FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case references	**:**	**LON/00BH/HXL/2019/0001-0007**
Properties	**:**	**Flats 1, 2, 3, 4, 5, 109-111 Old Church Road, London E4 6ST** **Flats A & B, 158 Blackhorse Road, London E17 6HN**
Applicant	**:**	**Luxcool Limited**
Representative	**:**	**Anthony Gold, solicitors**
Respondent	**:**	**London Borough of Waltham Forest**
Representative	**:**	**Sharpe Pritchard LLP**
Types of application	**:**	**Section 110(7) Housing Act 2004 – accounts maintained in respect of interim management orders**
Tribunal	**:**	**Judge Amran Vance** **Mr T Sennett**
Dates of Hearing	**:**	**8,9,10,11 and 14 February 2022**
Date of Decision	**:**	**20 April 2022**

DECISION

Covid-19 pandemic: description of hearing

This was a remote video hearing which has not been objected to by the parties. The form of remote hearing was V: FVHREMOTE. A face-to-face hearing was not held because it was not practicable, and all issues could be determined in a remote hearing. Page numbers in bold and in square brackets below refer to pages from the 784-page electronic hearing bundle provided by the Applicants. Page numbers in bold and in square brackets with the prefix "Supp:" refer to a 110-page supplementary bundle provided during the course of the hearing.

Order

1. We declare that except as referred to in paragraph 2 below the following amounts shown in the Council's accounts **[Supp:30-36]** constitute expenditure that was reasonably incurred in connection with the performance of its duties under s.106(1) to (3) Housing Act 2004, in respect of Flats 1, 2, 3, 4, 5, 109-111 Old Church Road, London E4 6ST and Flats A & B, 158 Blackhorse Road, London E17 6HN:

158 Blackhorse Road (Flat A)	£9,978.00
158 Blackhorse Road (Flat B)	£9,875.20
Flat 1, 109-111 Old Church Road	£9,895.43
Flat 2, 109-111 Old Church Road	£12,513.43
Flat 3, 109-111 Old Church Road	£10,001.43
Flat 4, 109-111 Old Church Road	£9,779.43
Flat 5, 109-111 Old Church Road	£9,402.43

2. The Council must adjust its accounts by making the following reductions that it conceded constituted expenditure that was not reasonably incurred under its s.106(1) to (3) duties:

    (a) £150 (out of a total sum of £620) in respect of the carpeting of the staircase in the communal areas of 109-111 Old Church Rd; and

    (b) £50 for the costs of replacing the laminate covering to the kitchen worktop in Flat 2, 109-111 Old Church Rd.

Background

3. This is the Applicant's application, pursuant to s.110(7) Housing Act 2004 ("the 2004 Act"), for an order:

    (a) declaring that certain amounts shown in the Respondent Council's expenditure accounts do not constitute expenditure reasonably incurred by the Council; and;

    (b) requiring the Council to make such financial adjustments to its accounts as are necessary to reflect that declaration.

4. The application concerns seven properties ("the Seven Properties"), all of which were the subject of Interim Management Orders ("IMOs") made by the Council on 6 December under s.102(2) of the 2004 Act. The properties are as follows:

    (a) flats 1, 2, 3, 4, 5, 109-111 Old Church Road, London E4 6ST ("the Old Church Road Properties); and

    (b) Flats A & B, 158 Blackhorse Road, London E17 6HN ("the Blackhorse Road Properties").

5. At all material times, the Old Church Road Properties have been owned by the Applicant, Luxcool Limited. The building comprises three storeys, with a commercial grocery store occupying most of the ground floor, and the residential flats on the first and second floors. The Blackhorse Road Properties were previously owned by Mrs Nasim Hussain until she transferred them to Blackbrook Capital Ltd on 20 December 2019. Mrs Nasim Hussain and Blackbrook Capital Ltd have confirmed that they authorised the Applicant to grant tenancies for the Blackhorse Road Properties in its own name.

6. The Applicant was, therefore, at all material times, the relevant landlord in respect of the Seven Properties for the purposes of the definition given at s110(8) of the 2004 Act.

7. Licence applications in respect of the Seven Properties were refused by the Council on 23 November 2018. Mrs Hussain appealed against those refusals, which were dismissed by this Tribunal in a decision dated 16 August 2021. That decision was made in respect of application numbers LON/OOBH/HSL/2019/0002-0014, LON/OOBH/HSV/2019/0002-0024, and LON/OOBH/HXO/2019/0001-0007, which concerned not only Mrs Hussain's appeals against the licence refusals for the Seven Properties, but also decisions taken by the Council to revoke or refuse licences, and to make Final Management Orders ("FMOs") in respect in respect of multiple other properties. This tribunal granted the Council permission to appeal its 16 August 2021 decision, and we are informed that the appeal is due to be heard by the Upper Tribunal (Lands Chamber) between 4 July 2022 and 28 October 2022, under reference LC-2021-556.

8. After the IMOs were made, the Council instructed Lettings Waltham Forest ("LWF"), its in-house lettings agency, to manage the Seven Properties.

9. On 5 November 2019, the Council made FMOs in respect of the Seven Properties. These were appealed by Mrs Hussain, with the result being that the FMO's did not come into effect. Instead, the tenure of the IMOs was extended by virtue of s.114(6) of the 2004 Act.

10. Notwithstanding the appeal currently before the Upper Tribunal in respect of the tribunal's 16 August 2021 decision, the Applicant's position is that this current application should be dealt with on the assumption that the FMOs were properly made, and that the IMOs remained in force until revoked by the Respondent. The Council concurs.

11. Licences for the Seven Properties were granted by the Council to an alternative licence holder, Lettings International Limited, on 30 April 2020, which resulted in termination of the IMOs.

12. The Applicant submits that the declaration it seeks is justified as:

    (a) items of expenditure in the Council's accounts were not reasonably incurred because, either the expenditure:

        i. was not incurred pursuant to the Council's duties under s106(1)-(3) of the 2004 Act; or

        ii. was unnecessary; or

        iii. concerned works that were carried to a substandard quality; or

        iv. was excessive;

    (b) the accounts need to be amended to take into account the costs to Applicant of rectifying poor workmanship overseen by the Council; and

    (c) the accounts should therefore be amended to take into account rental income lost because of the Council's failure to properly seek to market or let some of the properties.

13. The application was opposed by the Council. Its position was that except for concessions made in respect of two items of expenditure, all of the authority's expenditure set out in the Schedule of Disputed Items ("the Scott Schedule") prepared by the parties **[40-49]** was reasonably incurred.

14. At the hearing of the application the Applicant was represented by Mr Archie Maddan, of counsel, and the Respondent was represented by Riccardo Calzavara, also of counsel. Oral evidence on behalf of the Applicant was given by Mr Wahab Hussain, a director of the Applicant

company, and Ms Claire De Vos, a chartered surveyor who had provided an expert report dated 15 April 2021 **[150]**. For the Council, we heard oral evidence from: (a) Ms Julia Morris, a Service Manager in the Council's Private Sector Housing and Planning Enforcement team; (b) Mr Ian Dick, who previously worked for the Council as an Environmental Health Officer; (c) Mr Amrick Nota, the Lettings Manager at LWF; and (d) Mr David Beach, the Council's Director of Enforcement.

Legal Framework

15. A house comes within the licensing provisions of Part 3 if it is in an area that is designated under s.80 as subject to selective licensing, and the whole of it is occupied either under a single tenancy or licence, or under two or more tenancies or licenses in respect of different dwellings contained within it, unless the tenancies or licences are exempt (s.79(2). The exceptions are not relevant to this application.

16. Subject to irrelevant exceptions, every Part 3 house must be licensed (s.85(1)).

17. By virtue of s.99:

    (a) a "house" is defined as a building, or part of a building, consisting of one or more dwellings, and includes any yard, garden, outhouses and appurtenances belonging to, or usually enjoyed with, it (or any part of it); and

    (b) a "dwelling" is defined as a building, or part of a building occupied, or intended to be occupied as a separate dwelling.

18. In *Waltham Forest LBC v Khan* [2017] UKUT 153 (LC) at [11]), the Deputy President said that it follows that each flat in a house converted into a number of separate flats is itself a house for the purpose Part 3.

19. Section 102 of the 2004 Act concerns the making of IMOs and, so far as relevant, provides as follows:

" (1) A local housing authority–

    (a) are under a duty to make an interim management order in respect of a house in a case within subsection (2) or (3), and

    (b) .....

(2) The authority must make an interim management order in respect of a house if–

    (a) it is an HMO or a Part 3 house which is required to be licensed under Part 2 or Part 3 (see section 61(1) or 85(1))but is not so licensed, and

    (b) they consider either–

(i) that there is no reasonable prospect of its being so licensed in the near future, or

(ii) that the health and safety condition is satisfied (see section 104).

(3) –(10) ....."

20. Section 105 concerns the operation of IMOs and provides that an IMO made under s.102(2) comes into force when it is made, and ceases to have effect after 12 months. If an FMO is made to replace an IMO, the FMO has not come into force because but an appeal to the tribunal against the FMO has been made, the IMO continues in force pending determination of the appeal (s.105(8)-(9)).

21. Section 101(3) provides as follows:

"(3)An interim management order is an order (expiring not more than 12 months after it is made) which is made for the purpose of securing that the following steps are taken in relation to the house–

(a) any immediate steps which the authority consider necessary to protect the health, safety or welfare of persons occupying the house, or persons occupying or having an estate or interest in any premises in the vicinity, and

(b) any other steps which the authority think appropriate with a view to the proper management of the house pending [...] the making of a final management order in respect of it (or, if appropriate, the revocation of the interim management order

22. Section 106 concerns the local housing authority's duties once an IMO is in force, and, so far as is relevant, provides as follows:

"(1) A local housing authority who have made an interim management order in respect of a house must comply with the following provisions as soon as practicable after the order has come into force.

(2) The authority must first take any immediate steps which they consider to be necessary for the purpose of protecting the health, safety or welfare of persons occupying the house, or persons occupying or having an estate or interest in any premises in the vicinity.

(3) The authority must also take such other steps as they consider appropriate with a view to the proper management of the house pending–

(a) the grant of a licence or the making of a final management order in respect of the house as mentioned in subsection(4) or (5), or

(b) the revocation of the interim management order as mentioned in subsection (5).

(4) – (7) .....

23. Section 107(3)(b) provides that the authority is empowered to do anything in relation to the house which a person having an estate or interest in it would be entitled to do, and s.107(3)(c)(i) empowers the authority to create an interest in the house which, so far as possible, has all the incidents of a leasehold. However, in order to do so, it needs the written consent of the person who would (but for the IMO) have power to create the lease in question.

24. An authority is not liable to any person having an estate or interest in the house for anything done or omitted to be done in the performance, or intended performance, of its duties under s.106(1)-(3), unless the act or omission is due to negligence (s.107(7)(a)).

25. Section 110 concerns financial arrangements while an IMO is in force and includes, at s.110(3) the power for the authority to use rent, or other payments which the authority have collected or recovered from persons occupying the house, to meet relevant expenditure.

26. "Relevant expenditure" is defined in s.110(2) as meaning expenditure reasonably incurred by the authority in connection with performing their duties under section 106(1) to (3) in respect of the house (including any premiums paid for insurance of the premises).

27. Section 110(6)(a) requires an authority to keep full accounts of its income and expenditure in respect of the house whilst an IMO is in force.

28. Section 106(7) enables a relevant landlord of the house to apply to this tribunal for an order:

" (a) declaring that an amount shown in the accounts as expenditure of the authority does not constitute expenditure reasonably incurred by the authority as mentioned in subsection (2);

(b) requiring the authority to make such financial adjustments (in the accounts and otherwise) as are necessary to reflect the tribunal's declaration.

Agreed Chronology

29. During the course of the hearing, the parties agreed a factual chronology **[Supp 25-27]**. We are grateful to both counsel for their assistance in this respect. Except where indicated below, the following extracts from the chronology are agreed.

30. On 6 December 2018, after the IMOs were made, Waseem Hussain and Catherine Lovett, two members of the Council's Private Sector Housing team inspected the subject properties. Ms Lovett inspected the Old Church

Road Properties, together with Mr Beach, and subsequently produced a written Schedule of Works setting out the scope of works she believed was required at the properties **[533-538].** Mr Hussain did the same in respect of the Blackhorse Road Properties **[562-564]**. Both Schedules are undated.

31. The tenant of Flat 4, Old Church Road, vacated the flat on 16 December 2018. On the same date, the Council completed Electric Installation Condition Reports ("EICRs") for the Old Church Road Properties.

32. Wahab Hussain's visited the Old Church Road Properties on 30 December 2018 **[258]**.

33. On 16 January 2019, the Council obtained Energy Performance Certificates ("EPCs") for the Flats 1-3 Old Church Road, and EICRs for the Blackhorse Road Properties.

34. On 18 January 2019, in response to an email from the Council sent the same day, Mrs Hussain provided the Council with her banking details (for payments to be made to her by the Council) and requested that all correspondence be emailed to allprop@live.co.uk.

35. The Council carried out a second set of EPCs for Flats 1-3 Old Church Road on 29 January 2019.

36. Mr Amrick Nota sought Mrs Hussain's consent to re-let Flat 4, 109-111 Old Church Rd on 31 January 2019, which was granted on 4 February 2019 **[662]**

37. EPCs were completed for the Council in respect of Flats 4-5 Old Church Road on 14 February 2019.

38. On 12 March 2019, following an invitation to tender for works to the Old Church Road Properties, the Azpen Group Co. Ltd ("Azpen") wrote to Shahzad Hussain, Head of Commercial Operations in LWF **[622]**, outlining its proposals in respect of works to the external parts of the Old Church Road Properties. Azpen then carried out a survey of the building on 15 March 2019 and produced a written report noting defects it considered present and setting out its recommendations **[581-621]**.

39. On 18 March 2019, Wahab Hussain's carried out a second visit to the Old Church Road Properties and took several photographs of the exterior of the building and its common parts **[259-265]**.

40. Azpen carried out a second, borescopic, survey of the Old Church Properties and confirmed its findings in a survey report dated 4 April 2019 **[570–580]**, and in a covering letter to Shahzad Hussain of the same date**[568-569]**. In a letter dated 11 April 2019, to Shahzad Hussain **[565-567]** Azpen set out its final conclusion as to the works required to the building. The letter contains budgeted estimates for work that Azpen stated was "required imminently". In summary, that work concerned the provision of scaffolding (£12,000), renewal of double glazing to the north

and west elevations (£12,000); installation of replacement radiators (£7,800); and repair and redecoration to "poorly maintained external elevations" (£6,500). The total budgeted costs was in the sum of £38,300. An additional provisional sum of £3,000 was also made for dealing with water penetration and "incorrectly routed pipework across the façade".

41. On 12 April 2019, an EICR was completed for the council at Flat 5, 109-111 Old Church Road.

42. Flat 3, 109-111 Old Church Road became vacant on 23 April 2019 **[65]** and in an email dated 24 April 2019, Mr Nota sought Mrs Hussain's consent to let the Flat "at the same rental that it has been achieving of £1,200" **[663]**.

43. Shahzad Hussain summarised Azpen's findings in a letter to Julia Morris' team dated 23 April 2019 **[539-40]**.

44. It is Mr Nota's evidence **[134, para 26]** that suitable tenants for Flat 4 were identified on 9 May 2019 and that he attempted to contact Mrs Hussain by telephone on at least three separate occasions, but that on each occasion there was no response to his calls, or the voicemails he left. This is disputed by Mr Wahab Hussain, who said, in oral evidence, that his mother had informed him that she had not been contacted by telephone or received any voicemails regarding the re-letting of Flat 4.

45. According to Mr Dick, works to the residential parts of the Old Church Road Properties commenced in about May 2019 **[134,para 26]**.

46. On 22 May 2019, Azpen send Mr Hussain an invoice in respect of works carried out to 158A Blackhorse Road, in the total sum of £7,338 **[762-764]** and 158B Blackhorse Road, in the total sum of £7,915.20 **[765-766]**

47. By email dated 13 June 2019, Mr Nota repeated his request to Mrs Hussain for permission to let Flat 3 **[664]**. In that email Mr Nota also states, in respect of Flat 4, that Mrs Hussain was contacted multiple times by telephone to let her know of interested tenants but that as the Council had not heard from her, the potential tenants had been lost. It is Mr Nota's evidence that another set of potential tenants for Flat 4 were identified on 18 June 2019, and that he twice unsuccessfully attempted to contact Mrs Hussain by telephone to arrange a group viewing. However, as no response was received, Flat 4 was removed from the Council's advertised lettings **[134, para 27]**. This is disputed by Mr Wahab Hussain, who again said, in oral evidence, that his mother had told him that she had not received any telephone calls or voicemail messages to this effect.

48. On 22 August 2019, tenders were received in respect of external works to the Old Church Road Properties. Azpen's tender was in the sum of £16,282.80 **[624-626]**. A tender was also received from AMS Maintenance Ltd ("AMS")in the sum of £30,249 exc. VAT **[627-628]**.

49. Wahab Hussain carried out a third visit to the Old Church Road Properties on 21 September 2019, and again took photographs of the external and common parts **[266-288]**.

50. ALV Fire Protection Ltd provided the Council with a commissioning certificate in respect of the fire alarm system at the Old Church Road Properties on 18 October 2019 **[760-761]**.

51. On 28 October 2019, Mr Nota sent an email, addressed to "Mr Hussain" stating, amongst other matters, that Flats 3-4, 109-111 Old Church Road remained vacant and that he was happy to market them if permission to do so was given in writing **[632]**. A email reply from "Hussain" sent on the same day confirmed that the banking details for payment of surplus rental income given in Mr Nota's email was correct, but did not address his request for consent to let Flats 3 and 4 **[632]**.

52. Azpen provided its invoice in respect of the external works to the Old Church Road Properties on 5 December 2019 **[634-638]**. It totals £19,867.20 inc. VAT. Before and after photographs taken by Azpen for these works are included in the bundle at **[674-679]**

53. FMOs were made in respect of the properties on 6 December 2019. These were appealed, meaning that the IMOs continued in force.

54. This application was made on 9 December 2019 **[771-784].**

55. Mr Dick inspected the Old Church Road properties on 19 December 2019, by which time the works were substantially completed **[127]**.

56. On 23 December 2019, Azpen sent Mr Shahzad Hussain two invoices. One in respect of internal works to the Old Church Road Properties in the sum of £17,958 inc. VAT **[644-651]**. The second was in respect of roof works to that building, in the sum of £2,928 inc. VAT **[652]**.

57. Mr Wahab Hussain became involved with the Applicant, Luxcool Limited ("Luxcool") in December 2019, becoming its sole director on 9 January 2020 **[75, para 12 and 72, para 1**]**.**

58. Wahab Hussain carried out a fourth visit to the Old Church Road Properties on 9 January 2020, and again took photographs of the external and common parts of the building **[289-296]**.

59. On 30 April 2020, Lettings International Ltd were granted licences in respect of the properties, whereupon the IMOs were revoked.

60. Between 6 – 16 May 2020, Wahab Hussain's carried out a fifth visit to the Old Church Road Properties, and his first visit to the Blackhorse Road Properties, and took a large number of photographs of the internal condition of the flats, with a few external photographs of the Blackhorse Road Properties **[297-468]**.

61. On 28 May 2020, Coyle Construction London ("Coyle") provided the Applicant with a quote for "remedial works" to the Old Church Road Properties. In its quote it states that a "refurbishment has recently been carried out to a substandard quality" **[186-202].** The quote is for £41,259.26.

62. On 3 June 2020, RVTV Security provided the Applicant with its comments on the fire alarm system installed by the Council at 109-111 the Old Church Road Properties **[248]**.

Evidence for the Applicant

Nasim Hussain

63. Mrs Nasim Hussain has provided a witness statement dated 24 December 2020 **[86-91]**. This tribunal was told, in the previous appeals before it, that she has a limited command of English. Despite this, we note there is no reference in her statement to it being written in a different language and then translated to her.

64. In her statement, she acknowledged that there was some email contact between her and the Council using the email address: allprop@live.co.uk, which she said was an email address used by her and her husband when they managed the subject properties. She stated that she must have missed the Council's emails of 24 April 2019 and 13 June 2019, asking for her consent to re-let Flat 3, but asserted that she had not spoken to anyone at the Council about that request, nor had she received any voicemail messages or missed calls about it. She also expressed her disappointment with the Council's non-payment of rent to her until January 2020.

65. Mrs Hussain did not attend the hearing to be cross-examined.

Wahab Hussain

66. Mr Wahab Hussain has provided two witness statements dated 20 December 2020 **[72-83]** and 22 January 2021 **[92-119]**. In his first statement he said, in summary, that:

(a) prior to January 2020, he was working 24/7, running his own restaurant business which concerned 18 restaurants, located across the UK. His business ran into difficulties, and administrators were appointed in December 2019. That same month, he agreed to become the sole director of Luxcool in place of his mother. In cross-examination he confirmed that he was not involved in residential property management prior to December 2019;

(b) when the IMOs were in place he occasionally visited the properties to see what works the Council were doing, but did not report this back to his mother because he did not wish to upset her or cause her stress. He later inspected the properties after the IMOs terminated on 6 May 2020, and concluded that the flats and communal areas at the Old Church Road Properties were in a state of disrepair. In his

assessment, the work carried out by the Council was of a very poor standard.

(c) he therefore engaged Mr Amrit Berry from Coyle who produced a report stating the cost of making good the various issues to the Old Church Road properties was going to cost over £41,000. He also instructed RVTV Security to review the new fire alarm system installed by the Respondent, who advised that there were several issues with the installation;

(d) it was inappropriate for Azpen, a company who had only been incorporated on 14 January 2019, to be invited to tender for works in respect of which it had carried out initial assessments of the work required, as this gave it an unfair advantage.

(e) his concerns were not, primarily, about the cost of the works, but rather the quality of the works Azpen carried out, which, he said, will cost Luxcool a substantial sum to remedy;

(f) the Council failed to re-let Flats 3 and 4 when they became vacant, and should compensate Luxcool for lost rent in the sum of £39,900;

(g) the Council failed to collect rent arrears from tenants.

67. Mr Wahab Hussain's second witness statement primarily comprises his comments on the condition of the properties as shown in the large number of photographs exhibited to his statement. He also comments on some of the documents exhibited to the statement. He was cross-examined extensively on the contents of his exhibit, and we will address his evidence, where necessary, below when we consider the Scott Schedule.

68. We agree with Mr Calzavara's submission that Mr Hussain's evidence had several weaknesses. Although he told us that he may have visited some of the subject properties with surveyors prior to the making of the IMOs, when he was helping his mother with banking/financing issues, he could not say what properties he visited, or when, or what condition they were in when the IMOs were made. In cross-examination he did, however, acknowledge that his parents had let the condition of the Old Church Road Properties deteriorate. He only visited the Old Church Road Properties four times during the lifetime of the IMOs, and when he did so, he only inspected the external and common parts. He did not visit the Blackhorse Road Properties until after the IMOs had come to an end.

Ms De Vos

69. Ms De Vos is a chartered surveyor, and the Applicant's expert witness. Her report of 15 April 2021 **[150-185]** was based on a desktop review of

documents provided by the Applicant's solicitor. She did not visit the subject properties until 25 January 2022.

70. We will address Ms De Vos's evidence regarding the items in issue in the Scott Schedule where necessary, later in this decision.

71. At paragraph 3.2, Ms De Vos stated that her instructions were to establish whether the completed works can properly be said to have been undertaken by the Council in pursuance of the duty under s.106(2) Housing Act 2004 – that is: "immediate steps which they consider to be necessary for the purpose of protecting the health, safety or welfare of persons occupying the house, or persons occupying or having an estate or interest in any premises in the vicinity." She stated, at paragraph 3.3, that she was also aware that the Council must take such other steps as it considers appropriate with a view to the proper management of the house pending the grant of a licence or the making of a final management order. However, it is clear that she was only instructed to consider whether works fell within the s.106(2) duty, not the s.106(3) duty.

72. Ms De Vos set out her opinion at paragraphs 6.1 to 6.16 of her report. From her consideration of the two Schedules of Works, the photographic evidence provided by the Council, and the survey reports and invoices provided by Azpen, she concluded that it was evident that the fabric of the building at Old Church Road was in a deteriorated condition at the time of the IMO, and that repair works were required to remediate ingress of water around the roof hatch, as well as deficiencies in some of the windows and frames.

73. In her opinion, the works undertaken by Azpen would have resolved the majority of the defects to the structure and fabric of the building, as identified in the Schedule of Works prepared by the Council and the surveys obtained, but the scope and extent of the those works were, she suggests, more akin to works of cyclical repair and maintenance, rather than immediate remedial necessity. However, that opinion is caveated by her statement, at paragraph 6.4, that "it is not possible to properly assess the quality of the completed works purely from the photographic evidence alone, and without inspecting the properties".

74. She agrees that "the comprehensive approach taken by Azpen followed an appropriate methodology to assess the main external elements of the building, in terms of current condition, anticipated life, identification of defects and remedial solutions" (para. 6.5). However, in her opinion, the Council's s.106(2) duty only extended to those works required to remediate immediate hazards and defects severely impacting on the occupants of the premises and did not include undertaking comprehensive planned maintenance works (para. 6.6). She concludes that the scope and extent of the works actually undertaken to the Old Church Road Properties exceeded

the Council's obligations under s.106(2) and ventured into the realms of cyclical maintenance and improvements of a non-essential nature.

75. Ms DeVos makes clear that on the documentation available to her she was unable to provide an opinion on the cost of the works (para.6.11).

76. Finally, any defects concerning fire protection and precautions, and electrical/ gas installations should have, in her opinion been addressed in all premises, following a thorough examination of the services and recommendations made by a relevantly qualified and competent professional, to include a fire risk assessment (paras. 6.14 and 6.15).

Evidence for the Council

Julia Morris

77. Ms Morris has provided two witness statements, the first dated 18 February 2021 **[122-125],** and the second, 6 June 2021 **[148-149**]. She is the team leader of the Council's Private Rented Property Licensing Team, and manages teams of enforcement officers responsible for administering and enforcing the provisions relating to the licensing of Houses in Multiple Occupation under Part 2 of the 2004 Act, and the selective licensing of residential accommodation under Part 3.

78. She stated that from 6 December 2018, when the IMOs were first imposed, and until the date the FMOs were revoked, the Council placed the subject properties under the management and control of LWF in accordance with a Service Level Agreement **[501-508]** It was LWF that was responsible for collecting in rent and carrying out any required repairs.

79. She confirmed that the Schedules of Work required in the properties were drafted in December 2018, shortly after IMOs came into force, by Waseem Hussain and Catherine Lovett, two experienced members of the Council s Private Sector Housing Team. She said that Ms Lovett was, in fact, the Private Sector Housing & Licensing Team Manager at the time the Schedules of Work were produced. It would have been preferable if Ms Lovett and Mr Hussain had provided the tribunal with witness statements and made themselves available for cross-examination. However, we recognise that that the Council tendered four witnesses for the hearing, including Mr Beach, who accompanied Ms Lovett on her inspection of the Old Church Road Properties on 6 December 2018, and was therefore able to provide us with direct evidence of its condition.

80. Ms Morris comments on specific items of work identified in Scott Schedule. We will refer to her evidence, as necessary, when we consider that Schedule later in this decision.

Ian Dick

81. Mr Dick has provided a witness statement dated 8 February 2021 **[126-129]**, in which he confirms that he was asked to visit and inspect the progress of works to the five residential flats at the Old Church Road Properties, and that in order to do so, he and Mr Nota visited the block and the flats on 19 December 2019, and met with the building contractors. On 6 January 2020, he provided written comments regarding the works that had been carried out **[509-512]**. In his witness statement he concluded that the internal and external works had been largely carried out satisfactorily, with a number of minor 'snagging' items to be addressed. Mr Dick took a number of photographs on his inspection, and copies of these are exhibited to his statement **[513-532]**.

Amrick Nota

82. Mr Nota has provided two witness statements dated, respectively, 19 February 2021 **[130-137]**, and 4 June 2021 **[144-147]**. In his first statement he confirmed that given the serious problems at the Old Church Road Properties, Azpen were commissioned to undertake a full inspection of those premises, subsequently producing a building overview survey and then a borescopic report. Tenders were subsequently sought for the works required at the Old Church Road Properties, with Azpen scoring highest on both quality and price, with its bid being almost 50% cheaper than the bid received from AMS.

83. At para. 18 of his first statement, he said that all of the works at the Old Church Road Properties were completed by the end of December 2019, apart from some snagging items. Copies of the final invoices and reports from Azpen are exhibited to his statement. **[644-651 and 652]**.

84. Ms Nota also commented on specific items of work identified in the Scott Schedule. We will refer to his evidence, as necessary, when we consider that Schedule later in this decision. Some of Mr Nota's statements constituted heresay evidence, for example, his comments about the state of the subject properties when the Council inspected on 6 December 2018 is derived from information provided by Ms Lovett and Mr Waseem Hussain, rather than from his direct knowledge. He explained what matters were in his direct knowledge at the hearing but this should have been made clear in his witness statements.

David Beach

85. In his witness statement dated 19 February 2021 **[138-143]** Mr Beach confirmed that the procedure followed by the Council, following the making of an IMO, is for an officer from the Council's client services team (Ms Morris' team) to determine the scope of any works required to a property, which are limited to works falling within the Council's s.106 and

s.107 obligations. This information is then passed on to LWF (Mr Nota's team) to arrange for a contractor to carry out the identified works.

86. He said that the Council's initial priority is to carry out basic safety checks and to carry out any urgent works that are considered to impact on the health, safety and welfare of the occupiers (and any people living in the vicinity). Thereafter, according to Mr Beach, the Council seeks to identify and undertake repairs and improvements that it considers necessary to remedy defects that represent a current or future risk to any occupiers, or otherwise interfere with their safety and comfort, as well as such works that it considers appropriate with a view to the proper management of the house.

87. Mr Beach said that when he accompanied Catherine Lovett on her visit to the Old Church Road Properties on 6 December 2018, he noted that the exterior of the building, particularly the large expanses of timber panelling, had been poorly maintained, and that the exterior paintwork was in poor condition, with significant peeling of paintwork visible. He also considered that the timber panelling showed evidence of decay and wet rot. In addition, he noted that the door entry system to the building was inoperative, meaning that there was unrestricted access to the common staircase providing access to the flats, and that the fire alarm panel situated in the communal area at ground floor level had fault warning lights registering. Furthermore, he noted that there was evidence of water penetration through the flat roof, with water ponding on the second-floor landing level in the common staircase, immediately outside Flat 5. He and Ms Lovett were unable to gain access to the five flats.

88. At paragraph 15 of his statement, Mr Beach records that the Council's position is that a number of the defects present had arisen from a lack of routine maintenance and repair undertaken by Luxcool.

Questions of Law

89. Before we turn to the Scott Schedule and the factual issues that the tribunal is to determine, there are five questions of law, helpfully identified by Mr Calzavara, that the tribunal needs to determine. We summarise these below. The first and second of those questions concern the definition of relevant expenditure in s.110(2), and who bears the burden of proof in showing whether expenditure was reasonably incurred by the authority in connection its duties under s.106(1) to (3).

<u>Question 1: on whom does the burden of proof lie in establishing whether any particular item of expenditure was incurred pursuant to one of the relevant statutory duties</u>

90. This issue is raised at para.21 of the Applicant's Statement of Case **[20]** where it submits that the burden of proof lies with the Council. The point was not, however, pressed with any vigour by Mr Maddan who

acknowledged, in para. 21 of his skeleton argument, that there is, in general, no presumption that the burden of proof in respect of reasonableness lies with either party in an application to this tribunal. Nevertheless, he argued, relying on the decision of the Lands Tribunal in *Forcelux Ltd v Sweetman* [2001] 2 EGLR 173, that in some situations a landlord can be required to explain the process by which their decisions were made, and that this is one such situation.

91. Mr Calzavara's position was that unlike the vast majority of ways in which this tribunal becomes involved in licensing matters, this application is not an appeal by way of rehearing. It is, he stressed, Luxcool's application and as such the burden of proving its application lay with it.

92. In our determination, seeking to identify which party bears the burden of proof is not useful in an application of this nature. As Sedley LJ said in *Daejan Investments Ltd v Benson & Ors* | [2011] EWCA Civ 38 at [86]

> " it is increasingly rare in modern litigation for the burden of proof to be critical. Much more commonly the task of the tribunal of fact begins and ends with its evaluation of as much of the evidence, whatever its source, as helps to answer the material questions of law. In nine cases out of ten this is sufficient to resolve the contest. It is only rarely that the tribunal will need to resort to the adversarial notion of the burden of proof in order to decide whether an argument has been made out, and tribunals ought in my view not to be astute to do so: the burden of proof is a last, not a first, resort."

93. Where a landlord makes an application to this tribunal seeking an order under s.110(7) of the 2004 Act it is very likely, as in this case, to have only very limited information about how an authority's expenditure has been incurred. Once the application is made, there will be an evidential burden on the authority to provide disclosure and information regarding its expenditure. It will then be for the landlord to set out its evidential case as why that expenditure was not reasonably incurred by the authority in the performance of its statutory duties. The burden will then return to the authority to show otherwise. The evidential burden therefore shifts from one party to another during the course of an application. Ultimately, it falls upon the tribunal to evaluate the evidence before it and to determine whether or not the expenditure in issue was reasonably incurred for the purposes of s.110(2).

94. We accept that if, after evaluating the evidence, the tribunal is unable to determine the application, it may be necessary to have recourse to the burden of proof, and that it will usually be on an applicant to discharge that burden. However, such recourse is likely to be extremely rare in a s.110(7) application. In our assessment it is difficult to envisage a situation where the tribunal, as an expert tribunal, will be unable to determine an

application on the basis of the evidence presented to it, and such a scenario does not arise in this application.

Question 2: must costs be both "reasonably incurred" and, separately, "reasonable in amount"?

95. This issue is raised at para. 20 of the Applicant's Statement of Case **[20]** where it argues that for any item to be properly regarded as relevant expenditure it must have been incurred by the Council in connection with one or more of its duties under s.106(1) to (3) of the Act, and must both have been reasonably incurred by the Council, and also reasonable in amount.

96. Both parties agree that there is no previous authority on what constitutes reasonably incurred expenditure. Mr Calzavara submits that there is no separate requirement in the statute that the costs incurred be "reasonable in amount". Mr Maddan's position is that assistance may be taken from the approach to similar language in service charge cases under the Landlord and Tenant Act 1985, and that 'reasonable' should be given a broad common sense meaning which includes the financial impact on the Applicant. He relies on the decision in *Garside & Anson v RFYC Ltd & Maunder Taylor* [2011] UKUT 367] in which HHJ Robinson accepted that there is nothing in the 1985 Act to limit the ambit of what is reasonable so as to exclude considerations of financial impact.

97. We agree that when determining if expenditure has been reasonably incurred by an authority in connection with performing its duties under s.106(1) to (3), that it is useful, in the absence of any statutory provision, or previous authority, to have regard to the approach taken by courts and tribunals when considering service charge cases under the 1985 Act.

98. In *Forcelux* Mr P R Francis FRICS stated [40] that whether a service charge cost was reasonably incurred involves consideration of two distinctly separate matters. Firstly whether, on the evidence, the landlord's actions were appropriate and properly effected, and secondly, whether the amount charged was reasonable in the light of that evidence. We respectfully agree with that analysis. In our determination, consideration of whether expenditure incurred by an authority in connection with performing its duties under sections 106(1) to (3) was reasonably incurred involves an examination of both the authority's actions and, secondly, whether the costs incurred were reasonable in amount. As in a service charge case, it might, for example, be reasonable for an authority to decide to carry out patch repairs to a roof, but it would not be reasonable to incur excessive expenditure in doing so.

99. So, to answer the question posed, whether expenditure has been "reasonably incurred" is not a separate consideration from whether the expenditure is "reasonable in amount". Instead, whether expenditure is reasonable in amount is one of the matters to have regard to when determining if expenditure has been reasonably incurred.

100. We agree with Mr Maddan that 'reasonable' should be given a broad common sense meaning, however we do not agree that the financial impact on a landlord is relevant to the question of whether expenditure incurred by an authority under sections 106(1) to (3) was reasonably incurred. In Garside, the Upper Tribunal was considering whether the financial impact of major works on lessees was a material consideration when considering whether the costs of the works were reasonably incurred for the purposes of s.19(1)(a) of the 1985 Act. There was no dispute that the major works for which service charges had been demanded were necessary and that that cost was reasonable in amount. The only issue between the parties was as to whether the decision to carry out the works under one contract and paid for over two service charge years was a reasonable decision, or whether the cost should have been spread out over several years.

101. In our view the decision in *Garside* can be distinguished from the situation this application. Section 19 of the 1985 Act is a statutory limitation on the payability of service charge costs incurred by a landlord. It protects lessees from liability to pay costs that have not been unreasonably incurred. That contrasts with the situation here, where the statutory protection accorded to the Applicant does not concern liability to pay sums demanded from it, but rather, its right to apply to this tribunal for a declaration that expenditure incurred by the Council was unreasonably incurred (and for a financial adjustment to be made to reflect that declaration). We cannot see how the financial impact on the Applicant is relevant to determination of those questions.

Question 3: Was the Respondent entitled to carry out works to the communal parts of Old Church Rd ?

102. This issue is raised at paras.33 to 35 of the Applicant's Statement of Case **[22-23]** where it stated that because an authority's duties under s.106(1)-(3) concern duties in respect of a "house", those duties only extended to the individual flats and their occupiers, and not to communal areas of the Old Church Road Properties.

103. In opening, Mr Maddan conceded this point, correctly so in our view. Indeed, the Applicant appears to have conceded the point in paragraph 35 of its Statement of Case where it acknowledges that the Council's duties extended to the communal areas of the building where it was necessary for it to take "immediate steps", or appropriate proper management, in respect of the individual flats and their occupiers. It would be illogical if it were otherwise, especially in a building of this nature where the individual flats are accessed by common parts within the same structure, and where the s.106(2) duty extends to persons occupying or having an estate or interest in any premises in the vicinity.

Question 4: Is there any scope within the statutory scheme for compensation to be awarded for purportedly lost rent?

104. The Applicant raised this issue at para. 43 of its Statement of Case **[24]** where it argued that the tribunal's power "to make such financial adjustments (in the accounts and otherwise) as are necessary to reflect the tribunal's declaration" is a broad power enabling it not merely to disallow or reduce particular items of expenditure on the basis that a particular item does not represent relevant expenditure, but also to make adjustments to the Council's accounts of expenditure to compensate the Applicant for the Respondent's failure to re-let the two flats which were left vacant.

105. Mr Maddan conceded that that s.110 did not accord the tribunal with the power to award compensation. However, he submitted that if we were to find that the Council did not act in accordance with its statutory duties that the Council's charges for managing the flats could be reduced.

106. We have no hesitation in determining that there is no scope for the tribunal to award compensation for purportedly lost rent. The tribunal's power in s.110(7)(b) to order financial adjustments is limited to adjustments that are necessary to reflect a declaration under s.110(7)(a). The tribunal's power to make a declaration only extends to the question of whether an amount shown in the Council's accounts was reasonably incurred in connection with the performance of its s.106 duties. There is no scope within s.110 for the tribunal to order compensatory adjustments, and that includes the Applicant's suggestion that the Council's accounts should be amended to take into account expenditure that the Applicant alleges it needs to spend to rectify poor workmanship overseen by the Council. If works carried out by an authority have been carried out to a poor standard that is an issue that may be relevant to the question of whether the expenditure was reasonably incurred. However, this tribunal cannot compensate a landlord for the costs of remedial works it intends to carry out. Further, the tribunal can only order an adjustment of management charges where it is satisfied that it is appropriate to declare such expenditure was not reasonably incurred.

Question 5: Is the Applicant right to assert that it was inappropriate for the Council to have carried out works under s.106(3) (with a view to the proper management of the house) and that it was restricted to those works required for the immediate protection of the occupiers (s.106(2)?

107. This issue is raised at para.10 of the Applicant's Expanded Statement of Case **[33]** where it submitted that works required for the immediate protection of the occupants are clearly permitted under s.106(2), but that works purportedly carried out by the Council under s.106(3) (with a view to the proper management of the house) should have instead have waited until FMOs were made, and then included in a management scheme under s.119, or included as licence conditions when a licence was granted.

108. In his skeleton argument, Mr Maddan emphasised the word "pending" in s.106(3), and argued that any steps taken with a view to the proper management of the house must be steps taken pending either licensing, the making of a FMO, or revocation of the IMO. The statutory provision

does not, in his submission, permit an authority to take steps (and carry out works) that properly sit within either the FMO scheme, or licence conditions envisaged by s.106(3)(a). He pointed out that an owner of a property enjoys a right of appeal in respect of works included within a FMO scheme, or as licence conditions. It cannot, he contended, be correct that an authority is entitled to bypass such appeal rights by carrying out unlimited steps under the provisions of s.106(3), at an owner's expense, without any right of appeal or review save for the limited accounts challenge provided in s.110(7).

109. In his oral submissions, Mr Maddan agreed that it was possible for an authority to carry out works under s.106(3) for the proper management of a house, so long as any such works should not instead have been carried out as part of either a FMO or a licence condition. He submitted that as an IMO usually lasts one year, on commencement of the IMO, an authority should look forward for one year and decide whether its s.106(3) duty requires it to carry out works within that year. Works that are more properly characterised as part of a long-term scheme of works would, in his submission, fall outside of the s.106(3) duty.

110. We do not agree with Mr Maddan's submissions. In our determination, s.106(3) does not impose any statutory limitation on the extent and nature of steps (which must include works) that an authority can undertake with a view to proper management of a house that it has made subject to an IMO. We see no support in the statutory scheme for the suggestion advanced in the Applicant's initial statement of case, that an authority is limited to merely identifying management steps required, but not implementing those steps. We also reject Mr Maddan's submissions that s.106(3) requires an authority to have regard to the likely lifetime of the IMO when deciding what management steps are required and that an authority is precluded from taking steps under its s.106(3) duty where such steps more properly fit within an FMO management scheme, or licence conditions.

111. In our assessment, the extent and powers of an authority in s.106 are clear. Once it has made an IMO, s.106(1) imposes a duty on it to comply with the remaining provisions of the section as soon as practicable after the IMO has come into force. This includes carrying out any immediate steps it considers necessary for the purpose of protecting the health, safety, or welfare of occupiers of the house, or persons occupying or having an estate or interest in premises in the vicinity (s.106(2)). It also includes taking such other steps it considers appropriate with a view to the proper management of the house pending either the grant of a licence, the making of an FMO, or the revocation of the IMO (s.106(3)).

112. The use of the preposition "pending" in s.106(3) does not, in our view, operate as a fetter on the steps that an authority may take whilst the IMO is in force. Rather, it imposes a temporal restriction, namely, that no steps can be taken once the circumstances described in s.106(3)(a) or (b) arise, namely, once a licence has been granted, a FMO made, or the IMO revoked. We construe "pending" as equivalent to 'up until'.

113. It is our view that after an authority imposes an IMO it will need to identify what immediate steps, including works, are required to the property in order to protect the health, safety, and welfare of occupiers (s.106(2)) and also what non-urgent steps are required for proper management of the house (s.106(3)). The two s.106 duties are not exclusive, and steps identified by an authority might be relevant to both the s.106(2) duty to protect health safety or welfare, as well as the s.106(3) duty concerning proper management of the house. The distinction is one of priority with urgent steps to take precedence over non-urgent steps. It is a distinction that is recognised in the Service Level Agreement that the Council entered into with LBWF, which, at paras 2.1.6 and 2.1.7 emphasises the need to distinguish between urgent and longer term works when preparing a schedules of works **[501]**.

114. It cannot, in our assessment, be correct then when considering steps required for proper management that an authority needs to have regard to the likely lifetime of an IMO. Firstly, there is nothing in s.106, or the remainder of the statutory scheme, to suggest such a construction. Secondly, whilst it is correct that s.105(5) provides that an IMO can last a maximum of 12 months, the actual length of an IMO is inherently uncertain. It can be shorter than 12 months if a suitable licence holder is proposed, and the authority agrees to it being granted a licence. It can also be longer where, as in this case, an appeal is lodged against the making of a FMO. This inherent uncertainty militates against the construction proposed by Mr Maddan.

115. This is not to say that an authority has complete freedom to carry out unlimited steps as Mr Maddan suggested. If a relevant landlord considers an authority to have incurred unreasonable expenditure in performance of its duties it can seek an order from this tribunal under s.110(7). Whilst we accept that this is a more limited remedy than a right of appeal enjoyed by a landlord against, say, a decision to impose an IMO, it is the only remedy provided for in the statutory scheme. That this is the case is perhaps unsurprising given that the making of an IMO results from failure to comply with the statutory licensing regime in the 2004 Act.

Costs in Dispute

116. As directed by the tribunal in its directions of 12 January 2021 (amended 17 February 2021) **[55]**, the parties identified the costs in dispute, and their respective positions, in the Scott Schedule **[40-49]** In that schedule, the Applicant set out its initial comments regarding costs identified in the accounts breakdowns provided by the Council **[61 -71]** and the invoices provided by Azpen. The Council provided its response, and the Applicant replied. When it did so, the Applicant narrowed its challenge with regard to many of the heads of expenditure. For example, its initial challenge to the entire sum invoiced by Azpen in respect of repairs and maintenance at 158A Blackhorse Road (£7,338) was that these costs were "not particularised in accounts or disclosure". After the Council provided its comments in response, it narrowed its challenge by arguing that four items of work included within the repairs and maintenance head of expenditure,

as identified in Azpen's invoice, were outside of the scope of the Council's duties under the IMO.

117. During the course of the hearing it was identified that whilst Azpen's invoice listed the individual items of work carried out to the external areas of 109-111 Old Church Road **[634]**, it did not identify the cost incurred for each individual item, only the total cost of £19,867.20. So that the tribunal was able to identify the specific sums under challenge, an amended version of Azpen's invoice, identifying the costs of each item of work was provided by the Council **[Supp:37]**. A similar amended invoice was provided for the works carried out at 158A Blackhorse Road **[Supp:47-48]**, which replaced **[763-4**]. These were provided, by email, to the tribunal and the Applicant before the start of the third day of the hearing.

118. The invoice for the internal works carried at 109-111 Old Church Road, as included in the original bundle, was already fully itemised (although Mr Nota provided further breakdown of one head of expenditure not relevant to this decision **[Supp:40-46]**. The invoice included in the original bundle concerning works carried out at 158A Blackhorse Road was also fully itemised **[766]**.

119. We make no criticism of the Council for the fact that the amended invoices were provided during the course of the hearing. The Council had previously disclosed copies of Azpen's original invoices to the Applicant's solicitors. It was for the Applicant to request a more detailed breakdown from the Council if it required one. The amended invoices were provided by the Council at our request, so that when making the declaration sought by Applicant we were in a position to determine if the specific costs under challenge were reasonably incurred. We do not consider any prejudice was caused to the Applicant by the timing of the provision of this information. None was asserted by Mr Maddan, and he did not seek a postponement of the hearing in order to consider the new information.

120. At our request, the Council provided a Supplementary Bundle on the fifth, and final day of the hearing, before the hearing commenced. We had requested its provision in order to collect, in one place, documents that had been provided by the parties during the course of the hearing. Included in the Supplementary Bundle, as well as the amended Azpen invoices, was a Table of Expenses of Disputed Items **[Supp:23-24]** ("the Table") which identified the heads of expenditure disputed by the Applicant, and agreed figures as to the cost of each item. Also included were amended accounts **[Supp:30-36]** updating the rental income received by the Council, and the management fees levied. Again, this information was provided at our request. It was provided on the evening of the first day of the hearing.

121. The Table is the most useful place for us to start when determining Applicant's challenge to the Council's expenditure. It identifies the specific heads of expenditure disputed by the Applicant following the narrowing and refinement of its initial objections in the Scott Schedule and the provision of the amended Azpen invoices. In this decision we will take each

item in the Table in turn, explain the dispute between the parties as identified in the Scott Schedule and Statements of Case, refer to the relevant evidence as required, and determine whether costs in question were reasonably incurred by the Council in connection with performing its duties under s106(1)-(3).

The costs of obtaining EPCs and EICRs

122. The Council obtained EPCs, at a cost of £60 each, for both of the Blackhorse Road Properties, and for each of the five Flats at Old Church Road. It also obtained EICR's for all of those flats at a cost of £150.

123. In her first witness statement, para. 14, Ms Morris **[124]** said that the reason the Council obtained fresh EPC and EICR documentation was due to both the then director of the Applicant company, Mrs Nasim Hussain, and her husband, Mr Tariq Hussain, having previously been convicted of offences involving false gas safety certificates. This, she said, meant that the Council had no confidence that any exiting certification was genuine, and that as the Council was responsible for the condition of the property during the lifetime of the IMO's it considered it appropriate to commission new certificates. She went on to say that upon inspecting the existing EPCs in place for the Flats at Old Church Road, it was noted that the incorrect wall structure had been noted.

124. Mr Nota, in his first witness statement, para. 21 **[134]**, explained that the Council commissioned two sets of EPCs for the flats at Old Church Road, as the initial EPCs it obtained contained the same error as the existing EPCs, namely the reference to the building having cavity walls with a thickness of 240mm, when in fact there were no cavity walls and the thickness was measured as 150mm (see, for example the initial EPC for Flat 1 **[654]**. Additional EPCs were therefore obtained (the one for Flat 1 is at **[661]**, but the Council only passed on the costs for one set. Mr Nota also said that when the Council inspected Flat 4 it noted that had the boiler lacked an adequate seal which would have allowed exiting emissions to seep into the property. This, he said, led the Council to consider it possible that the existing EPCs were invalid or false.

125. The Applicant's initial challenge, as recorded in the Scott Schedule, was that the EPCs and EICRS in place at the time the IMOs were made were valid and new ones were not required. Ms De Vos addressed the appropriateness of the Council obtaining the certificates in her report. She agreed that EPCs were required for the properties, but pointed out that an EPC is valid for 10 years and that the existing certificates, obtained in 2017, were therefore valid when the IMOs were made [para 5.3-16] **[157-159]**. As to the EICR's, at paras. 5.22-24 Ms De Vos said although the Applicant had advised her that EICRs were in place prior to the making of the IMOs copies had not been provided to her. She went on to say that, if the EICRs were, as was likely, dated prior to 2nd of July 2018, then the Council may have considered there was a need to retest to comply with new regulations introduced in the Electrical Safety Standards in the Private Rented Sector (England) Regulations 2020, which came into force on 1st June 2020, and

which applied to new tenancies from 1st July 2020, and to existing tenancies from 1st April 2021. She accepted, at paragraph 5.24 that it was likely that at the time of the service of IMOs on the subject properties on 6th December 2018, there was a regulatory requirement for electrical testing of the installations and the provision of new compliant EICRs for each of the subject properties.

126. In our determination, the costs of obtaining the EPCs and EICRs for the subject properties was expenditure that was reasonably incurred by the Council under its s.106(2) duties. It would also have been reasonable to incur the expenditure under its s.106(3) duties. At the time the IMOs were made, Mrs Hussain was the sole director of the Applicant company. She and her husband, Mr Hussain, had both previously been convicted of offences involving the provision of false information regarding gas safety certificates. Given that background, we consider it reasonable for the Council to have obtained new EPCs and EICRs once the IMOs were in place, given the importance of certification for the health and safety of the occupants of the flats. The error regarding the construction of the building mentioned on the EPCs for the Old Church Road flats would also, in our view, justify the cost of obtaining new, corrected, EPCs.

127. As to the EICRs, Mr Hussain accepted in cross-examination that there was nothing to indicate that the Applicant had provided copies of the certificates to the Council, although, as Mr Maddan submitted, there is no evidence that they were requested. The tribunal was not provided with copies of the pre-IMO EICRs for the Old Church Road flats until the second day of the hearing **[Supp:69-103]** and it has not been provided with pre-IMO EICRs for the Blackhorse Road Properties. The certificates for the Old Church Road flats are dated 23 September 2017. We agree, as was accepted by Ms De Vos, that it was appropriate for the Council to obtain new certificates in order to comply with the 2020 Regulations, given that the previous certificates are all dated prior to 2 July 2018.

128. Mr Maddan submitted that the correct time to obtain new EICRs was when the existing certificates were about to expire, or else one would have to obtain new certificates each time the regulations changed. However, as Ms De Vos states, at para. 5.20 of her report, the standards for electrical installations are those specified in the 18th edition of the Wiring Regulations. Those regulations came into effect in 2019, so it was possible that the existing installations at Old Church Road may not have complied with the 18th edition in every respect. In any event, it was, in our determination, prudent, and good practice for the Council to have checked whether the electrical installation at the subject properties complied with current electrical safety standards once the IMOs were made. Its actions in doing so were in accordance with its s.106(2) duties to take steps to protect the heath, safety or welfare of those occupying the flats.

158A Blackhorse Road

129. At the hearing, Ms De Vos described the Blackhorse Road Properties as being flats located in a low rise, two-storey contemporary building with a

pitched roof, timber facias and soffits, and UPVC double glazed windows. Each flat has private entrance doors, located at rear of a concrete car park.

130. In the Scott Schedule, the Applicant raised initial challenges to costs incurred in respect of redecoration of the bathroom, replacement of a window, and works intended to facilitate the use of the "inner room" as a bedroom rather than as a living room. However, Mr Nota said at para. 32 of his first witness statement **[135]** that these planned works were not carried out because the tenants of the Flat were reluctant to communicate with the Council, and declined to allow access to contractors. The full sum quoted for the works was, he said, held back, and was due to be repaid to the landlord. He identifies the incomplete works in a table at page **[680]** of the bundle.

131. This left the following costs in dispute: (a) the installation of security lighting at a cost of £462.50 **[Supp:47]**; and (b) the installation of central heating at a cost of £2,416.67 **[Supp:48**]. The Applicant also argued that the quality of workmanship carried out by Azpen was generally poor, as evidenced by photographs taken by Mr Wahab Hussain in May 2020.

132. In the Council's Schedule of Works **[562]** Mr Waseem Hussain said that there were security lights present but none came on when he visited the Flats at 7am. He recorded that a system of sensor-operated lighting should be provided to illuminate the main passageways providing access to the flats, and stairwells, sufficient to allow for identification of obstructions and trip steps. In his second witness statement, Mr Nota confirms **[145]** that the Council's initial visit to the Flats took place at 7am on 6th December 2018, when it was still dark, and that it was noted that the pathway leading to the property had no lighting. This, he said, was a health and safety risk.

133. In her report, Ms DeVos agreed, in principle, that the works carried out by the Council were needed, but suggested that as Flat 158A was located within a large residential block that the failure of the existing security lights was probably the responsibility of the freeholder of the block. However, in cross-examination she stated that now that she had visited the flats she was confused by the Council's reference to 'passageways' as the only passageway she noted was the short entrance hallway to flat A. In his submissions, Mr Maddan contended that: these works were unnecessary as no trip hazards had been identified; the works could not have been carried out under the Council's s.106(2) duty as they were not done immediately; they could not have been carried out under a s.106(3) duty, and that if the lighting was a problem the Council should first have considered if the existing lighting could have been upgraded.

134. It is clear from the photograph taken by Mr Wahab Hussain **[468]** that there are external security lights with motion sensors above the entrance doors to the Flats. Although Mr Nota's witness evidence concerning the defective state of the lighting was hearsay, as he was not present at the inspection on 6 December 2018, we see no reason to doubt Mr Waseem Hussain's assessment, as recorded in his Specification of Works, that the

lighting was defective. Mr Wahab Hussain does not address the condition of the existing lighting in either of this two witness statements, and nor does he make any reference to external lighting being the responsibility of the freeholder. The only evidence on behalf of the Applicant regarding the lighting came from Ms De Vos, whose principle point regarding the need for the lighting was her confusion regarding Mr Waseem Hussain's reference to passageways. It appears to us that this is likely to be a reference to the external pathway servicing the building rather than an internal passageway. His reference to 'stairwells' appears to be an error, as none are evident.

135. We find, on the balance of probabilities, that the existing lighting was defective and that, as recorded on its invoice **[Supp:47]** Azpen first investigated the lighting (at a cost of £100) and then replaced it (at a cost of £362.50) because it was defective. We find it improbable that it would have been replaced by Azpen if it was working. The costs involved in this are modest and there is no evidence to suggest that an attempted repair or upgrade would have led to any costs savings. The Applicant has not produced any evidence, by way of plans or otherwise, to suggest that there would be adequate alternative lighting to the pathway without the presence of these lights. As such, we accept that there was a potential trip hazard risk for residents, and their visitors, using the pathway when it was dark. We determine that the expenditure was reasonably incurred by the Council under its s.106(2) duties and that it would also have been reasonable to incur the expenditure under its s.106(3) duties.

136. Turning to the installation of the central heating system, Mr Waseem Hussain's Schedule of Works **[562]** identified the need to install an efficient fixed heating system to all the rooms in the flat.

137. The only evidence on behalf of the Applicant regarding the installation of the central hearing was from Ms DeVos, who, at para. 5.30 xviii) of her report **[163]** suggested that these might be works of improvement outside the scope of the Council's s.106(2) duty. In cross-examination she agreed that trip hazards always need to be dealt with, but suggested that the installation of a new heating system should be justified by a heat loss assessment.

138. Mr Nota's evidence **[145]** was that upon inspection of the property, it was noted that the only heating present were portable heaters which did not provide adequate heating and constitute trip hazards because of trailing wires. He said that the Council considered it vital to install fixed heating which provided sufficient and programmable heating to maintain comfortable temperatures. In cross-examination, Mr Beach said that portable heaters are the poorest quality form of heating available and commonly lead to the presence of excess cold hazards.

139. It is regrettable that Mr Waseem Hussain was not present to provide evidence regarding his Schedule of Works. However, we see no reason to doubt what he recorded in that Schedule. It is agreed between the parties that that the heaters in place when the IMOs were made were portable

heaters. We agree with Mr Nota that trailing wires render portable heating a potential trip hazard. In our experience, they can sometimes also constitute a fire risk as cables can become abraided. In our determination, the installation of the heating was within scope of the Council's s.106(2) duty to take immediate steps considered necessary for the purpose of protecting the health, safety or welfare of persons occupants of the flat. We do not know exactly when the heating was installed, but Azpen's invoice was submitted on 22 May 2019 **[761]**. Even if these works did not constitute taking "immediate steps" we are satisfied that the Council was entitled to carry them out under its s.106(3) duty, with a view to proper management of the property. We do not consider these amounted to works of improvement, but even if they did this would not prevent the council from carrying out the works under either its s.106(2) or (3) duties.

140. There is nothing in the photographs taken by Mr Wahab Hussain in May 2020 to suggest that the security lighting and central heating installations were of poor quality, and there is no other evidence to support the assertion. Nor was there a substantive challenge to the quantum of costs incurred in installing both the installations. We determine that the expenditure was reasonably incurred.

141. At paragraphs 148-168 **[112-115]** of his second witness statement Mr Wahab Hussain referred to photographs taken by him in May 2020 which, he asserted showed the presence of multiple problems in the Flat, such as gaps in the laminate flooring, insufficient hinges on doors, and mould and damp on walls. It is suggested by the Applicant in the Scott Schedule that "charges should be reduced to a reasonable level to reflect this". In this lengthy decision we have addressed all of the expenditure identified as being in issue in the Table, as agreed by the parties. None of the matters Mr Hussain complains about in paragraphs 148-168 of his statement are relevant to the issues identified by the Applicant in the Table, or any specific expenditure identified in its Statements of Case or in the Scott Schedule. As such, no determination is required from us on the matters complained about by Mr Hussain.

142. In any event, Mr Hussain makes no attempt to link the issues he complains about to expenditure incurred by the Council. For example, he complains about gaps in the laminate flooring, but the Council do not appear to have incurred any expenditure in respect of the flooring. Mr Hussain's overarching complaint appears to be that additional works should have been carried out by the Council, which would, of course, have incurred additional expense. That is not what the tribunal has to determine in this application, which is whether the expenditure incurred was reasonably incurred. It also fails to take into account the fact that that the full extent of works planned by the Council were not carried out because, according to Mr Nota, the tenants of the Flat denied access to contractors.

143. We make the same criticisms of the whole of Mr Hussain's second witness statement. In this decision, we limit our determination to the specific items of expenditure incurred by Council which have been identified, and put in issue by the Applicant in the Scott Schedule, as crystallised in the Table.

158B Blackhorse Road

144. The Applicant contended that the following works were outside the scope of the Council's s.106 duties: (a) replacement of bathroom tiling (£560); (b) replacement of kitchen carpet (£1,399.33); and (c) installation of central heating (£2,416.67). In the Scott Schedule, the Applicant had challenged the costs of works to the bathroom extractor fan, damp remediation of the concrete floor, and the installation of a new fire alarm system. However, these challenges did not make their way into the final Table and were not pursued by Mr Maddan at the hearing. Our understanding is that they are therefore no longer in issue.

145. In the Council's Schedule of Works **[564]** Mr Waseem Hussain said that missing bathroom tiling required replacing, that it was inappropriate for the kitchen to be carpeted as carpet cannot be readily cleaned, and that fixed, permanent, heating was required. Mr Nota's witness evidence **[145]** was that the missing tiles could allow leaks when water seeped behind the remaining tiles, and that the tiles had to be replaced as matching tiles could not be found, and it would have been inappropriate to patch replace them. The carpet was replaced, he said, as it is unhygienic to have carpet in a kitchen area. His evidence regarding the fixed heating was the same as for Flat 158A.

146. Ms DeVos accepted at para. 6 ii) of her report **[163]** that the replacement of the bathroom tiles was "undoubtedly required" but she doubted that the work fell within the Council's s.106(2) duty. Mr Maddan concurred, arguing that their replacement could not constitute an immediate step for the purposes of s.106(2), although he accepted that they may fall within the scope of s.106(3).

147. Mr Maddan also agreed that it was not acceptable to have carpet in the kitchen, but that this was not an immediate step that the Council needed to remedy under its s.106(2) duty, and nor was it a matter that needed to be addressed within the one-year life of an IMO. Ms DeVos considered that its replacement would appear to be an improvement rather than a necessity.

148. The Applicant's challenge to the fixed heating, as well as Ms DeVos's evidence, was the same as for Flat 158A.

149. In our determination the works to the tiling, carpeting, and heating, all fell within the scope of the Council's s.106(2) duty. We accept that as matching tiles could not be found that replacement was necessary in order to prevent water ingress. Potential water ingress is, in our view, relevant to the health, safety and/or welfare of the tenants. There is no challenge to the costs, which are modest, or to the quality of the work. In any event, the photograph at page **[766]** shows work of a good standard. Even if the work was outside the Council's s.106(2) duty, it would have fallen within the scope of s.106(3), as management steps that the Council could reasonably have carried out during the lifetime of the IMO, and which a tenant might legitimately expect to be completed within that timescale.

150. Similarly, we consider the replacement of the carpet to be steps that the Council was entitled to carry out under its s.106(2) duty. The Applicant did not contest against Mr Nota's evidence that the carpet in the kitchen was unhygienic. We concur. Carpeted areas in a kitchen are a potential breeding ground for pests, and if the presence of carpet is unhygienic, its replacement in order to protect the health, safety and/or welfare of the tenants is unarguable. We agree that immediate replacement may not have been a priority, but if that is the case, it was appropriate for the Council to replace it under its s.106(3) duty whilst the IMO was in force.

151. As to the installation of central heating, the parties' respective positions, and the evidence relied upon mirrored that for Flat 158A. So does our decision, and for the same reasons. The costs were reasonably incurred under the Council's s.106(2) duty, or, alternatively, under its or s.106(3) duty.

Communal parts of 109-111 Old Church Road

Facade

152. The single most expensive item of work under challenge concerned external works carried out to the building at 109-111 Old Church Road. Azpen's invoice, in the sum of £19,867.20 **[Supp:37]** itemises the works carried out. The following items, relating to the façade of the building, were challenged by the Applicant, as identified in the Table: (a) scaffolding costs (£6,499); (b) treatment or replacement of the timber structure encasing the window (£800); (c) painting all previously painted surfaces in white to restore the original colour (£3,400); (d) removal of first floor rotten timber throughout the whole length of building and supply and installation of new timber frame cladding (£1,800). Costs of £60 incurred in installing PVCu trims were identified in the Table as being in dispute but were conceded as reasonable by Mr Maddan at the hearing.

153. The need for works to the façade was identified in the Schedule of Works prepared by Ms Lovett **[538]**. In Ms Morris's witness statement, she stated that the façade was in poor decorative order, with the wooden timber structure on the North West elevation rotten, and a potential source of water penetration. She said that works were required to either remove or treat the wooden elements of the façade in order to prevent damp internally. Mr Nota's evidence was that upon receipt of the Schedule of Works, he commissioned Azpen to inspect the building which resulted in its two survey reports. Tenders were sought for the works, with Azpen scoring the highest. **[132]**. All of the works to the building were, he said completed by the end of December 2019 **[140]**.

154. In the Scott Schedule, the Applicant contended that redecoration of the external façade was unnecessary, and outside the scope of the Council's duties. However, the opinion of its own expert, Ms DeVos was that the fabric of the building had deteriorated at the time of the IMO, and that repair works were required to remediate ingress of water around the roof hatch, as well as the deficiencies in some of the windows and frames **[181,**

para 6.3**]**. She accepted that the works carried out by Azpen would have resolved the majority of the defects identified in the Schedule of Works prepared by the Council and the Azpen surveys. It was, nevertheless, her opinion that the scope and extent of the external works were more akin to a cyclical repair and maintenance programme of planned works, rather than of immediate remedial necessity.

155. Mr Maddan agreed, submitting that the works to the façade were clearly cyclical maintenance. He pointed out that Ms Morris had confirmed in cross-examination that the Council was not at the time aware of any of the flats being affected by water penetration or damp because of problems with the façade. Whilst the Applicant accepted that works had been required, there was, he said, no evidence that emergency works were needed, and as the works were not as a matter of fact, carried out immediately, they cannot have been carried out under a s.106(2) duty. He pointed out that Azpen's initial advice to the Council, in its 15 March 2019 report, was that repair to the façade was required within 6-12 months to prevent further damage from progressing and significant timber rot **[586]**. Then, in its letter of 11 April 2019 to Mr Shahzad Hussain, Azpen said that "whilst not directly contributing towards thermal deficiency in the building, we believe the repair and deterioration of the external timbers to be worth rectifying immediately" **[565]** . It was the Applicant's position, said Mr Maddan, that the façade did not, in fact, require immediate attention, and that works on this scale should have waited until a FMO was in place. It was, in his submission, draconian for the Council to have carried out the works whilst an IMO was in place.

156. We do not agree with Mr Maddan's submissions. Mr Beach's evidence **[141]**, paras, 11,15, was that when he visited the building on 6 December 2018, he noted that the exterior of the building had been poorly maintained, with exterior paintwork in poor condition, and the timber panelling showing evidence of decay and wet rot. In his view, these defects had arisen because of a lack of routine maintenance and repair by the Applicant. Ms Morris's evidence, in cross-examination was that the façade was clearly rotting, with visible holes present, and that water penetration into the Flats could have occurred at any point.

157. We find the evidence of Mr Beach and Ms Morris compelling, and substantiated by the two Azpen reports and the available photographic evidence which clearly shows the presence of serious rot to the façade at the time the IMOs were made **[513-514, 543-546 674-679 733-734 742 -748]**.

158. The poor condition of the façade, the presence of rot, and the need for works were all matters accepted by Ms De Vos and Mr Wahab Hussain. Mr Hussain said, in oral evidence, that the Applicant had not carried out any works to the façade since 2015 but considered that work should have been carried out about every 18 months. In our view, it was entirely appropriate for the Council to have carried out these works when it did in order to protect the fabric of a building that the Applicant had allowed to deteriorate. These were not works that should have waited until a cyclical

works programme was due to take place. They constituted structural maintenance works that if not carried out may well have led to further deterioration to the timbers with significant structural impact. The fact that there was no evident damp or water penetration affecting the flats at the time the IMO was made is irrelevant. The works carried out by the Council were needed in order to prevent such problems occurring. The delay in completing the works is quite long, but not unreasonably so. It is explained by the need for the Council securing the survey reports and recommendations from Azpen, and the need for it to tender for the works.

159. We do not consider the Council can be criticised for taking such steps, or for acting on the recommendation in Azpen's letter of 11 April 2019 that it was worth carrying out works to the timbers immediately, rather than within the 6-12-month window it originally suggested. This change in recommendation is readily explained by the fact that it was made *after* Azpen had carried out the borescopic survey of the building. As identified in the final paragraph of its letter of 11 April, its new recommendation was its "final conclusion with regard to what works remain outstanding and their respective priority".

160. In our determination, the works were properly carried out by the Council under its s.106(2) duty, in order to protect the health, safety, or welfare of the tenants. The Council was also entitled to carry them out under its s.106(3) duty, with a view to proper management of the property.

161. In our assessment, all of the expenditure incurred by the Council in respect of works to the façade was reasonably incurred. Mr Hussain argued that scaffolding costs of £6,499 were excessive, but the only evidence relied upon in support of that suggestion was Coyles' quote **[714]** which specified a sum of £2,880. However, the Coyles' quote was in respect of a completely different, four-week proposed contract as compared to the works carried out by the Council which lasted from May 2019 to December 2019. It cannot be considered a like for like quote. There was no suggestion that scaffolding was unnecessary and it was clearly needed for some of the works identified in the Schedule of Works, such as the repositioning of pipework, the making good of the render band to the north and west elevations, and the remedial works and painting of the façade. All these works needed access either by a cherry picker or scaffolding, and scaffolding was the most appropriate choice given the extent of the works and likely duration. Mr Nota's unchallenged evidence was that the scaffolding was erected on two sides of the building. In our assessment, the costs incurred are reasonable given the likely extent of scaffolding required and the length of time for which it was required.

162. There was no substantive challenge to the other expenditure concerning the façade, all of which we determine were reasonable in amount and reasonably incurred. The costs of treatment or replacement of the timber structure encasing the window (£800) appear reasonable to us, as does the costs of painting (£3,400) and removal of the rotten timber and installation of new timber frame cladding (£1,800). Mr Hussain suggested that the quality of the paintwork was substandard and that some 'bubbling'

was evident in one of the photographs **[293]**. Mr Nota acknowledged that there was some bubbling shown, but considered it to be a minor issue. We concur. The bubbling is negligible, and the area can be rubbed down and repainted when the Applicant next carries out redecoration works.

163. Also challenged by the Applicant were the costs of the installation of a new "buzzer" door entry system (£1,500); replacement of the staircase carpet (£620); replacement of the fire detection system (£3,840); and works to remedy a roof leak (£470 and £2,928). A challenge to the costs of replacing the lock to the communal front door of the building (£207.15) was conceded by Mr Maddan at the hearing.

Door entry System (£1,500)

164. In the Scott Schedule, the Applicant asserted that the existing bell sounders for the flats were sufficient, and there was no reason for the Council to install a different system. However, Mr Nota's witness evidence was that when the Council first visited, the building bell sounders were tested and were not working **[146]**. At the hearing he said that the existing door lock system was a magnetic lock, with an external keypad. He could not recall any separate doorbells for the individual flats, and he said that the system was defective. There is no witness evidence of fact on behalf of the Applicant that addresses the condition of the bell sounders when the IMO was made, and in cross-examination Mr Wahab Hussain agreed that if Mr Nota said they were not working he had no reason to disbelieve him.

165. Mr Nota was not present when original inspection was carried out, but he confirmed that he visited with Mr Dick when they both inspected the building on 19 December 2019, as well as on other occasions. At the hearing Mr Nota said that when he inspected the building he could only see a magnetic strip on top of the door, which suggests, to us, that the rest of the door lock system was missing. That concurs with the photograph of the front door taken when Azpen carried out its borescopic survey **[577]** which shows no doorbells present or signs of doorbells being removed. We accept the evidence given by Mr Nota at the hearing and find, on the balance of probabilities, that the existing door entry system, which consisted of a magnetic door entry system was defective.

166. The Council proceeded to install an entry phone system which allows occupants to open the door to visitors from within their flats **[370]**. In her report, Ms DeVos accepted at para. 9(v) **[166]** that a simple 5-way door system is considered a requirement for properties of this kind, and in answer to a question raised by the tribunal at the hearing, Mr Wahab Hussain agreed that they are essential, and that he fits them in other buildings .

167. Mr Maddan agreed that the system installed by the Council was desirable, and ultimately what might be wanted, but argued that there had been no need to fit it within the one-year lifetime of the IMO and its installation therefore fell outside the scope of the Council's s.106(3) duty. He pointed out that in cross-examination Mr Dick had said that it would not be very

wise to install an entry phone system whilst an IMO is in place because during that period one would want to keep the common parts as secure as possible. An intercom system would, he suggested, be more sensible.

168. In our determination, it was reasonable for the Council to install the entry phone system in question, and that doing so fell within the scope of its s.106(3) duty. We disagree with Mr Dick's suggestion that doing so was inappropriate during the lifetime of the IMO. It was clearly desirable for the occupants to have the benefit of an entry phone system as soon as practicable given that both Mr Wahab Hussain and Ms De Vos considered one to be necessary. The Council's decision cannot, in our view, be considered an unreasonable course of action. There was no substantive challenge to the costs of the system. Coyle's quote **[174**] refers to installation of intercom access at a cost of £300, but no detail is provided as to what was being proposed, or why and the quote is not a helpful comparator. We determine that the expenditure was reasonably incurred.

Staircase carpet (£620)

169. Mr Nota's witness evidence regarding the replacement of the staircase carpet was that when the Council first visited the property it was evident that the carpet was very patchy and torn in multiple places. Photographs showing the original condition of the carpet are at **[280, 284,** and **604]** Mr Nota said that the Council saw its condition as a trip hazard, and considered it preferable to replace the carpet, rather than carry out patch repairs, which could themselves become loose over time and cause further hazards. It did so at a cost of £620.

170. The Applicant's position is that the carpet could have been cleaned and the torn sections replaced. However, Ms DeVos accepted, at paragraph 9 xvii) of her report **[166]**, that tears and disruption to the carpet around the spindles of the bannisters may have determined the need for the replacement, although, from the photographs, she thought this only affected the perimeter of the carpet beneath the balusters, and therefore would not appear to be a trip hazard. Mr Wahab Hussain, in his witness statement said that he considered the carpet fitted by the Council to be too long and that it was coming away.

171. During the course of the hearing, Mr Dick agreed that the photograph of the carpet at **[312]** showed that its fit was too loose and that the nosings needed replacing. This was conceded by Mr Calzavara, who said that the Council offered the sum of £150 towards the cost of doing so. Mr Maddan submitted that as the carpet would need to be refitted, none of the costs incurred by the Council were reasonably incurred.

172. We consider the £150 concession made by the Council to be appropriate. We accept the evidence tendered by the Council that when the IMO was made the carpet was worn, patchy and torn. In her Schedule of Works Ms Lovett stated that the carpet was very dirty and required replacement **536]**. That this is correct is seen most clearly in the photograph accompanying the 16 March 2019 Azpen report at **[604]** which shows a

dirty, worn and frayed carpet. The photographs taken by Mr Wahab Hussain after the Council had replaced the carpet at **[308]** and **[312]** do not, as he suggests, evidence that the new carpet is too long. The only evident defect is that the fitting is loose in places, a problem that can be easily resolved by fitting proper nosings, for which an allowance of £150 appears to us to be appropriate. We determine that the works were properly carried out by the Council under its s.106(2) duty, in order to protect the health, safety, or welfare of the tenants, and that it was also entitled to carry them out under its s.106(3) duty, with a view to proper management of the property. The expenditure incurred of £620, less the £150 concession, was reasonably incurred.

Fire detection system (£3,840)

173. In Ms Lovett's Schedule of Works **[536]** she identified that the existing Automated Fire Detection fire alarm system was inadequate and that its alarm panel showed faults **[549]**. She stated that as the building had been converted from office space to residential use, LACORS (Local Authorities Coordinators of Regulatory Services) guidance was that a Grade A, LD2 system was needed in the common areas, with a heat detector in each flat. In his witness statement Mr Nota concurred **[149]** and said that a new installation was required for the health and safety of the tenants, and for good management.

174. The Applicant's position was that replacement of the existing system, without first commissioning, and having regard to, a full fire risk assessment was premature. Ms DeVos said in her report **[168**], para.9 (xxiv), that the commissioning of a fire risk assessment should have been an immediate step taken by the Council.

175. In cross-examination, Mr Wahab Hussain said that he considered the Council's installation was defective. He referred to a one-page report that he commissioned from a company called RVTV Security Ltd dated 3 June 2020 **[248]** in which it was stated that modifications and remedial work was required to the system installed by the Council. Amongst other matters, it was stated that the inappropriate plastic trunking had been used without metal fire resistant fixings.

176. In his closing submissions, Mr Maddan accepted that the system in place when the IMO was made may not be of the correct type, and the Applicant was not arguing that it might have needed replacing. He suggested, however, that the Council could have repaired the existing system if it showed faults that needed immediate attention and then installed a more sophisticated system later on if that was what experts advised.

177. We see no need for the Council to have sought a full fire risk assessment before replacing the existing fire alarm system. As Mr Maddan acknowledged, there was no evidence before us to counter Ms Lovett's assessment, and Mr Nota's evidence, that the system was inadequate and faulty. In circumstances where the existing fire alarm system was inadequate, and, it appears on the evidence, faulty, there was, in our view,

no need for the Council to first carry out a full fire risk assessment before replacing the defective system. Nor would it have been appropriate for the Council to have repaired, and then left in place, an inadequate system. We agree with Mr Nota that replacement was appropriate in order to protect the health and safety of the tenants, especially where, as Mr Dick acknowledged in his evidence, there is greater risk to the occupiers of the residential flats by reason of their flats' location above commercial premises.

178. We do not find the report from RVTV Security Ltd to carry any useful evidential weight. The brief report, signed by a Mr Jay Munton, says nothing about his expertise or qualifications and makes no reference to appropriate safety standards. We find persuasive the commissioning certificate from ALV Fire Protection Ltd dated 18 October 2019 **[760]** in which it was stated that the system installed by the Council was fully compliant with all current British Safety Standards (BS5389), and included sounders reaching a minimum of 65dB (and 75DB where there is a sleeping risk), as well as smoke and heat detectors and manual call points.

179. We determine that the works were properly carried out by the Council under its s.106(2) duty, in order to protect the health, safety, or welfare of the tenants, and that it was also entitled to carry them out under its s.106(3) duty, with a view to proper management of the property. The expenditure was reasonably incurred.

Works to remedy a roof leak (£2,928).

180. In her Schedule of Works **[536]** Ms Lovett states that the flat roof was leaking, resulting in a large amount of water pooling on to the second-floor landing. As such, the covering needed to be inspected and repaired or re-covered. Mr Nota's witness evidence was that the roof previously had multiple small patch repairs, which were evidently not sufficient as there were still leaks coming into the building causing the stairs and hallways to become trip hazards.

181. At the hearing, Mr Calzavara suggested that the Council's expenditure for these works was in fact £470 and £2,928. However, it appears to us that this must be incorrect, as only the sum of £2,928 is referred to in the Council's accounts **[Supp:61-67]** and that the sum of £470 was Azpen's initial provision for the costs of inspecting, making good and redecorating **[647], [Supp:41]**. Its final invoice was in the sum of £2,928 **[652]** which included stripping and replacing the felt around the access hatch, repairing external and internal damage to the upstand, replacing plasterboard, and filling and decorating.

182. Photographs showing water pooling, and the roof hatch that was allowing the water penetration are at **[532, 550-553]**. Ponding on the flat roof, around the roof hatch, can be seen from the photographs at **[618-621**]. Photographs showing the removal of the old roof felt, and the presence of rotten timbers are at **[730-731]**. Photographs showing the new hatch, new timber framework and new roof felt are at **[732]**.

183. In her report Ms DeVos **[167]** agreed that it was evident from the photographs that the existing roof was not in a good condition and that the water penetration needed to be remedied. However, she mistakenly assumed that the Council had replaced the whole of the roof covering rather than just the area that was allowing the penetration. In cross-examination she accepted that this was incorrect.

184. The Applicant's case, as recorded in the Scott Schedule, was that the leak in the lobby was not adequately dealt with, and the cost of £2,928 was excessive. At the hearing Mr Maddan accepted that the photographic evidence showed there was clearly a serious water leak but suggested that the work Azpen carried out appeared to be an odd compromise when further works appeared to be needed to the remainder of the roof. Mr Wahab Hussain's evidence was that when he took photographs on 6 May 2020 **[387 – 388]**, there was still evidence of water penetration from the roof and that it still leaked.

185. There is no dispute that works were needed to resolve the water penetration issue. We consider that the works carried out by the Council were measured and entirely appropriate. Mr Dick inspected the roof on 6 January 2020, after the works carried out by Azpen had been completed, and found that the repairs were sound. He noted **[510]** that the roof was at the end of its life and that, depending on future plans for the property, complete renewal of the roof may be cost effective in the medium term. However, the medium term, and the remedying of any ongoing leaks, is a matter for the Applicant. What this tribunal is concerned with is whether the expenditure actually incurred by the Council was reasonably incurred, not whether it should have incurred further expenditure. We have no doubt that it was. The photographs referred to by Mr Hussain were of the ceilings of individual flats and not the communal area under the hatch. There is no evidence to suggest that the works carried out by Azpen were of a poor standard, or that they failed to remedy the water penetration from the hatch area. Nor is there any evidence to support the Applicant's assertion in the Scott Schedule that the expenditure was excessive.

186. We determine that the works were properly carried out by the Council under its s.106(2) duty, in order to protect the health, safety, or welfare of the tenants, and that it was also entitled to carry them out under its s.106(3) duty, with a view to proper management of the property. The expenditure was reasonably incurred.

Management Fee - 109-111 Old Church Rd

187. The Applicant challenged charges made by the Council in the sum of £6,040 in connection with the management of the building at 109-111 Old Church Rd. These charges were calculated as 10% of the rent received for the letting of the individual Flats, with nothing charged for period when any Flat was unlet. £2,210 was charged in respect of both Flat 1 and Flat 2 **[Supp:30,31]**, £600 for Flat 3 **[Supp:32]**, and £1,020 for Flat 5 **[Supp:34]**. Nothing was charged for Flat 4.

188. The Applicant's case, as stated in the Scott Schedule, was that it was not reasonable to charge any management fee because of the poor management service provide by the Council, including its failure to take proper action to re-let Flats 3 and 4 when they were vacant. In cross-examination, Mr Wahab Hussain, accepted that the Council was not providing a lettings service but said that the Council had failed its duty to maximise rental income for the Flats.

189. Mr Maddan's submissions were that we should reduce the amount of management fees allowable to take into account sub-standard workmanship by Azpen and neglect by the Council. He cited the following: a photograph taken by Mr Wahab Hussain on 9 January 2020 showing a mattress left outside the front door to the building **[289]** that was still there when he took another photograph on 6 May 2020 **[299]**; a handrail that was left in an unsafe condition **[280]**; a component of the fire alarm system that was left without a cover **[305]**; a trickle vent in Flat 1 that was left with its cover off **[318]**; a self-closer to the door of Flat 4 that had been incorrectly fitted **[418]**; and the presence of mould and damp in the bathroom of Flat 5 **[422]**.

190. We find the expenditure on management charges to have been reasonably incurred. We see no merit in Mr Hussain's suggestion that the Council failed to take adequate steps to let Flats 3 and 4. Emails regarding lettings of these Flats were sent to Mrs Hussain using the email address, allprop@live.co.uk which was the address she asked the Council to use. On 31 January 2019 Mr Nota wrote to her at that email address asking for her agreement to re-let Flat 4 **[662]**, to which she agreed on 4 February 2019 **[662]**. He then emailed her again 24 April 2019, asking for her consent to re-market Flat 3. Mr Nota said that he received no response to that email, nor to his subsequent email chasing a response, sent on 13 June 2019 **[664]**, in which he also said that that there had been numerous viewings of Flat 4 and that he had tried, unsuccessfully, to contact her by telephone on multiple occasions to let her know of potential tenants, but as he heard nothing back from her, the lettings fell through.

191. We accept as true Mr Nota's evidence to us that he attempted to contact Mrs Hussain by telephone to discuss potential lettings of Flats 3 and 4 and that he left her several voicemail messages that were not returned. He tendered direct evidence to us on this point which we found to be credible and corroborated by the contents of his email of 13 June 2019. We prefer his direct evidence to that of Mr Hussain's heresay evidence regarding the conversations he said he had with his mother in which she denied receiving any telephone calls or voicemail messages from the Council. We also prefer it to Mrs Hussain's evidence in her witness statement to that effect **[89]**. We give her witness statement limited evidential weight given that she did not make herself available to be cross-examined as to the truth of her evidence.

192. As to Mr Maddan's submissions, the tribunal's role is to determine whether expenditure shown in the Council's accounts was reasonably incurred. We accept that, arguably, we have the power to reduce

management charges where the Council's management of properties subject to an IMO has been inadequate. However, even if we have that power, we do not consider it should be exercised on the facts of this case. We have no evidence as to who left the mattress outside the building or where it came from, or of any communications from Mr Hussain to the Council asking for it to be removed. We agree that the plastic cover to the handrail is loose in one place, but that is in our view a minor repair issue that does not warrant a reduction in the management charges on the basis of poor management. The same is true of the points raised regarding the trickle vent and the self-closer. All the self-closer needs is for a door stop to be fitted so that it does not hit the wall when the door is opened, and all the trickle vent needed was for someone to put its cover back on. There is no evidence before us at to the source of the damp evident by the base of the shower in the bathroom of Flat 5 and whether it is due to condensation, which may well be likely. Nor is there evidence as to what works it is said should have been carried out by the Council in the bathroom, which would, of course fall to be paid by the Applicant.

193. As Mr Calzavara submitted, the Council was obliged to carry out its statutory duties in respect of these properties because they were required to be licensed, but were not licensed. A charge of 10% of the rent collected is, in our view, eminently reasonable for the work it was obliged to undertake especially when it is borne in mind that it did not charge any supervision fee for the works carried out by Azpen. We determine that the expenditure was reasonably incurred under the Council's s.106(3) duty.

Flat 2, 109-111 Old Church Rd

194. The Applicant challenged the cost of decoration of the bathroom wall at a cost of £75. An initial challenge to the costs of replacing sealant around the bath (£30) was not pursued at the hearing. A charge for replacing laminate covering on the kitchen worktops (£50) was conceded by the Council. Mr Nota accepted that the covering had been filled rather than replaced, and Mr Calzavara accepted that the work had not been carried out to an appropriate standard.

195. Mr Nota's evidence was that the works were carried out to ensure the property was in a good condition and to make it more appealing for any potential tenants that would be looking to rent it. He said the wall needed to be painted because bare plaster was visible, making the painting look unfinished **[147]**. We accept his evidence as true, there being no evidence to the contrary. In cross-examination Mr Wahab Hussain accepted that he had no knowledge of the condition of the wall at the time the IMO was made. We determine that the expenditure was reasonably incurred under the Council's s.106(3) management duty.

196. Although the Applicant included a challenge to the costs of the construction of a partition and installation of a fire door to the kitchen (£310) in the Table, no challenge to this expenditure was raised in its Statements of Case or in the Scott Schedule. As such, it was too late to challenge these costs. The Respondent needed to know the case it had to

meet in advance of the hearing. Although Mr Wahab Hussain said in his second witness statement **[693]** that he believed the door had been installed incorrectly, a witness statement is not the place to delineate the extent of the Applicant's pleaded case. It was crucial that in litigation of this nature, which involved a very large number of challenges to individual items of expenditure, that the parties fully complied with the tribunal's direction to set out their case in their Statements of Case and in the Scott Schedule.

Flat 3, 109-111 Old Church Rd

197. In the Scott Schedule, the Applicant challenged the costs of replacing a kitchen drawer front, and replacing the kitchen units, on the basis that the works did not fall within scope of the Council's s.106(2) duty to protect the health, safety or welfare of occupants. It also contended that it was unreasonable to carry out work in a flat that was vacant and that the work was of poor quality. However, in the Table, the Applicant narrowed the scope of its challenge to the replacement of the kitchen drawer front at a cost of £45.

198. Mr Nota's evidence on this point was that, on inspection, the drawer was found to be unusable as items would fall out when opening it. At paragraph 5.36.16 ix) of her report **[175]** Ms DeVos agreed that the photographic evidence indicated that the kitchen drawer was in poor condition. Mr Wahab Hussain did not say otherwise in his witness statement and we therefore accept Mr Nota's evidence as accurate. Mr Hussain contends that the drawer does not open, but it appears to us from the photographs **[360-3]** that the drawer has been replaced. On the balance of probabilities, we accept that the drawer front was replaced to an appropriate standard of quality, and we are satisfied that to do so fell within the scope of the Council's s.106(3) duty. We determine the cost was reasonably incurred.

199. There is no merit in the suggestion that it was unreasonable to carry out works in a flat that was vacant. As referred to above, the Council actively sought Ms Hussain's consent to re-let the Flat and to carry out required works to render it more attractive to prospective tenants was clearly within the scope of its management duty.

200. In the Table, the Applicant included a challenge to the costs of fitting window restrictors in the back bedroom at a cost of £25 **[648]** but as these were not put in issue in its Statements of Case or in the Scott Schedule, are outside the scope of its application.

Flat 4, 109-111 Old Church Rd

201. The Council carried out a series of works to Flat 4 at a cost of £1,800 **[650-1]** including fitting window restrictors, installing a humidistat fan to address a strong smell of damp, relocating and refitting a new base unit to the oven, repainting the bedroom walls, and replacing cracked tiles in the bathroom. The only challenge to these costs identified in the Applicant's

Scott Schedule is that it was unreasonable to carry out these works in flat which the Respondent left vacant.

202. We reject that contention for the same reasons as for Flat 3. We determine that it was reasonable for the Council to carry out the works to render it more attractive to prospective tenants, and that the work was within the scope of its s.106(3) management duty. As we found above, Mr Nota made several attempts to contact Mrs Hussain after suitable tenants were identified on 9 May 2019, and that these attempts elicited no response from Mrs Hussain. The fact that the Flat was not re-let was not due to any evident default by the Council.

Flat 5, 109-111 Old Church Rd

203. As Mr Nota explained in his witness statement, the Council installed central heating in Flat 5 because it lacked fixed heating. It took the view that portable heaters did not provide adequate heating throughout the property and were a potential trip hazard due to trailing wires.

204. The Applicant's position was that the installation of a central heating system constituted an improvement which fell outside the remit of the Council's duties under an IMO. We reject that suggestion, for the same reasons as we did for the installation of the central heating system at 158A Blackhorse Road. We agree with Mr Nota that trailing wires render portable heating a potential trip hazard, that the works did not amount to an improvement, and that even if they did, the works would fall within scope of either of the Council's s.106(2) or (3) duties.

205. The Applicant also argued in the Scott Schedule that work carried out was of poor quality, having regard to the photographs taken by Mr Wahab Hussain in May 2020. However, there is nothing in either the photographs or in Ms DeVos' report, to suggest that the heating installation was defective or of poor quality.

206. There is no substantive challenge to the costs of the works (£420) **[650]** and we determine that the costs were reasonable in amount and reasonably incurred.

Tendering Process

207. Finally, we address criticisms made by the Applicant regarding the tendering process followed by the Council. In her report, at para 6.10, Ms De Voss suggested that it was unusual for a local authority supplier such as Azpen to act as both a consultant and contractor. Mr Wahab Hussain, in his first witness statement, paras 27-30, suggested that Azpen had an unfair advantage when tendering for works because it had assessed the need for works in the first place. He also criticised their appointment by the Council as it was a new company, only incorporated on 14 January 2019.

208. Mr Maddan, in his submissions, criticised the fact that there was no documentary evidence in the hearing bundle of any contract between the

Council and Azpen, and no schedule of works showing specific measured quantities.

209. In cross-examination, Mr Nota explained that the tendering process was carried out by his manager, Mr Shahzad Hussain, using an online public sector procurement portal called the London Tenders Portal. He believed that his manager would have uploaded the Schedules of Work prepared by Ms Lovett and Mr Waseem Hussain on to the Portal, possibly with evaluation criteria. Potential contractors would then have submitted their tenders, which they would have reviewed together. Mr Nota explained that in respect of 109-111 Old Church Rd, there were two tendering exercises, one for the external works, and one for the internal works. He said that once a contractor is awarded a job, they have to sign terms and conditions.

210. The problem with the Applicant's criticisms, is that there is no evidence to suggest that they are relevant to the question that we have to determine in this application, namely whether the expenditure incurred by the Council was reasonably incurred in performance of its statutory duties. As Mr Calzavara submitted, this application is not a procurement challenge, and we do not have before us all of the documentation that would have been uploaded to the Portal by the Council and contractors during the tendering process. There is simply no evidence at all before us to suggest that the way in which the Council conducted this tendering exercise lead to it incurring unreasonable expenditure. Indeed, the preparation of detailed specifications of works, with measured quantities, may have led to increased costs if prepared by an external surveyor. We see no bar to Azpen tendering for the works just because they conducted the previous surveys in respect of the subject properties, and there is no evidence to support Mr Wahab Hussain's suggestion that this gave them an unfair advantage. As to the absence of a formal contract, Mr Nota considered it likely that Azpen would have signed terms and conditions, but such documentation is not before us. Again, in the absence of evidence that the contractual arrangements between the Council led to the Council incurring unreasonably expenditure, this is not an issue that falls within scope of this application.

What adjustments must the Council make to the accounts?

211. For the reasons stated above, we determine that all of the amounts shown in the Council's accounts **[Supp:30-36]** constitute expenditure that was reasonably incurred by the authority in connection its performance of its duties under s.106(1) to (3) of the 2004 Act, in respect of the subject properties, except for the following costs that were conceded by the Council:

    (a) £150 (out of a total sum of £620), in respect of the staircase carpet in the communal areas of 109-111 Old Church Rd; and

    (b) £50, for the costs of replacing the laminate covering to the kitchen worktop in Flat 2, 109-111 Old Church Rd.

Amran Vance

20 April 2022

ANNEX 1

RIGHTS OF APPEAL

Appealing against the tribunal's decisions above

1. A written application for permission must be made to the First-tier Tribunal at the Regional office which has been dealing with the case.

2. The application for permission to appeal must arrive at the Regional office within 28 days after the date this decision is sent to the parties.

3. If the application is not made within the 28-day time limit, such application must include a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.

4. The application for permission to appeal must state the grounds of appeal, and state the result the party making the application is seeking.

ANNEX 2

SCHEDULE OF PROPERTIES

LON/00BH/HSL/2019/0002-0014

LON/00BH/HSV/2019/0002-0024

LON/00BH/LXO/2019/0001-0007

IN THE FIRST TIER TRIBUNAL PROPERTY CHAMBER

(RESIDENTIAL PROPERTY)

B E T W E E N:

(1) NASIM HUSSAIN

(2) FHCO LIMITED

(3) FARINA HUSSAIN

(4) LUXCOOL LIMITED

Applicants

- and -

LONDON BOROUGH OF WALTHAM FOREST

Respondent

SCHEDULE OF PROPERTIES

	Property Address	Description of Property	Appeal against	IMO made?	FMO made?	Licence applicant/ licence holder before	Freeholder (December

			licence revocation or refusal?			**revocation as applicable**	**2018/present)**
1.	Flat 1 109-111 Old Church E4 6ST	2 Bedroom flat, Living Room, Kitchen	Refusal	Yes – s101(2)	Yes	Nasim Hussain	Luxcool Limited throughout
2.	Flat 2 109-111 Old Church E4 6ST	2 Bedroom flat, Living Room, Kitchen	Refusal	Yes – s101(2)	Yes	Nasim Hussain	Luxcool Limited throughout
3.	Flat 3 109-111 Old Church E4 6ST	2 Bedroom flat, Living Room, Kitchen	Refusal	Yes – s101(2)	Yes	Nasim Hussain	Luxcool Limited throughout
4.	Flat 4 109-111 Old Church E4 6ST	3 Bedroom flat, Living Room, Kitchen	Refusal	Yes – s101(2)	Yes	Nasim Hussain	Luxcool Limited throughout
5.	Flat 5 109-111 Old Church E4 6ST	Studio flat	Refusal	Yes – s101(2)	Yes	Nasim Hussain	Luxcool Limited throughout
6.	Flat A 158 Blackhorse Road E17 6NH	2 Bedroom flat, Open Living Room and Kitchen	Refusal	Yes – s101(2)	Yes	Nasim Hussain	Nasim Hussain/Blackbrook Capital Limited
7.	Flat B 158 Blackhorse Road E17 6NH	Studio flat	Refusal	Yes – s101(2)	Yes	Nasim Hussain	Nasim Hussain/Blackbrook Capital Limited