



Neutral Citation Number: [2022] EWCA Civ 791

Case No: CA-2020-000578 and CA-2020-000579A

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COUNTY COURT AT WILLESDEN
HH Judge Saunders
3PA90505

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21 June 2022

Before :

LORD JUSTICE BAKER
LORD JUSTICE PHILLIPS
and
LORD JUSTICE EDIS

Between :

ZOHRA KHAN

**Claimant/
Appellant**

- and -

TARIQ MEHMOOD

**Defendant/
Respondent**

-and-

**THE HOUSING LAW PRACTITIONERS'
ASSOCIATION**

Intervenor

Christopher Mann (instructed by **Shuttari Paul and Co**) for the **Appellant**
Toby Vanhegan and Matthew Lee (instructed by **Duncan Lewis Solicitors**) for the
Respondent
Liz Davies QC and Marina Sergides (instructed by **Hodge Jones Allen LLP**) for the
Intervenor

Hearing dates : 23 March 2022

Approved Judgment

Remote hand-down: This judgment was handed down remotely at 10:30am on Tuesday 21 June 2022 by circulation to the parties or their representatives by email and by release to the National Archives.

LORD JUSTICE BAKER :

1. This appeal concerns a challenge by the owner of a property (“the claimant”) to the quantum of damages awarded to the tenant of the property (“the defendant”) for breach of an implied covenant to keep the property in repair.

Summary of Facts

2. The defendant moved into the property in about March 2005 and thereafter occupied the property with others and contributed to the rent. At that point, he was not the tenant named in the tenancy agreement, although it was his evidence that it was he who delivered the rent to the claimant’s agent every month.
3. It was the defendant’s case that at all times during his occupancy the property was in an extremely poor state of repair. In particular, the house was damp, the floors in the kitchen and on the landing were unstable, and the carpets were filthy and infested. Complaints to the managing agent met with no response. The defendant’s evidence was that he complained about the state of the property whenever he visited the agent to pay the rent.
4. In about March 2011, the person named as the tenant in the tenancy agreement left the property. At that point, the defendant signed a new tenancy agreement with the claimant through her managing agent. For the first year of the tenancy, the defendant paid rent of £900 per month. In addition, he was required to pay a deposit in the sum of £900. Two of the defendant’s friends moved into the property to assist him with the rent.
5. It was the defendant’s evidence that, in about September 2011, the condition of the property deteriorated still further, the roof started leaking, and living conditions became intolerable. At this point, the agent arranged for repairs to be carried out, but according to the defendant they were ineffective. In January 2012, a gas inspector declared that the cooker was unsafe. The following month, the claimant and her agent visited the property. They agreed to carry out repairs in return for increased rent. The defendant agreed and signed a new tenancy agreement, under which the rent was increased to £1,050 per month and a further deposit required in the sum of £150. According to the defendant, however, no work was carried out by the claimant, although the defendant and his friends carried out some work themselves. The condition of the property continued to deteriorate. It was the defendant’s evidence that, as a result of the conditions in which he was living, he became ill, was unable to work, and fell into arrears with the rent.
6. On 12 July 2013, the claimant filed a claim for possession and payment of rent arrears. In paragraph 3(a) of her Particulars of Claim, she pleaded that the premises

were let to the defendant “under an assured shorthold tenancy which began on 23 March 2007”. Rent arrears at the date of the pleading were said to be £4,200.

7. On 9 August 2013, the defendant filed a Defence in Form N118 accompanied by a document headed “Additional Defence Form”. In the latter document, he averred (in paragraph 2):

“The defendant admits that he occupies [the property] under an assured shorthold tenancy. The tenancy began on 23 March 2011 ... and was renewed on 23 March 2012”

The document included a Counterclaim for damages in which the defendant averred that he was entitled to the benefit of the repairing covenant implied by s.11 of the Landlord and Tenant Act 1985 in respect of which the claimant was in breach by failing to keep the property in repair.

8. The preliminary hearing was listed for 12 August 2013 but adjourned to 2 September 2013. On that date, the defendant did not attend court and judgment was entered for possession of the property. The defendant then applied to set aside the order. In his statement dated 9 October 2013 in support of that application, he explained that he had been misled by notices from the court into thinking that the hearing had been adjourned. In the statement he also set out his account of the history. In particular, of relevance to this appeal, he said:

“2. I entered into the property in or around March 2005. The tenancy agreement was not in my name but [I] was occupying the property jointly and was paying rent along with the others at the time.

3. In or around March 2011, the main tenant of the property left the house and I signed a new tenancy agreement with the claimant through the claimant’s then property managing agent I currently reside with two of my family friends.

4. I have always been paying rent to the agent on time and was paying in full every month. In the first year my rent was £900 which was increased to £1,050 during the second year.

5. In addition, I was required to pay a deposit of £1,050.00. I paid a deposit of £900 in the first year and £150 in the second year

...

11. ... From the start of my occupation, I was responsible to pay the rent which I would deliver by personal visit to the agents. On each occasion ... I complained to them about the disrepairs in the property”

The statement gave detailed evidence about the state of disrepair of the property.

9. On 17 October 2013, the claimant filed a statement in reply. She said that paragraph 2 of the defendant's statement was incorrect. Between 2005 and 2011, she had rented the house to a series of other tenants. In 2011, she had signed a tenancy agreement with the defendant, followed by another agreement in 2012. She exhibited copies of the various tenancy agreements for the property between 2007 and 2013. She said:

"In the light of all the above documentary evidence it is submitted that I was not in knowledge of the defendant entering in the property in or around since 2005. The defendant was introduced to me by ... the property agents for the first time on 16.03.2011 to sign the rent agreement for the property."

The claimant proceeded to deny the defendant's account about the disrepair of the property.

10. Subsequently, the order dated 2 September 2013 was set aside. On 30 January 2014, the defendant filed an Amended Defence and Counterclaim. By paragraph 3, he pleaded:

"As regards paragraph 3(a), it is admitted that the property is let to the defendant under an assured shorthold tenancy and that the defendant has been in occupation since at least March 2007. However, the defendant first entered into a 12 month assured shorthold tenancy agreement with the claimant on 16 March 2011 ... and subsequently entered into a further 12 month tenancy agreement on 21 February 2012 On expiry of the second tenancy agreement, the tenancy became a statutory periodic tenancy."

The defendant accepted that he was in arrears of rent but not the amount claimed and denied that the claimant was entitled to possession. In the alternative, he sought to set off sums awarded under the counterclaim. Under the amended counterclaim, he averred that (a) the provisions of s.11 of the Landlord and Tenant Act 1985 applied to the tenancy; (b) it was an implied term of the tenancy agreements that the property, being a furnished property, would be fit for habitation; (c) it was a further implied term that the claimant would keep the appliances supplied by her, including the hob and oven, in safe working order; (d) the claimant was in breach of the implied terms by failing to keep the property and appliances in good repair. The counterclaim proceeded to set out particulars of breach and of damage. In paragraph 18, he set out particulars of damage that had occurred "since the commencement of the tenancy". In paragraph 19, the defendant pleaded:

"The claimant has been on notice of the said defects. The defendant gave oral notice of each of the above issues to the claimant and/or her agents repeatedly throughout the duration of the tenancy and was complaining about the repair before he became the tenant in 2011"

The defendant counterclaimed for damages, including special damages for expenses incurred on takeaway meals as a result of the disconnection of the cooker, interest,

specific performance of the repairing obligations, and return of the deposits paid under the two tenancy agreements.

11. On 19 February 2014, the claimant filed a Reply to the Amended Defence and Counterclaim. She admitted paragraph 3 of the Defence, thereby accepting that the defendant had been in occupation since 2007 but had first entered into a tenancy agreement in March 2011. She accepted that the agreement contained the implied terms pleaded but denied the allegations of breach, asserting that notices of disrepair had been brought to her attention, that appropriate repairs had been carried out, and that the deposit had been returned to the defendant.
12. The final hearing was listed on 14 August 2014. The claimant did not attend the hearing, later maintaining that she had thought that would be adjourned because of an unresolved issue about an expert's report. She had also failed to comply with a direction to file a trial bundle. At the hearing, the defendant's counsel asked for the possession claim to be dismissed, and for judgment on the counterclaim with damages to be assessed at a later date. District Judge Middleton-Roy, as he then was, indicated, however, that he was willing to deal with the damages issue at the hearing "where it is possible and where it is fair to do so". The transcript of the hearing shows that counsel agreed and said:

"I would be asking you to base it on a reduction in their rent by way of doing it since it is accepted, and for the period of six years prior to the issue of proceedings as the claimant himself says he was there since 2007. It would be possible to do it today."

The judge replied:

"I am really guided by you in that regard but I am perfectly prepared to dispose of the matter in its entirety today."

He then continued with the hearing, considered the surveyor's report and took brief evidence from the defendant himself.

13. In closing submissions, counsel argued that the property was in a severe state of disrepair and that damages should be measured by a large reduction in the rent that had been paid for the premises. In the course of submissions, he said:

"The rent was initially £900 per month until March 2012, when it was put up to £1,050. The disrepair, as I say, has been there now for six years prior to issue. That was issued in March 2013, so there has been another year and five months. Clearly, it would have been reasonable to have allowed the claimant some time to put matters right, but when the property was first let to Mr Mehmood on 23 March 2007 they could have been allowed two months, say. Therefore for the last seven years and three months we say that damages are due to Mr Mehmood. For the first year, as I say, they are based on the rental of £900 per month and then since March of £1,050."

Counsel referred to the claim for special damages but added:

“He does not have documentary evidence, and it may just be appropriate to include that in the overall assessment of the harm that has been caused to him by the state of the premises.”

14. In addition to the damages calculated on that basis, counsel asked for the return of the deposit (which the defendant claimed had not been paid back) and a penalty on £3,150 under s.214 of the Housing Act 2004. He added:

“Also, I say that you may take into consideration the fact that under *Simmons v Castle* last year the Court of Appeal said there should be a 10% increase in general damages for such loss of amenities claims, and that can either be taken into account when you apply the percentage or after you have applied the percentage, 10% on top of that.”

15. In his short judgment, the district judge dismissed the claim and gave judgment on the counterclaim. He found that the evidence showed that the property had been in a severe state of disrepair which deserved a considerable reduction in rent which he fixed at 50%, adding:

“That will apply to the initial £900 rent up to March 2012 and thereafter on the contractual rent of £1,050. I accept the submissions that ... the appropriate period for that reduction was seven years and three months, allowing ... an appropriate and reasonable period of two months for the claimant to have put these matters right”

He also accepted the submissions that, in the absence of documentary evidence, the special damages element should be included in the assessment of general damages. He ordered the return of the deposit, added £3,150 by way of penalty under s.214, added “a further 10% increase in damages”, and ordered the claimant to carry out the works in the schedule appended to the pleading. Counsel then invited him “to award interest on the period since the date in May 2007”. The judge agreed and further awarded costs to the defendant.

16. On 4 September 2014, the claimant filed an application to set aside the order of 14 August. Separately on the same day, she filed a notice of appeal against the order. On 6 January 2015 the application to set aside was dismissed.
17. Extraordinarily, for reasons which are not entirely clear to the Court, but which appear to relate to administrative issues with the relevant county courts, there was no substantive action on the appeal for over four years. Meanwhile, the claimant recovered possession of the property by separate proceedings on the basis of a notice under s.21 of the Housing Act 1988. Eventually, on 29 November 2018, HH Judge Dight granted permission to appeal against the order dated 14 August 2014.
18. At the hearing of the appeal before HH Judge Saunders on 6 August 2019, the claimant put forward four grounds of appeal. (1) The district judge awarded damages for an excessive period. The obligation to repair which s.11 of the Landlord and

Tenant Act 1985 implies into every applicable lease is owed only to the tenant, not to a licensee and, as a result, the defendant had no claim for damages for the period between 2007 and 2011 when he was in occupation but not a tenant. (2) The district judge failed to set off rent arrears, which the defendant admitted he owed, against the damages awarded. (3) The order for the return of the deposit, plus a penalty, was erroneous because the deposit had already been repaid. (4) There was no proper basis for the order to carry out works. In addition, the claimant asserted as a "subsidiary point" that it was wrong as a matter of law to increase the damages by 10% under the principle in *Simmons v Castle*. Both parties were represented at the hearing of the appeal (in the defendant's case, not by counsel who had attended before the district judge). After hearing submissions on both sides, the judge reserved his judgment.

19. In his judgment, the judge dismissed the appeal on all grounds. As the present appeal relates only to the first ground and the additional *Simmons v Castle* point, it is unnecessary to set out the judge's reasoning on the other grounds.
20. Dealing with the first ground of appeal, the judge summarised the claimant's argument, noting the claim that it was not suggested that he was a tenant between 2007 and 2011. He continued:

"15. It must be remembered that the claimant was not at the trial and did not put forward any evidence. The judge was only interested in the counterclaim as he had already struck out the claim and the defence to counterclaim under CPR 39.3(1)(b). Mr Mehmood had said in his witness statement dated 9 October 2013 that he moved into the house in or about March 2005.

16. There are what I would loosely describe as several indicators which would support the judge's decision. These are as follows:

(a) In his witness statement, the defendant says at paragraph 2 that although the tenancy agreement was not in his name, he was occupying the property jointly, and was paying rent along with the others;

(b) ... again in his witness statement, the defendant says he was paying rent to the agent on time paying in full every month;

(c) ... paragraph 11, he says 'from the start of my occupation, I was responsible to pay rent ... by personal visits to the agents'

17. Even putting these matters aside, and accepting that the only evidence before the judge was that presented by the defendant, the pleadings are also the most informative. The claimant's own particulars of claim indicate that 'the premises were let to the defendant under an assured shorthold tenancy which began on 23 March 2007' ...

18. Significantly, the claimant did not amend that pleading. Faced with the evidence which revealed that the defendant had been in occupation since 2007 paying rent to the claimant's agent, it is, in my view, consistent with the claimant's own pleaded case and so it cannot be said (because of this, and the other evidence to which I referred above) the judge was wrong to make this finding.

19. In view of the fact that the claimant was not present at the hearing, and presented this pleaded case along with the witness evidence (along with the chartered surveyors report) it would, in my view, [have] been extremely difficult for District Judge Middleton-Roy to have held an enquiry into the commencement date of the tenancy when it was not in issue on the pleadings. He had to deal with what was before him at that time and this is certainly not a case where he came to a conclusion on the evidence ... which was either plainly wrong on [or] one which no reasonable judge could have reached.

20. The difficulty for the claimant here that they were not present [at] trial for their own reasons and [have] suffered the consequences of their non-attendance." [Emphasis added.]

21. Having considered and dismissed grounds two to four, the judge dealt finally with the "subsidiary point".

"38. Although it does not strictly fall within the grounds of appeal, the appellant has raised an issue with regard to the district judge's decision to increase the general damages that he has awarded in his final order by 10% invoking *Simmons v Castle*. The appellant says this is a wrong approach and that a rent rebate approach should be adopted. I disagree. The position is clearly set out in paragraph 50 of the decision of Lord Judge in the case."

Having recited the paragraph of that judgment, he continued:

"39. Here, this is the case involving physical inconvenience and discomfort to the defendant and it was a civil claim. The district judge was correct in applying the *Simmons v Castle* uplift to the facts of this case...."

22. Although the judgment is dated 11 August 2019, it was in fact formally handed down on 6 December 2019 by another judge, because Judge Saunders was unavailable on health grounds. In addition to dismissing the appeal, the order made that day extended the time for further appealing until the matter could be further considered by Judge Saunders, and adjourned all further matters to the first available date after 3 February 2020 when they could be considered by that judge. In the event, it was not possible for Judge Saunders to conduct a further hearing until 13 July 2020. On that occasion, he made an order for costs against the claimant and extended the time for filing a further appeal notice for 28 days.

23. On 20 July 2020, the claimant filed notices of appeal to this Court, on three grounds. On 29 June 2021, Newey LJ granted permission to appeal on the first ground, but refused it on the other two.
24. As Newey LJ noted when granting permission, the first ground has two distinct elements and it is appropriate to re-classify it as two grounds, in these terms:
- Ground 1 – The judge erred in holding that, despite the defendant’s Counterclaim stating that the tenancy commenced on 21 March 2011 and there being nothing in the Counterclaim by way of pleading of any lease either at law or in equity prior to that date, the district judge had been entitled to award damages for disrepair for a period of about four years prior to that date. He ought to have held that under the Counterclaim the defendant was only entitled to damages for the period of tenancy pleaded in the Counterclaim from 21 March 2011 onwards.
 - Ground 2 – The judge further erred in ruling that the district judge was correct to have increased those damages by 10% by application of the decision in *Simmons v Castle*. He ought to have held that the 10% increase was inapplicable to this case since the damages so assessed were intended to embrace special damage as well as general damage and also that the principle was designed to apply to a situation in which there is a “proper level of general damages...(i) for pain and suffering, (ii) loss of amenity, (iii) physical inconvenience and discomfort, (iv) social discredit, or (v) mental distress, which implies the application of a tariff rather than the use of a formula such as that applied in this case”.
25. Subsequently, the Housing Law Practitioners’ Association applied to intervene in the appeal in respect of ground 2. On 8 March 2022, I granted them leave to intervene and gave consequential directions.

Ground 1

26. It is correct that in the Particulars of Claim, the claimant asserted that the premises had been let to the defendant under an assured shorthold tenancy which began on 23 March 2007. But in the “Additional Defence Form” filed shortly afterwards, the defendant pleaded that he occupied the property under an assured shorthold tenancy which began on 23 March 2011. Subsequently, in paragraph 3 of the Amended Defence and Counterclaim, the defendant pleaded that

“it is admitted that the property is let to the defendant under an assured shorthold tenancy and that the defendant has been in occupation since at least March 2007. However, the defendant first entered into a 12 month assured shorthold tenancy agreement with the claimant on 16 March 2011”

Further on in the Counterclaim, he averred that he had been complaining about the disrepair “before he became the tenant in 2011. At all times, therefore, it was the defendant’s pleaded case that he became a tenant in 2011”. In her Reply to Amended Defence and Counterclaim, the claimant admitted paragraph 3 of the Amended Defence. At the start of the hearing on 14 August 2014, the claimant’s claim was

dismissed. Accordingly, at that point, there was no dispute about the pleaded case on the Counterclaim. On the pleadings, it was common ground between the parties that the defendant occupied the property from 2007 but only became the tenant in 2011.

27. Similarly, there was no dispute on the written evidence. It was the defendant's evidence in his statement dated 9 October 2013 that he entered the property in 2005, that at that point the tenancy was not in his name, that in 2011 the "main tenant" left the property and the defendant then signed a new tenancy agreement. He added that "in the first year" his rent had been £900 which was increased to £1050 "during the second year". In her statement dated 17 October 2013, the claimant said that she entered into a series of tenancy agreements with other persons between 2007 and 2011 and that it was in 2011 that the defendant became the tenant.
28. The pleadings and the written evidence therefore clearly demonstrated that the parties were agreed that the defendant became the tenant in 2011. Why, then, did the district judge reach a different conclusion? It seems from the transcript that he was misled by the assertion in counsel's submissions that the property had been first let to the defendant on 23 March 2007. In saying that I am not accusing the defendant's counsel (who was not, I should say either of Mr Vanhegan or Mr Lee, who appeared for the defendant before us) of acting improperly. The fact is, however, that the assertion made by counsel and accepted by the judge was contrary to the defendant's pleaded case and his statement. Furthermore, there is nothing in the transcript of the hearing to suggest that the district judge had read the claimant's statement dated 17 October 2013. The defendant's counsel never referred to it. The claimant was plainly at fault for failing to comply with the direction to file a trial bundle. Had she done so, the district judge would have had before him a full set of the pleadings and both parties' statements. But the statement had been filed and served and should therefore have been taken into account by the district judge. The case as presented to and considered by him was therefore very different from the case as pleaded and set out in the written evidence filed with the court.
29. In his submissions to this Court, Mr Vanhegan on behalf of the defendant cited case law to the effect that pleadings are not an end in themselves but a means to the end of giving each party a fair hearing. He submitted that the appeal should be dismissed because (1) the claimant had failed to attend or be represented at the hearing before the district judge; (2) as the Claim had been dismissed, the claimant's pleaded case was irrelevant; (3) as she did not attend the trial, she did not give evidence on the Counterclaim; (4) as she was not represented, the defendant's Counterclaim was never challenged; (5) in any event, the Particulars of Claim stated that the tenancy was granted in 2007, the year in which the defendant took up residence. Mr Vanhegan submitted that the unchallenged evidence at trial showed that, although the defendant's first written tenancy of the property was in 2011, he had on the facts been a tenant since 2007. He argued that the claimant is now inviting the court to overturn a finding of fact and reminded us that "appellate courts have been repeatedly warned, by recent cases at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so" (Lewison LJ in *Fage UK Ltd v Chobani UL Ltd* [2014] EWCA Civ 5 at [114]).
30. In my view, these arguments are based on the fallacy that the pleaded case and the evidence available to the district judge established that the defendant became a tenant in 2007. In fact, as demonstrated above, the defendant's case, as pleaded and as set

out in his statement, was that, whilst he started to occupy the property in 2007, he became the tenant under an assured shorthold tenancy in 2011. At no point in either his pleadings or his written evidence did the defendant assert that he became a tenant in 2007. Furthermore, although the claimant did not give oral evidence, she had filed a statement in which she clearly asserted that the defendant first became a tenant in 2011 and exhibited copies of tenancy agreements with other individuals for the previous years.

31. I recognise the importance of the principle in *Fage*. But what happened in this case amounted to a serious procedural irregularity. The submissions made at the hearing on behalf of the defendant were inconsistent with both the pleadings and the evidence. The district judge would not have arrived at the conclusion he reached in his judgment had his attention been properly drawn to the pleadings and to the claimant's statement.
32. It is clear from the circuit judge's judgment on the first appeal that he was unaware of these irregularities. There is nothing to suggest that he knew that the claimant had filed a statement dated 17 October 2013 or that the district judge had not seen it. As noted above, the circuit judge said (at paragraph 15 of his judgment) that "the claimant was not at the trial and did not put forward any evidence" and (at paragraph 17) that "the only evidence before the district judge was that presented by the defendant". Although he identified what he called "several indicators" in the defendant's statement which supported the district judge's decision, the circuit judge was therefore unaware of, and so did not refer to, several points made in the claimant's statement which were contrary to the decision but which were never considered by the district judge.
33. The circuit judge proceeded to consider the pleadings, which he described as "the most informative". But in considering them he only referred to the Particulars of Claim, not to the subsequent pleadings. In paragraph 15, he said that "the judge was only interested in the Counterclaim as he had already struck out the claim and the defence to counterclaim under CPR 39.3(1)(b)". In saying this he was repeating an assertion made by the defendant's counsel in his skeleton argument for the appeal. As I read the transcript of the hearing before the district judge and the order he made after the hearing, however, there is no reference to the Claim and the Defence to Counterclaim being "struck out". Instead, both the transcript and the order refer to the claim being dismissed and judgment being given on the Counterclaim. In analysing the pleadings, therefore, the circuit judge should have considered both the Amended Defence and Counterclaim and the Reply to Amended Defence and Counterclaim.
34. Had he done so, he would not have asserted without qualification that the claimant had never amended the assertion in paragraph 3 of the Particulars of Claim that "the premises had been let to the defendant under an assured shorthold tenancy which began on 23 March 2007". Looking at the pleadings as a whole, it is clear that, although the Particulars of Claim were never amended, the claimant's assertion about the date on which the defendant's tenancy started was contradicted or superseded by paragraph 3 of the Reply to Amended Defence and Counterclaim in which the claimant accepted the defendant's case that he had first entered into an assured shorthold tenancy with the claimant in March 2011. The circuit judge observed that, as the claimant had not been present, it would have been extremely difficult for the district judge "to have held an enquiry into the commencement date of the tenancy

when it was not in issue on the pleadings”. Looking at the pleadings as a whole, however, it was common ground between the parties that the tenancy started in 2011, not 2007. With respect to the circuit judge, the analysis of the pleadings in paragraphs 18 and 19 of his judgment is therefore inaccurate.

35. Both the pleaded case and the evidence before the court clearly indicated that the defendant only became the tenant of the property in March 2011. It was only at that point that he became entitled to the benefit of the term implied into the tenancy agreement by s.11 of the 1985 Act. He was therefore only entitled to damages for breach of the implied term from that date. The damages to which he is therefore entitled are equal to 50% of the rent paid under the tenancy from 23 March 2011. The award of damages calculated by reference to a reduction in rent dating back to 2007 was therefore excessive.
36. For those reasons I would allow the appeal on ground 1.

Ground 2

37. In *Simmons v Castle*, at the conclusion (paragraph 50) of the second of two judgments (reported separately at [2012] EWCA Civ 1039 and [2012] EWCA Civ 1288 and together at [2013] 1 WLR 1239), this Court (Lord Judge CJ, Lord Neuberger of Abbotsbury MR and Maurice Kay LJ) made the following declaration:

“with effect from 1 April 2013, the proper level of general damages in all civil claims for (i) pain and suffering, (ii) loss of amenity, (iii) physical inconvenience and discomfort, (iv) social discredit, or (v) mental distress, will be 10% higher than previously, unless the claimant falls within section 44(6) of LASPO [the Legal Aid, Sentencing and Punishment of Offenders Act 2012].”

38. Under ground 2 of the present appeal, the claimant identifies three “sub-issues” which she invites the Court to resolve as follows:

- (1) Was the declaration in *Simmons v Castle* correct in the sense that it justly and properly implemented the recommendations of Sir Rupert Jackson’s “Final Report on Civil Litigation Costs” (December 2009)?

- The claimant asserts that the declaration was neither in accordance with the recommendations in Sir Rupert’s report nor just.

- (2) Can and should this Court depart from that declaration?

- The claimant submits that this Court can and should depart from the declaration because (a) in the exceptional circumstances where the Court in *Simmons v Castle* was translating a recommendation from Sir Rupert’s report into a declaration, the normal rule of precedent does not apply; (b) in any event, this Court has a positive power and a duty to ensure that damages awards accord with justice and should now depart from the earlier decision.

- (3) Even on the terms of the declaration as currently expressed, should the general damages for disrepair in contact awarded in this case benefit from a 10% uplift?

- The claimant submits that the 10% uplift should only be applied to damages calculated by reference to a guideline or tariff and not (a) to damages based on a reduction in rent nor (b) to damages which were intended to include an element of special damage.
39. Before setting out the claimant's arguments in greater detail, it is instructive to trace the steps which led this Court to make the declaration as described in the judgments in *Simmons v Castle*.
40. At paragraph 7 of the first judgment, the Court set out the background in these terms:

“On 1 April 2013, the reforms to civil costs contained in the Legal Aid, Sentencing and Punishment of Offenders Act 2012 will come into force. Part 2 of the 2012 Act provides for the implementation of recommendations 7, 9, 14 and 94 of the *Final Report on Civil Litigation Costs* (December 2009) by Sir Rupert Jackson. These recommendations form part of a coherent package of reforms, one element of which is that general damages should rise by 10%: see recommendations 10 and 65 (i). [The Lord Chief Justice], with the unanimous support of the Judicial Executive Board, has previously announced the judiciary's support for this package of reforms, as has the Government following a consultation exercise. The 2012 Act has been introduced by the executive and enacted by the legislature on the basis that the reforms are a coherent package, and that the judiciary will give effect to the 10% increase in damages.”

41. In paragraphs 8 to 12 of the first judgment, the Court cited authority for its role in setting guidelines for damages in personal injuries actions, in particular non-economic loss, referring in particular to *Wright v British Railways Board* [1983] 2 AC 773 and *Heil v Rankin* [2001] QB 272, concluding, at paragraph 12:

“These observations make it clear that this court has not merely the power, but a positive duty, to monitor, and where appropriate to alter, the guideline rates for general damages in personal injury actions.”

At paragraph 14, the Court acknowledged that the increase in general damages now being declared “extends to tort claims other than personal injury actions” but added that they could see no good reason why the observations in the earlier authorities should not apply equally to general damages in all tort cases. Therefore, at the conclusion of the first judgment (paragraph 20), the Court declared that the 10% increase should apply to:

“general damages for (i) pain, suffering and loss of amenity in respect of personal injury, (ii) nuisance, (iii) defamation and (iv) all other torts which cause suffering, inconvenience or distress to individuals.”

42. Some weeks after the first judgment in *Simmons v Castle* was handed down, the Association of British Insurers issued applications seeking permission to invite the Court to reconsider whether the 10% increase should be applied only to cases where the claimant's funding arrangements for legal costs had been agreed after 1 April 2013. The application was listed for hearing and the Personal Injuries Bar Association ("PIBA") and another professional body were invited to appear as interested parties. Prior to the hearing, PIBA raised an additional point, namely whether the 10% increase should be extended to cases in contract and to claims for general damages more widely.
43. In setting out its analysis in the second judgment, the Court compared the provisions relating to the costs of providing advocacy or litigation services under the regime then in place with those being introduced under LASPO. Under the existing regime, a claimant could enter into a conditional fee agreement ("CFA") under which his lawyers received nothing if the claim failed and an uplift in the lawyers' normal fee, known as a "success fee", if the claim succeeded. If it succeeded, the claimant's lawyers would recover from the defendant the whole of the success fee (subject to assessment by a costs judge) in addition to their normal fee. S.44 of LASPO provided that the level of success fees was to be limited by reference to a maximum set by the Lord Chancellor and further stipulated that success fees would no longer be recoverable from a defendant as part of a successful claimant's costs. Under s.44(6), however, this latter provision did not prevent a costs order including provision in relation to a success fee payable under a CFA entered into before 1 April 2013 if certain conditions were met.
44. In considering the issues raised at the second hearing, the Court then outlined in greater detail the reason for the 10% increase in damages, again by reference to Sir Rupert Jackson's report:

"21. One of the major proposals in the Final Report was that, as is now reflected in sections 44 and 46 of [LASPO], a successful CFA claimant should no longer be able to recover the success fee from the defendant. Chapter 10 para 5.1 of the Final Report addressed the question whether "any measures ... ought to be taken to assist [such] claimants to meet the success fees which they will have to pay ... out of damages or other sums recovered". In para 5.3 of that chapter, Sir Rupert concluded that "in order to assist personal injury claimants in meeting the success fees out of damages", "[the] level of general damages for pain, suffering and the loss of amenity be increased by 10% across the board" (and success fees be capped at 25% of damages, and "the reward for making a successful claimant's offer under CPR Part 36 ... be enhanced").

22. In para 5.6 of the same chapter, Sir Rupert said that he "recommended] that the level of general damages for nuisance, defamation and any other tort which causes suffering to individuals be increased by 10%". He went on to say that this "would assist claimants who proceed on CFAs to meet the success fees". He added that the increase "may appear to be a

windfall for claimants who are not on CFAs", but pointed out that "the level of general damages in England and Wales is not high at the moment", so "[the] abolition of 'recoverability' would be an opportune moment for raising the level of such damages generally.""

45. The Court then set out relevant sections of a consultation paper issued by the Ministry of Justice following the Report, together with Sir Rupert's responses and other comments made by him in a lecture given as part of the implementation programme. The judgment continued:

"27. In our view, it is clear from these observations that both Sir Rupert and the MoJ envisaged and intended the primary purpose of the 10% increase in damages would be to compensate successful claimants, as a class, for being deprived of the right which they had enjoyed since 2000 to recover success fees from defendants, in cases where a claimant was funding the legal costs of pursuing his or her claim by a CFA. The reason, or at least the principal reason, Sir Rupert made the point that the level of general damages was generally on the low side was to meet the argument that the 10% increase in damages could be said to represent something of a windfall for successful conventional claimants. Similarly, it appears clear that the MoJ regarded the proposed 10% increase in damages as being a *quid pro quo* for depriving successful CFA claimants of the ability to recover success fees from the defendant."

46. Having considered the submissions made by the applicant and the interested parties, the Court agreed to exclude from the 10% increase those claimants who fell within the ambit of s.44(6) of LASPO. This point has no relevance to the present appeal and it is unnecessary to consider it further. Turning to the supplemental issue raised by PIBA, which is relevant to this appeal, the Court reached the following conclusion:

"46. In our view, it would be inconsistent and unfair to limit the 10% increase to claims in tort, so that it did not apply, for instance, to claims in contract. As Mr Dutton [counsel for the applicant] said, there is much overlap between tort and contract cases, both in the sense of parallel claims under each head, each based on essentially the same facts (e.g. many professional negligence claims), and in the sense of similar claims (e.g. disappointing holiday claims in contract). Further, claims in tort and contract are and will be equally susceptible to being funded on a CFA basis (or, after 1 April 2013, under a damages based agreement). Indeed, while it is hard to think of many examples, we can see no good reason why the 10% increase should be limited so as to exclude any type of claim.

47. We do not regard this conclusion as running counter to what was said by Sir Rupert or by the MoJ. While some of their statements seemed to limit the increase to tort cases (as was reflected by what we said in para 20 of our earlier judgment),

that is readily explicable by the fact that the protagonists in the argument on this issue before Sir Rupert were personal injury lawyers and interest groups. In any event, as the whole issue of the 10% increase in damages has been left to the court ... it is ultimately for us to decide how to give effect to it in a way which best accords with justice.

48. As to the types of damages which are covered by the 10% increase, we believe that the best guidance is to be found in chapter 3 of *McGregor on Damages*, 18th edition, (2010), which is concerned with "Non-Pecuniary Damages". The chapter goes on to discuss four types of damage in relation to both tort and contract cases, namely "pain and suffering and loss of amenity", "physical inconvenience and discomfort", "social discredit", and "mental distress". In our view, it is those types of general damages which are to be subject to the 10% increase.

49. We accept that there may be cases where either the cause of action, or, perhaps less unlikely, the nature of the damages, is such that it is not clear whether the 10% increase is to apply. Those cases will have to be dealt with on their merits if and when they arise."

47. The claimant now invites this Court to vary the declaration in *Simmons v Castle* so as to exclude general damages for breach of a repairing covenant and to make a further reduction in the damages awarded to the defendant in this case. On her behalf, Mr Mann makes the following submissions:
- (1) The decision in *Simmons v Castle* extended the 10% increase in damages to categories of cases that fell outside the ambit of Sir Rupert Jackson's Report. A proper construction of the Report and its recommendations is that the 10% uplift was intended to be confined to damages for personal injuries and other tortious claims and not to include damages in other types of civil litigation such as contractual claims for disrepair. Whilst it is acknowledged that there was some inconsistency in the language used in the report, it was mainly focused on personal injury litigation. Recommendation 10 at the end of the report that "the level of general damages for personal injuries, nuisance and all other civil wrongs to individuals should be increased by 10%" was an outlier and contrary to the true purport of the Report.
 - (2) It is appropriate for this Court to entertain departing from the principle in *Simmons v Castle* because of its positive duty, recognised by the Court in that case, to monitor, and where appropriate to alter, the guideline rates for general damages. Given the nature of the exercise undertaken in the judgments in that case, the principle of *stare decisis* does not apply.
 - (3) The question of whether the principle should extend to general damages for breach of a repairing covenant clearly falls with the category of cases anticipated in paragraph 49 of the second judgment in *Simmons v Castle* where "the cause of action ... is such that it is not clear whether the 10% increase is to apply" and as

such must be dealt with on its merits. The application of the uplift to damages for breach of repairing covenants was not fully argued in *Simmons v Castle*. The Court in that case did not have the benefit of submissions from interested parties representing litigants or practitioners in landlord and tenant proceedings. The fact that this Court was willing in *Simmons v Castle* to entertain a supplemental application and submissions from interested parties and amend the terms of the original declaration provides a “jurisdictional gateway” for the claimant in this case.

- (4) The declaration in *Simmons v Castle* should be interpreted as only applying in a situation where one can extract a figure from a set of guidelines or tariff (such as, classically, personal injuries) to which the 10% uplift can be added.
 - (5) General damages for breach of repairing covenant are based on the compensatory principle, application of which, by itself, corrects for inflation and other matters which might lead personal injuries awards to fall behind. Thus there is no justification for any 10% uplift in general damages for such breaches.
 - (6) It is acknowledged that for several years since the judgments in *Simmons v Castle* were handed down, courts have proceeded on the basis that the 10% uplift applied to breach of repairing covenants. It is contended, however, that this is not a principled objection and this Court should be concerned with future litigants to prevent tenants receiving an undeserved windfall and landlords being unjustly penalised.
 - (7) The fact that this Court has in the intervening period since *Simmons v Castle* held that the uplift applies to damages awarded for psychiatric harm and injury to feelings in a claim for disability discrimination (*De Souza v Vinci Construction UK Ltd* [2017] EWCA Civ 879) provides no support for the extension of the principle to breach of a repairing covenant. The case in question concerned a statutory tort for which damages were awarded by reference to guidelines to which the uplift could be properly applied.
 - (8) On the specific facts of this case, the general damages awarded to the defendant included an element of compensation for special damage. Even if the uplift is held to apply to general damages for breach of the implied covenant, it cannot extend to that element.
48. As stated above, the HLPAs were given leave to intervene in the appeal and to file a statement by Ms Eleanor Solomon of Anthony Gold Solicitors LLP. Leading and junior counsel were permitted to file written submissions and make supplemental oral submissions limited to 30 minutes. Written submissions were duly filed by Ms Liz Davies QC and Ms Marina Sergides on behalf of the Association, and Ms Davies took the lead in responding to the claimant’s arguments on this second ground. The HLPAs’ arguments, supported by Ms Solomon’s statement, were in summary as follows:
- (1) The Court in *Simmons v Castle* saw “no good reason why the 10% increase should be limited so as to exclude any type of claim” and so declared that it should apply to all civil claims. By definition, that extends to damages for breach of a repairing covenant. As illustrated by Ms Solomon’s statement, that has been

followed by practitioners subsequently when litigating and negotiating such cases. There is no good reason to depart from this established practice.

- (2) The fact that the assessment of damages for loss of amenity starts with a calculation based on rent does not put these cases into the type of case where the cause of action or nature of the damages is such that it is outside the Court of Appeal's reasoning. The reference to a percentage of rent in the award of damages is a broad-brush approach, not a precise calculation.
- (3) The fact that the level of rent is usually taken as the starting point does not necessarily mean that the effect of inflation is already taken into account.
- (4) As the Court in *Simmons v Castle* noted (at paragraph 46) when giving its reasons for extending the uplift to all civil claims, "there is much overlap between tort and contract cases". In addition to breach of repairing covenant, claims for damages arising out of disrepair may brought by tenants against landlords in nuisance or for personal injury under the Defective Premises Act 1972, both of which would plainly attract the 10% uplift.
- (5) Many claimants, however funded, receive modest awards of damages and withholding the 10% uplift would have a significant effect on the level of compensation.
- (6) A significant number of claimants or counter-claimants fund these cases by way of CFAs and so fall within the primary purpose of *Simmons v Castle*, to compensate for the percentage reduction of damages as a result of the non-recoverability of the success fee following the LASPO reforms.
- (7) Another consequence of LASPO was to reduce the scope of legal aid for housing disrepair cases. The number of legal aid practitioners specialising in this area is falling. Representation by CFA is therefore increasingly common and necessary for potential claimants. The success fee is a vital part of the sustainability of representation for tenants, particularly for those in social housing or at the lower end of the private housing market who are unable to afford legal fees out of their own resources. Removing the *Simmons v Castle* uplift, and thereby reducing the level of general damages, would have an adverse impact on success fees and the availability of legal representation for such claimants.
- (8) The uplift should be applied irrespective of how the litigation is funded. In *De Souza v Vinci Construction (UK) Ltd*, supra, this Court held that a successful claimant recovering damages for disability discrimination in the employment tribunal was entitled to the 10% uplift even though the proceedings took place in a no costs jurisdiction. In *Summers v Bundy* [2016] EWCA Civ 126, this Court held that a successful claimant in clinical negligence proceedings who had been legally-aided throughout the proceedings was entitled to the uplift. Whilst the issue of compensating for the loss of the success fee will not arise for legally-aided claimants, any distinction when it came to the assessment of damages would lead to complexity and perceptions of unfairness, rather than the simplicity and clarity recommended by the Court of Appeal in *Simmons v Castle*.

49. On behalf of the defendant, Mr Vanhegan adopted those submissions and added the following arguments.
- (1) The decision in *Simmons v Castle* to extend the 10% uplift to all civil claims, including in contract, was made after extensive argument and analysis and there is no justification for this Court now revising that decision.
 - (2) Since the decision in *Simmons v Castle*, the courts have taken a permissive rather than a restrictive approach to the application of the uplift – see for example *Cruddas v Calvert* [2015] EWCA Civ 171 (defamation), *De Souza v Vinci Construction* [2017] EWCA Civ 879 (claim in the employment tribunal for disability discrimination) and *Mohammed v Home Office* [2017] EWHC 2809 (QB) (false imprisonment).
 - (3) In any event, there is no merit in the argument that the 10% uplift should be confined to cases where damages are assessed by reference to a “tariff”. There is nothing in the approach to general damages for breach of a repairing covenant as propounded in the case law (see in particular *Wallace v Manchester City Council* (1998) 30 HLR 1111 and the line of subsequent authorities) to support excluding such damages from the scope of the uplift.
 - (4) Contrary to the claimant’s assertion, the uplift supports the compensatory principle. Without it, the successful claimant would have to pay the success fee to his lawyer out of his general damages.
50. Mr Vanhegan accepted that the uplift could not be extended to special damages. In this case, however, no special damages had been awarded because of a lack of documentary evidence at the hearing before the district judge. Instead, the level of general damages had been increased to reflect the harm caused to the defendant of having to purchase takeaway meals because the cooker had been condemned. In those circumstances, it was appropriate to apply the uplift to the whole of the general damages.

Discussion and conclusion on ground 2

51. The basis for assessing the level of general damages for breach of a repairing covenant has been considered in a series of decisions in this Court. In *McCoy & Co v Clark* (1982) 13 HLR 87 (CA), damages were assessed by reference to a proportion of the rent. In *Calabar Properties Ltd v Stitches* [1984] 1 WLR 287, on the other hand, the Court favoured a global award. At p297, Griffiths LJ observed:

“The object of awarding damages against a landlord for breach of his covenant to repair is not to punish the landlord but, so far as money can, to restore the tenant to the position he would have been in had there been no breach. This object will not be achieved by applying one set of rules to all cases regardless of the particular circumstances of the case. The facts of each case must be looked at carefully to see what damage the tenant has suffered and how he may be fairly compensated by a monetary award.”

52. In *Wallace v Manchester City Council* (1998) 30 HLR 1111, having found that there had been breaches of a repairing covenant in a secure tenancy of a house let by a local authority, the trial judge had made a global award of general damages for distress, inconvenience and disruption in lifestyle. The tenant's appeal on the grounds that she should have made an additional award in respect of the diminution in value of the tenancy with reference to the rent paid was dismissed. This Court dismissed the appeal. In his judgment, Morritt LJ summarised the previous authorities and at pages 1120-1 set out his conclusions in four propositions:

“First, the question in all cases of damages for breach of an obligation to repair is what sum will, so far as money can, place the tenant in the position he would have been in if the obligation to repair had been duly performed by the landlord. Secondly, the answer to that question inevitably involves a comparison of the property as it was for the period when the landlord was in breach of his obligation with what it would have been in if the obligation had been performed. Thirdly, for periods when the tenant remained in occupation of the property notwithstanding the breach of the obligation to repair the loss to him requiring compensation is the loss of comfort and convenience which results from living in a property which was not in the state of repair it ought to have been if the landlord had performed his obligation Fourthly, if the tenant does not remain in occupation but, being entitled to do so, is forced by the landlord's failure to repair to sell or sublet the property he may recover for the diminution of the price or recoverable rent occasioned by the landlord's failure to perform his covenant to repair

Obviously the tenant cannot claim damages in accordance with the third proposition for periods occurring after the sale or sublease referred to in the fourth. To that extent ... those two heads are mutually exclusive. This case is concerned with the proper application of the third proposition, not the fourth. Thus the question to be answered is what sum is required to compensate the tenant for the distress and inconvenience experienced because of the landlord's failure to perform his obligation to repair. Such sum may be ascertained in a number of different ways, including but not limited to a notional reduction in the rent. Some judges may prefer to use that method alone ... some may prefer a global award for discomfort and inconvenience ... and others may prefer a mixture of the two. But in my judgment they are not bound to assess damages separately under heads of both diminution in value and discomfort because ... those heads are alternative ways of expressing the same concept.

It follows that in my judgment [the trial judge] was right when he said that diminution in the value of the property in relation to the amount of rent paid is not a separate head of damage.”

53. Morritt LJ made two further observations:

“First ... expert valuation evidence is not of assistance when assessing the damages in accordance with my third proposition. The question is the monetary value of the discomfort and inconvenience suffered by the tenant. That is a matter for the judge Secondly, a judge who seeks to assess the monetary compensation to be awarded for discomfort and inconvenience on a global basis would be well advised to cross-check his prospective award by reference to the rent payable for the period equivalent to the duration of the landlord’s breach of covenant. By this means the judge may avoid over- or under-assessments through failure to give proper consideration to the period of the landlord’s breach of obligation or the nature of the property.”

54. This approach has been followed by this Court in subsequent cases. In *Shine v English Churches Housing Group* [2004] EWCA 434, [2004] HLR 42, the judgment in *Wallace* was described (at paragraph 94) as “plainly the leading case on the subject”. At paragraph 104, the Court (Wall and Keene LJ) said:

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

55. In *Moorjani v Durban Estates Ltd* [2015] EWCA Civ 1252 [2016] 1 WLR 2265, Briggs LJ (with whom the other members of the Court agreed) observed that the loss caused to a lessee by a period of disrepair to leasehold premises attributable to a landlord’s breach of covenant consisted in the impairment to the rights to amenity afforded to the lessee by the lease of which discomfort, inconvenience and distress were only symptoms. As to the assessment of damages, he said (at paragraph 40):

“... the court is entitled and, I would say, obliged to temper the rigour of those rules which seek to implement the compensatory principle which lies at the heart of the law of damages, where particular circumstances make it just to do so.... In particular circumstances, as was acknowledged in the *Shine* case ... this may admit quantification of damages in excess of the current rental value In other cases, it seems to me perfectly legitimate to treat the particular circumstances of the claimant lessee as tending to reduce rather than aggravate

his damages, and not merely where the relevant conduct consists of what may conventionally be described as mitigation.”

56. These citations illustrate the flaws in the claimant’s principal argument on the present appeal that, because general damages for breach of a repairing covenant are conventionally calculated by reference to a notional reduction in rent as opposed to a tariff or set of guidelines, the 10% uplift should not be applied. In some types of claim, the level of damages is assessed by reference to a tariff to “ensure consistency in awards and promote settlement of disputes” (*McGregor on Damages*, 21st edition, para 52.008). But there is nothing in the judgment in *Simmons v Castle* to suggest that the declaration should be confined to cases where damages are assessed by reference to a tariff. The Court could have confined it to such cases but conspicuously did not do so.
57. The calculation of general damages for loss of amenity, of which discomfort, inconvenience and distress are the symptoms, is a matter for the judge, without expert valuation evidence. As Griffiths LJ observed in *Calabar Properties v Stitcher*, “the facts of each case must be looked at carefully to see what damage the tenant has suffered and how he may be fairly compensated by a monetary award.” Furthermore, as Morritt LJ observed in *Wallace v Manchester City Council*, damages are not invariably calculated by reference to a notional reduction in rent but may alternatively be expressed as a global award or a combination of the two. Even where the rental value is used as the basis for calculation, the particular circumstances of the tenant may lead to either an increase or a reduction in the quantification. For that reason, the fact that taking a notional reduction in rent as the starting point may sometimes (though not invariably) incorporate an adjustment for inflation is no justification for excluding such damages from the scope of the uplift.
58. In any event, it is not the case that claims for general damages for breach of repairing covenants have benefited fortuitously from the expansion of the declaration in *Simmons v Castle*. On the contrary, they fall squarely within its primary purpose. As the Court observed in the second judgment in *Simmons v Castle* at paragraph 27:

“... the primary purpose of the 10% increase in damages would be to compensate successful claimants, as a class, for being deprived of the right which they had enjoyed since 2000 to recover success fees from defendants, in cases where a claimant was funding the legal costs of pursuing his or her claim by a CFA.”

A claimant for damages for breach of a repairing covenant manifestly falls within that class. As demonstrated by the statement and submissions on behalf of the HLPAs, CFAs play an important role in assisting tenants to bring claims for breach of repairing covenants. Such claims are therefore manifestly within the category of cases for which the 10% uplift was specifically intended, by way of compensation for the success fee which the claimant tenant’s lawyer is entitled to be paid by his client but which, following LASPO, cannot be recovered from the defendant landlord. The need to secure funding for claims in the post-LASPO environment was integral to the recommendations in Jackson Report and the declaration made by this Court in *Simmons v Castle*. The arguments put before this Court on behalf of the HLPAs

demonstrate that it remains a very important consideration in this category of litigation.

59. The decision to extend the 10% uplift to all civil claims was made after careful consideration. It is true that the Court anticipated that there may be cases where it was not clear whether the 10% increase is to apply which would have to be dealt with on their merits if and when they arise. In granting permission to appeal in this case, Newey LJ identified this as one of those cases. Having considered the arguments, however, I have reached the clear conclusion that there is no good reason why general damages for breach of a repairing covenant should be excluded from the 10% uplift authorised in *Simmons v Castle*. On the contrary, for the reasons identified above, there are good reasons why such damages should attract the uplift.
60. Although the general damages were expressed as including losses incurred in having to purchase cooked food on occasions after the cooker in the property had been condemned, for which special damages could have been claimed but for the absence of documentary evidence, I see no justification for making any consequential deduction from the *Simmons v Castle* uplift. The fact is that the loss was subsumed into the general damages for loss of amenity. In any event, no basis for deduction has been advanced, and the sum to be deducted would surely be *de minimis*.
61. For those reasons, I would dismiss the second ground of appeal.
62. If my Lords agree, it follows that the appeal is allowed on Ground 1 but not Ground 2. The level of damages and interest awarded thereon must therefore be reduced. It would be of assistance if counsel could agree the precise figure to be included in the order.

LORD JUSTICE PHILLIPS

63. I agree.

LORD JUSTICE EDIS

64. I also agree.