimant's counsel that if the rent had not been increased as he alleged that he had been already been overpaid in the sum of £2,758.44.

The Application by the Defendant to Amend the Defence to Plead Limitation

71. On the first morning of the hearing the Defendant made an application in the face of the Court to amend the Defence and Counterclaim so as to include an assertion that as the Claimant's action was based upon breach of contract – the Defendant's alleged failure to meet his duty of repair, a limitation period of six years applied.

72. The Defendant's counsel, Mr Daniels, argued that the claim was issued on the 12th November 2013 and, therefore, any claim could not date back beyond the 13th November 2007 and since the Claimant left the premises on the 22nd April 2013 the claim could only be for the period of 5 years and 23 weeks between those dates.

73. The Claimant had not been put on notice prior to the trial of the application and no written application had been made to the Court. The late nature of the application was evidenced by the fact that I was presented with a hand written addition to the pleading. The Court was given no real explanation for the delay in making the application and I was left with the distinct impression that the idea to seek the amendment was made the evening before the trial commenced.

74. The Claimant objected to the amendment. It was stressed that no formal application had been made prior to the hearing. It was submitted that such an application made so late in the day, the morning of the hearing, when the proceedings had been

commenced in November 2013 – some 17 months earlier, and without any reason or justification for the delay should not be allowed.

75. Counsel for the Claimant relied upon **Ronex Properties Limited v John Laing Construction and Others [1983] 1Q.B. 398,** in which the Court of Appeal held that an application for a claim to be struck out on the grounds it disclosed no cause of action could only be properly made where it was manifest that there was an answer immediately destructive of the claim and that since a defence under the Limitation Acts barred the remedy and not the claim and the defence had to be pleaded the application by the Defendant to strike out was misconceived.

76. Having heard oral submissions by both counsel I ruled that the defence of limitation had to be specifically pleaded and refused the application by the Defendant to include the defence in its pleading. I indicated that I would not delay the trial by giving a more detailed judgment at that point but would do so in this judgment.

77. The footnotes in the White Book upon late amendments are helpful. It notes suggest that an important factor when considering permission to amend sought close to the trial date is whether the amendment will put the parties on an unequal footing or will place or add excessive burden to the opposing party's task of preparing for trial so as to jeopardise the trial date or so as to inevitably cause a postponement of the trial.

78. In **Swain-Mason v Mills & Reeve LLP [2011] 1WLR 2735,** in which the Claimants had been permitted to amend their claim in negligence at the start of the trial in order to raise a different case to that originally pleaded, the Court of Appeal allowed the Defendants' appeal against the amendment and held that the Court should be less ready to allow a late amendment than it used to be in former times and ruled that a heavy onus lies upon a party seeking to make a very late amendment to justify it, not only as regards his own position, but also as regards that of the other parties to litigation and other litigants in other cases before the Court.

79. Further, the Court of Appeal in **Swain** cited with approval the earlier decision of **Worldwide Corporation Ltd v GPT Ltd (unreported) 2 December 1998** in which Waller LJ stated:-

> "*Where a party has had many months to consider how he wants to put his case and where it is not by virtue of some new factor appearing from some disclosure only recently made, why, one asks rhetorically, should he be entitled to cause the trial to be delayed so far as his opponent is concerned and why should he be entitled to cause inconvenience to other litigants?*"

80. In this case the Defence and Counterclaim had already been amended once before and by counsel and so the Defendant had able opportunity to decide how to put his case.

81. Further, I was provided with no explanation, let alone one with merit, as to how the Amended Defence and Counterclaim had not specifically pleaded what it was submitted by the Defendant's counsel was such a clear and obvious point.

82. The propositions in the cases of **Swain-Mason v Mills & Reeve LLP [2011] 1WLR 2735** and **Worldwide Corporation Ltd v GPT Ltd (unreported) 2 December 1998** are quite clear, namely the Court should be less ready than previously to allow late amendment. It is difficult to envisage an application to amend any later than the first morning of the hearing. Given the lateness of the application I find that there was a heavy onus upon the Defendant seeking to make such a very late amendment to justify that course.

83. I found the lateness of the application to amend is compounded by the fact that the Defendant had made an application to adduce the evidence of Mr Haroon as late as the 22nd January 2015. That gave the Defendant's legal advisors yet another opportunity to consider the case and how it should be defended at trial and yet the point on limitation was not taken or even flagged to the other side.

84. I found that the Defendant failed to discharge the heavy onus upon him to justify the lateness of the application to amend. Therefore, I refused the application for permission to amend the Amended Defence and Counterclaim to include the defence of limitation.

The Analysis

85. I have, of course, reminded myself that it is party who makes an allegation or seeks to recover who must prove the case. Therefore, in this case the Claimant must prove the claim in respect of the alleged disrepair. However, it is the Defendant who must prove his Counterclaim – not only that monies are owed but the amount allegedly due.

86. In this case as with any civil action the standard of proof is the balance of probabilities, no more and no less.

87. The Claimant was obviously nervous when she gave her oral evidence. However, I found that she gave her evidence in a calm, measured and balanced manner. She was ready to accept points that were not in her favour and made appropriate concessions in respect of her case and her evidence.

88. As I have already indicated she gave evidence before the short adjournment on the first day that she had been confined to bed for five years as a result of the state of disrepair of the premises and its effect on her health but on refection after lunch indicated that the period was more like three years and that the earlier figure had been an exaggeration. She made it clear she wanted to correct the false impression she had given the Court. Further, she accepted that her numerous, significant and complex mental health problems and her addiction to heroin were not caused by the state of

disrepair of her premises and the Defendant's repeated failure to repair the same but stated that her health had been adversely affected by the same.

89. I found her to be an impressive witness. Despite her poor start in life and her many problems she was persuasive, plausible and truthful.

90. I accept her account that she accepted the tenancy of the premises although it was already in a poor state of repair when she moved in because she did not feel, given her limited means and difficult circumstances, that she would obtain better accommodation to be truthful. Further, I find that the state of disrepair of the premises was as she told me in her oral evidence. Her account of the state of disrepair of the premises is more than adequately supported by the detailed report by Mr Wheeler and the photographs of the premises that he took at the time of his inspection in March 2013. In addition, the photographs of the premises taken by the Claimant's solicitor in April 2013 also confirm the extent and nature of the condition of the premises.

91. Put bluntly the photographs of the premises not only give cogent evidence of the state of disrepair but illustrate the appalling conditions in which the Claimant was living far more graphically than the descriptions of the Claimant or Mr Wheeler.

92. I reject the Defendant's assertion that Mr Wheeler's report upon the state of disrepair is inaccurate and not a true reflection of the condition of the premises. I accept Mr Wheeler's report as accurate.

93. I have no hesitation in reaching the view that the defects of which the Claimant complains in her Particulars of Claim, Schedule of Disrepair and witness statement amount to disrepair of the premises in question. Further, I have no doubt that the defects in the external wall and paving also amount to disrepair.

94. I accept the Claimant's evidence that she informed the Defendant regularly about the defects in her premises and that, save on a few occasions when repairs were carried out – although not effectively or properly, the Defendant, although fully aware of the same, blatantly failed to carry out his obligation to repair. I have no doubt that the Defendant knew that repairs were required and without the same the conditions in which the Claimant was living would be unbearable but still failed to carry out his obligation.

95. It follows that I do not accept the assertions by the Defendant that the Claimant failed to inform him of the defects. I do not accept the Defendant's contention that the lack of appropriate heating and hot water in the premises was due to the Claimant's failure to pay her gas and electricity bills rather than defective appliances and that any damp was caused by her failure to heat the premises and not the defective state of repair. Nor do I accept the Defendant's assertions that any damage was caused by the unsavoury visitors to the Claimant's premises rather than the poor state of repair and his failure to act upon the Claimant's complaints and warnings.

96. I accept the Claimant's evidence that whilst she signed the tenancy agreement and application for Housing Benefit it was the Defendant who completed the same and submitted the application for benefit on her behalf. Further, I accept the Claimant's evidence that at the time she agreed to the tenancy the Defendant agreed to accept the monies she received in Housing Benefit in full satisfaction of the rent and that she would not have to pay any shortfall of rent. I do not accept that the Defendant gave notice, either in writing or orally, that the rent in respect of the premises had allegedly been increased to £110.00 in October 2008.

97. Further, I accept that the Defendant (i) informed the Claimant that she did not have to attend the Court hearing at which he sought possession of the premises on the 4thOctober 2012 and (ii) did not inform her that he was also seeking a money judgment against her for arrears of rent. However, it is quite clear that the Claimant would have been sent documents directly from the Court to her address which would, if read, have revealed that arrears of rent were being should. I find that the Claimant was, therefore, on notice that a money judgment was being sought.

98. In short, I find that in all aspects of the evidence where the evidence of the Claimant and Defendant conflict I prefer the evidence of the Claimant to that of the Defendant.

99. I am satisfied that the Claimant has proved, on the balance of probabilities, each and every aspect of her case. Indeed, I have no hesitation in making that finding as I am satisfied way beyond that standard.

100. As to the Defendant's evidence. I found him to be a thoroughly unimpressive witness. He was evasive in his answers. He often pretended not to understand even the most basic questions and was extremely reluctant to make any concession on any point. Even when confronted by incontrovertible evidence such as the extent of his property portfolio, his convictions, the notice by the Health and Safety Executive in respect of his failings as a landlord and his expulsion from the Midland Landlord Accreditation Scheme he would repeatedly claim he did not know or had forgotten and only agreed after intensive and thorough cross examination. Obtaining a straight and honest answer by the Defendant was, sadly, as difficult as pulling teeth.

101. The Defendant inability to answer even straightforward questions was not, I find, due to a lack of understanding of the questioning or the issues. I have no doubt that he is an intelligent man. I find he knew full well what was being asked of him but chose quite deliberately to prevaricate in an attempt to deflect the line of enquiry.

102. His evidence that many of the important documents that corroborate his version of events have been lost, that he does not retain invoices for repairs on his premises as he does not see to off-set the same as expenses against income tax or recall his convictions stretches incredulity to braking point.

103. His evidence was unconvincing, implausible and untruthful. I have no hesitation in reaching the view that the Defendant not only gave a false account of

events but did so quite deliberately with the clear intention of deceiving the Court. This was not a question of mistake on his part or poor recollection of distant events which had faded with the passage of time but a calculated attempt to lie about his shortcomings in an attempt to evade responsibility for the claim.

104. Further, it is clear that he sought to challenge the truthful account of the Claimant, who remains by any account vulnerable, by a vicious and sustained attack on her character.

105. Therefore, I have no hesitation in reaching the view that the Claimant has established each and every aspect of the state of disrepair as set out in her Particulars of Claim and the Schedule of Disrepair.Further, I find that as a result of the disrepair the Claimant suffered distress, inconvenience, embarrassment, loss and damage as set out in sub-paragraphs 10.1 to 10.10 of the Particulars of Claim and her witness statement.

106. I turn to the question of quantum in respect of the Claimant's claim. I have found that the Defendant was in breach of his obligation to repair throughout the Claimant's tenancy. Further, I find that the premises were in a very serious state of disrepair and not fit for habitation. The Claimant occupied the premises from the 10th October 2002 to the 21st April 2013, a period of 10 ½ years – or more accurately 126 months 1 week and 4 days, 549 weeks and 3 days or 3846 days. The Defendant obtained an order for possession on the 4th October 2012 that is 521 weeks or 3647 days after the commencement of the tenancy.

107. I have already found that despite the Claimant informing the Defendant of the defects he took little or no action in response. Further, I find that whilst the defective conditions did not cause the multiple and complex psychological and psychiatric conditions from which the Claimant suffered, her state was exacerbated by the appalling conditions in which she was required to live. There is no medical evidence to that effect. However, it is a matter of common sense that anyone living in such appalling conditions would experience distress, anxiety and embarrassment.

108. The fact that the Claimant had no hot water for extended periods and her heating was ineffective must, I find, have made the life of this vulnerable woman unbearable. The regular annual infestation of rats into the premises must, I find, have made a poor situation even worse and, at times, insufferable.

109. The skeleton argument on behalf of the Claimant drew my attention to a number of authorities to assist in the determination of the level of damages. Inter alia:-

(a) **Personal Representatives of Chiodi v De Marney [1989] 21HLR 6** in which £1,1560 (adjusted to £3,831.36) per annum was awarded for water penetration, no hot water, electrical problems and rotten windows;

(b) **Southwark LBC v Bente [1998] 2 CL 181** where £2,500 (adjusted to £3,972) per annum was awarded for "mid range" disrepair and the tenant was continually frustrated by the landlord's failure to repair;

(c) **Ferguson v Jones Legal Action** (December 2008) where £2,700 (adjusted to £3,268.35) per annum was for no heating and hot water;

(d) **Bernard v Meisuria Legal Action** (January 2011) where £20,000 – namely £5,000 (adjusted to £5,591.50) per annum was awarded for 4 years of rat infestation caused by the disrepair of drains.

(e) **Ngoma v Dhillon** (December 2012) where the Court awarded damages based on a 70% reduction in rent for penetrating and rising dampness, structural cracking and foul odours from incomplete drainage work.

110. As from the 1st April 2013 the measure of general damages in disrepair claims have, of course, increased by 10%. **Simmons v Castle [2013] 1 WLR 1239.**

111. Mr Nabi on behalf of the Claimant argued that the damages should (i) be assessed by reference to the diminution in value of the premises calculated by reference to a proportion of the rent payable; (ii) the appropriate percentage should be 80% of the rent payable; and (iii) that percentage should be calculated with respect to the "*rent said to be due at the end of her occupation for the duration of her occupation*".

112. I have no hesitation in reaching the view that the damages awarded to the Claimant should be based upon the diminution in the value of the premises to the Claimant assessed by reference to a proportion of the rent payable as opposed to the other potential approaches to calculating the same. The rationale for that approach is clear. The award of damages for disrepair is to reflect the fact that the tenant did not get proper value for the rent paid – paying for premises in good repair and yet living in a state of disrepair.

113. Given the extent and nature of the disrepair – in particular the prolonged periods without hot water and effective heating; the fact some of the disrepair was present at the commencement of the tenancy; the prolonged period during which the Claimant had to endure the state of disrepair, and the repeated failure of the Defendant to act upon the Claimant's requests for the matters to be remedied, i find that the figure of 80% of the rent is appropriate and fair.

114. It is, however, necessary to consider what figure in "rent" is to be used to calculate the award. I do not accept the submission on behalf of the Claimant that the figure should be the "*rent said to be due at the end of her occupation for the duration of the occupation*"- namely £110.00 or £5,720, 80% of which is the sum of £4,576.00

115. Firstly, I have already found that the rent payable by the Claimant to the Defendant was £89.50 per week or £4,654.00 per annum. I have rejected the

Defendant's assertion that the rent was increased to £110.00 per week in 2008. I find, therefore, that the measure of damages should not be based upon the higher figure since the Claimant was never obliged to pay that sum but, rather the lower figure which represented her payment for the premises she occupied. Secondly, the contention is fundamentally flawed in that it seeks to use the higher figure to assess the damages even before the rent was allegedly increased to that figure.

116. I find that the rent was £89.50 per week or £4,654.00 per annum and that should be used as the basis to calculate the diminution in the value of the premises which I assess as 80% thereof. Therefore, the annual diminution is 80% of £4,654.00 namely £3,723.20. Since the disrepair was present at the start of the tenancy and remained throughout the Claimant's occupancy I find that the period of 10 ½ years is appropriate period to use in determining the award. That results in a figure of £39,093.60. To that figure the 10% uplift must be applied in accordance with the decision in **Simmons v Castle** resulting in a total figure of £43,002.96.

117. I now turn to the Defendant's Counterclaim for the sum of £4,503.52 - £4,293.52 in rent arrears and £210.00 in respect of Court and bailiffs' fees. Given that I have found that the Defendant was an unconvincing, implausible and untruthful witness who gave evidence in order to deceive the Court, in order for him to establish his Counterclaim, even on the balance of probabilities, he would have to have presented clear and cogent documentary evidence to support his case that there were rent arrears and the amount thereof.

118. Even on his own account that evidence does not exist. He admitted in evidence that the schedule upon which he sought to rely to prove the alleged arrears was inaccurate, he had no idea how he had calculated the alleged arrears, his schedule was not contemporaneous but prepared at some later unknown date and he was unable to demonstrate how he had calculated the arrears of £1,137.75 awarded in the earlier proceedings or why he had not sought to recover a greater sum at that time.

119. As I indicated earlier in this judgment, even by the end of the case the Defendant and his own counsel were not able to indicate how the counterclaim was framed. The court, despite repeated attempts and questioning during the Defendant's evidence, was in no better position. In reality the Defendant and his counsel all but accepted that the Court would be unable to make a finding in the Defendant's favour on the Counterclaim as the Defendant's case lacked the cogency upon which to base such a finding.

120. I find that the Defendant has soundly failed to prove his Counterclaim. There is no reliable supportive documentary evidence and the Defendant is unable to give cogent oral evidence in support thereof.

121. The Counterclaim is dismissed.

122. The Defendant argued that if the Claimant succeeded in any part of her claim so that the Court awarded damages to her, the unsatisfied money judgment that he obtained on the 4th October 2012 of £1,237.75 – inclusive of costs, should be set off against any such award. I do not propose to adopt that course of action. It is not at all clear how the Defendant calculated the figure the Court ordered the Claimant to pay. Indeed given my findings about the manner in which the Defendant kept his records and his propensity for untruthfulness it would be inappropriate to allow the remedy of set off in this case. If the Defendant wishes to enforce the judgment of October 2012 he must seek to enforce the same.

123. There will be judgment for the Claimant in the sum £43,002.96. That sum will be payable to the Claimant by the 14th May 2015.

124. The Defendant will pay the Claimant's costs of the Claim and on the Counterclaim to be assessed if not agreed by the 14th May 2015Although the counsel for the Claimant submitted that the Defendant should pay the Claimant's costs on an indemnity basis I decline to make an order in those terms.

125. A draft of this judgment was sent to the parties on the 12th March 2015 but has only been possible due to court commitments for the judgment to be handed down today.

Birmingham Civil and Family Justice Centre,

Bull Street,

Birmingham.

12th March 2015