Claim No: L00MB331

IN THE APPEALS CENTRE AT TEESSIDE COMBINED COURT CENTRE
(Pursuant to Practice Direction 52B of the Civil Procedure Rules, Table A)

ON APPEAL FROM DISTRICT JUDGE RICHARDS
SITTING IN THE COUNTY COURT AT MIDDLESBROUGH ON 6 NOVEMBER 2024

Teesside Combined Court Centre
Centre Square
Middlesbrough
TS1 2AE

Date: 12 February 2026

Before :

HIS HONOUR JUDGE ROBINSON BEM

- -

Between :

GEMMA COURT

Claimant/ Appellant

- and -

BEYOND HOUSING LIMITED

Defendant/ Respondent

- -

Mr. Hogan, Counsel, instructed by Coyne Learmonth on behalf of the Claimant/Appellant
Mr. Marcus, Counsel, instructed by Swinburne Maddison LLP on behalf of the Defendant/Respondent

Hearing date: 29 January 2026 (attended)
Draft judgment disseminated: 2 February 2026

- -

APPROVED JUDGMENT

This judgment was handed down at a remote hearing on 12 February 2026

INTRODUCTION

1. This is a judgment concerning an appeal of the decision of District Judge Richards ("the District Judge") on 6 November 2024 not to include provision in an Order for costs in the case on the fast track for legal costs incurred prior to completion of repairs in a claim brought in respect of alleged housing disrepairs of a residential property.

2. The role of the appeal court is to review the decision of the lower court (Civil Procedure Rule ("CPR") 52.21(1)). The appeal is brought on the ground the District Judge was wrong (as per CPR 52.21(3)).

PROCEDURAL BACKGROUND

3. The appellant issued a claim on 8 May 2024 alleging housing disrepair of a semi-detached house in Guisborough, North Yorkshire, and sought specific performance, cost of repairs estimated at more than £1,000 and damages of more than £5,000 but less than £10,000.

4. The particulars of claim set out the defects relied upon along with reliance upon a report of Mr. Lawson, Chartered Surveyor. The defects identified were as follows (with Mr. Lawson's cost, excluding VAT, in brackets): (a) a bathroom extractor fan defect (£424.69), (b) damp/mould in bedroom 1 (leaking flat roof/issue with drainage) (£515.34), (c) plaster cracked/de-bonding to door reveal on rear door with door trims loose (£59.62) and (d) "PIV defective" (disconnected) in the hall (£61.69). I note that (c) and (d) were marked by Mr. Lawson as being "additional items" in that there had been no prior notice of them in the letter of claim, making his observation being the first notification of the same to the defendant.

5. The defence asserted that the costs proposed by Mr. Lawson were excessive and relied on a report from Mr. Sowden, Chartered Surveyor, who estimated the total costs at £243.16.

6. An allocation and directions hearing took place before the District Judge on 6 November 2024 at which the claim was allocated to the small claims track and directions provided, with a final hearing listed on 2 December 2024. The District Judge determined not to make an order for costs in case on the fast track in relation to legal costs incurred prior to the completion of repair works. Permission to appeal that latter determination was sought and refused at the hearing, and an application for permission to appeal was filed dated 22 November 2024.

7. The hearing before the District Judge had been conducted by way of video, and it appears there may have been a delay with obtaining the transcript or some other internal delay in the file being referred to me on 11 March 2025. On receipt I considered the papers and refused permission to appeal on 14 March 2025, providing reasons for the same.

8. The appellant sought the opportunity to make oral representations, and such a hearing was listed before me on 30 May 2025 when I granted permission to appeal. The appeal hearing was originally listed in September 2025, but was vacated by consent owing to the appellant having delayed sending the transcript of the whole hearing (received in August 2025) to the respondent, and then it was listed in November 2025 but with there being an error such that it did not appear in my list and I was dealing with another matter.

THE HEARING BEFORE THE DISTRICT JUDGE

9. The hearing before the District Judge was an "Allocation and Directions hearing", as set out in the notice of hearing dated 24 August 2024, and the time allocated for the hearing was 1 hour.

10. The appellant submitted a bundle for the hearing and within it included the appellant's directions questionnaire dated 25 July 2024 in which it contended for allocation to the fast track with draft directions provided leading to a trial. The respondent's directions questionnaire contended for allocation to the small claims track with draft directions provided also leading to a trial. Along with the respondent's directions questionnaire was also a document entitled "submissions on allocation" dated 26 July 2024, in which the respondent referenced relevant provisions from CPR 26.

11. At the outset of the hearing Mr. Coyne, on behalf of the appellant, set out the position as follows:

> "I was just having a discussion with my learned friend then … In the interest in narrowing issues, the claimant accepts that the works have now been completed to their property … Which obviously would lead us to some difficulty in convincing the Court that this is now a fast-track matter".

12. What then transpired was an agreed position on directions with allocation to the small claims track and the listing of a final hearing. Mr. Coyne then raised "the fact of pre-allocation costs" and referenced *Birmingham City Council v Lee* [2008] EWCA Civ 891. Submissions were made in relation to the same and the District Judge retired to consider such submissions before returning and delivering her judgment in which she determined not to provide a direction for costs in the case on the fast track for legal costs incurred prior to completion of repairs.

GROUNDS OF APPEAL

13. The grounds of appeal are as follows:

> **"Ground 1: Misdirection/misconstruction of CPR 26.9**
> The Learned District Judge erred in law in that she wrongly misconstrued or misapplied CPR 26.9 in concluding that this claim was only ever a Small Claim: had she correctly construed and applied CPR 26.9 she would have concluded that the existence of the claim for specific performance until the repairs were carried out made the claim a Fast Track claim by valuation requiring the court to consider the question of costs prior to allocation.
>
> **Ground 2: Misdirection/misconstruction of Section 51 SCA and CPR 44.2**
> The Learned District Judge erred in law in that she wrongly misdirected herself or misconstrued her jurisdiction and the extent of her discretion to make a costs Order at the time of allocation in respect of the part of the proceedings to that date under section 51 of the Senior Courts Act 1981 and CPR 44.2. There was no need for a discrete application for costs.

Ground 3: Misunderstanding/misapplying binding caselaw
The Learned District Judge erred in law and made of an error in principle in failing to understand and apply correctly the Court of Appeal decision in *Birmingham City Council v Lee* [2008] EWCA Civ 891 which was binding upon her and mandated an Order for Claimant's costs in the case should have been made in respect of the part of the proceedings prior to the date of completion of the repairs".

SUBMISSIONS

14. I am very grateful for the helpful skeleton arguments and submissions which have been made by both counsel. I will provide the briefest overview, but that does not reflect the eloquence and detail that was provided. I also add that simply because I have not referenced an aspect of their submissions or skeleton arguments, it does not mean that I have not considered them, and the parties can be reassured I have.

15. On behalf of the appellant, it was submitted that injustice would be done to the appellant if she was unable to preserve her entitlement to costs up to 30 September 2024 when repairs were completed. It was said that the starting point for the District Judge should have been Practice Direction 7A and a consideration of the claim form and particulars of claim, and in doing so it would have identified that the normal track at the point of issue of proceedings was the fast track. In respect of *Birmingham City Council v Lee*, it was submitted to be a binding authority which the District Judge did not apply. The District Judge was said to have erred by failing to apply the structured approach for the exercise of her discretion which emanates from the relevant Protocol, the CPR and *Birmingham City Council v Lee*.

16. On behalf of the respondent, it was submitted that the District Judge was correct to refer to "this is and always has been a small claim", and it is such characterisation of the case which distinguishes it from the type of case envisaged by *Birmingham City Council v Lee*. It was submitted further that the District Judge was entitled to look at the documents before her and draw conclusions, and she is not bound to follow the appellant's assessment and should, as she did, consider both sides. There was said to be no prejudice to the appellant by not deploying the clause as sought, as all that was lost was certainty for the appellant and her solicitors, and that the issue of the costs incurred prior to completion of the works could be considered at conclusion of the trial.

CASE ALLOCATION: THE RELEVANT LAW AND PROCEDURE

17. The issue of allocation and the cost issue raised are closely connected, and therefore I will proceed to set out the relevant procedure in relation to allocation which is necessary to review the District Judge's decision.

18. CPR Practice Direction ("PD") 7A, paragraph 3.6, states:

> **"**If a claim for housing disrepair which includes a claim for an order requiring repairs or other work to be carried out by the landlord is started in the County Court, the claim form must state—

(1) whether or not the cost of the repairs or other work is estimated to be more than £1000, and
(2) whether or not the claimant expects to recover more than £1000 in respect of any claim for damages.
If either of the amounts mentioned in (1) and (2) is more than £1000, the small claims track will not be the normal track for that claim".

19. CPR 26 sets out the "normal" track for different types of claims. It is a triage system to ensure that cases proceed on the right track to enable appropriate directions to be given, costs to be kept proportionate and the allocation of appropriate court resources. It is therefore an important foundation of case management and sets the trajectory of a case.

20. CPR 26.9 sets out what amounts to the "normal" track, and relevant to this appeal are the following:

> (1) The small claims track is the normal track for—
> …
> (b) any claim which includes a claim by a tenant of residential premises against a landlord where—
> (i) the tenant is seeking an order requiring the landlord to carry out repairs or other work to the premises (whether or not the tenant is also seeking some other remedy);
> (ii) the cost of the repairs or other work to the premises is estimated to be not more than £1,000; and
> (iii) the value of any other claim for damages is not more than £1,000; …
>
> (5) Subject to paragraphs (6) and (10), the fast track is the normal track for any claim—
>
> (a) for which the small claims track is not the normal track; and
> (b) which—
> (i) is a claim for monetary relief, the value of which is not more than £25,000; or
> (ii) is or includes a claim for non-monetary relief and—
> (aa) if the claim includes a claim for monetary relief, the value of the claim for monetary relief is not more than £25,000;
> (bb) the claim meets the criteria in paragraph (6)(a) and (b); and
> (cc) the court is satisfied that it is in the interests of justice for it to be allocated to the fast track.

21. The Civil Procedure Rules recognise that "no one size fits all", and CPR 26.12(1) includes a further requirement to allocation decisions:

> "In considering whether to allocate a claim to the normal track for that claim under rules 26.9, 26.10 or 26.11, the court shall have regard to the matters mentioned in rule 26.13(1).

22. CPR 23.13(1) lists several factors:

(a) the financial value, if any, of the claim;
(b) the nature of the remedy sought;
(c) the likely complexity of the facts, law or evidence;
(d) the number of parties or likely parties;
(e) the value of any counterclaim or additional claim and the complexity of any matters relating to it;
(f) the amount of oral evidence which may be required;
(g) the importance of the claim to persons who are not parties to the proceedings;
(h) the views expressed by the parties; and
(i) the circumstances of the parties.

23. Further assistance is found in CPR 26.13(2), which sets out:

> (2) It is for the court to assess the financial value of a claim and in doing so it shall disregard—
> (a) any amount not in dispute;
> (b) any claim for interest;
> (c) costs;
> (d) any contributory negligence; and
> (e) where the claim is, or includes a claim for non-monetary relief, any amount prescribed by rule 45.45(1)(a)(ii) and rule 45.50(2)(b)(ii).

24. The above provides a very clear 2 stage process in which a judge needs to firstly consider the "normal" track ("stage 1"), and CPR PD 7A aids in assessing stage 1 in claims of alleged housing disrepair, and to then apply the factors set out in CPR 23.13(1) ("stage 2").

25. Stage 1 should be a relatively straightforward assessment, considering the statements of case. When considering stage 2, the judge needs to undertake a balancing exercise, wrapped with the overriding objective of the CPR of dealing with cases justly and at proportionate cost, to determine whether the normal track remains appropriate or whether the case should be allocated to a higher or a lower track. There is no set formula as to how judges should undertake such a balancing exercise, and it is a matter which falls into their discretion. However, it is not simply a tick-box exercise counting the factors for and against deviating from the normal track, and it is fact-specific and to be considered holistically. Whilst a judge is not to conduct a mini-trial, the judge needs to weigh and assess the information to make a reasoned decision.

26. It is of further relevance to consider CPR PD 26, including the following cited paragraphs:

> "3(1) If a party wishes to give the court further information which is believed to be relevant to allocation, assignment to a complexity band, where applicable, or case management it shall be given when the party files the directions questionnaire and copied to all other parties …"

PRE-ALLOCATION COSTS (WHERE REPAIRS ARE COMPLETED): THE LAW

27. *Birmingham City Council v Lee* sets out that permission had been granted to enable the Court of Appeal to consider a matter of principle (at paragraph 2):

> *"*There is a pre−action protocol applicable under the Civil Procedure Rules to such cases. It requires the tenant to give early notification to the landlord that a claim is being made, rather than commence immediate proceedings. The question which we have to consider arises where, on receipt of that notification, the landlord promptly carries out the repairs. If he does, that will remove from the tenant's claim in the court action subsequently brought any application for specific performance of the repairing covenant, but will, very often, leave outstanding in that action only a claim for consequential damages. It may often be the case that if the landlord had not carried out the repairs, and thus the tenant had sued for specific performance as well as for consequential damages, the effect of the Civil Procedure Rules ("CPR") would have been that the action was allocated to the fast track. By contrast, if the action is for the consequential damages alone, because the repairs have now been done, the action will very often fall to be allocated to the small claims track. The issue for us is this: what if any order ought to be made in such a case as to pre−allocation costs? In particular, ought some order to be made which reflects the fact that until the repairs were carried out the tenant's claim (notified under the protocol) was for specific performance as well as for damages, and would potentially have been for allocation to the fast track?".

28. The judgment proceeds (at paragraph 13) to explain the importance of the Pre-Action Protocol:

> "The protocol proceeds by stipulating that the tenant should give notice of the claim either by way of an "early notification letter", or by way of a "letter of claim". The difference between the two does not need detailed analysis here, but it is material to note that both require some detail. They require the listing of the defects, by way of schedule if appropriate, the setting out of why the tenant says that the landlord knows the defects are there, the identification of a proposed single joint expert, a copy of the proposed letter of instruction to that expert and disclosure of relevant documents in the hands of the tenant. The protocol continues by requiring a response from the landlord within, ordinarily, 20 working days. In its response the landlord is expected to say whether liability is admitted or not, to schedule any work which will be done, and to say when it will be done".

29. Whilst the Protocol has changed slightly since 2008, it now being titled 'The Pre-Action Protocol for Housing Condition Claims' ("the Protocol"), the essence of it as captured in the above paragraph remains. The current Protocol includes, at Annex A, 2 specimen letters of claim – one for use by solicitors and one for use by tenants.

30. The Protocol also sets out the following in respect of costs:

> "If the tenant's claim is settled without litigation on terms which justify bringing it, the landlord will pay the tenant's reasonable costs".

31. Returning to *Birmingham City Council v Lee*, at paragraph 34 Hughes LJ states:

> "Without some order as to the early−incurred costs, it would be open to a landlord who is in fact and in law liable for want of repairs to adopt a deliberate policy of omitting to repair until the protocol letter is received, but then of repairing without admission of liability so as to ensure that any subsequent court claim fell to the small claims track. The result of that would be that fast track costs which would otherwise have been due to the tenant would no longer be payable. We do not say that this is what has happened here; it may well not be. But that very possible scenario illustrates the necessity for some order in relation to the costs of advancing the protocol claim. Moreover, quite independently of the possibility of any such deliberate manipulation of the process by a landlord, such an order is necessary if the protocol is not to operate as a means of preventing recovery of reasonably incurred costs. The tenant who has a justifiable claim for disrepair needs legal assistance in advancing it. He must initiate it in accordance with the protocol. If the effect of the claim is to get the work done, then providing that the landlord was liable for the disrepair the tenant ought to recover the reasonable costs of achieving that result".

32. The Court of Appeal proceeded to set out the form of order to be used (at paragraph 36):

> "We would accordingly replace the order made by the judge with the following:
>
> > "Pursuant to CPR 44.9(2), the claimant shall have her costs in the cause on the fast track basis up to 26 September 2006."
>
> That means that if she wins, she will have fast−track costs of making the claim up to that date. If she fails, she will have nothing. Any costs order, in favour of either side, relating to the period after 26 September will remain governed by the allocation to the small claims track. The certain knowledge that that order will stand if she succeeds can inform any efforts to settle. In future cases of a similar kind, the expectation of an order such as this should have a similar effect, and it is to be hoped, without the need for litigation beyond the protocol negotiations".

33. CPR 44.9(2), at the time of *Birmingham City Council v Lee*, was as follows:

> "Once a claim is allocated to a particular track, those special rules shall apply to the period before, as well as after, allocation except where the court or a practice direction provides otherwise".

34. The Civil Procedure (Amendment) Rules 2013 revoked this rule with effect from 1 April 2013, and a new rule was introduced on this date (CPR 46.13(2)):

> "Where—
> (a) claim is allocated to a track; and
> (b) the court subsequently re-allocates that claim to a different track,
> then unless the court orders otherwise, any special rules about costs applying—
> (i) to the first track, will apply to the claim up to the date of re-allocation; and
> (ii) to the second track, will apply from the date of re-allocation".

35. Such a new rule was then revoked by the Civil Procedure (Amendment No 2) Rules 2023 on 1 October 2023.

36. What remains of relevance in this regard is within CPR 46.13(1):

> "Any costs orders made before a claim is allocated will not be affected by allocation".

37. CPR PD 46 also sets out at paragraph 7.1(3):

> "Where a claim, issued for a sum in excess of the normal financial scope of the small claims track, is allocated to that track only because an admission of part of the claim by the defendant reduces the amount in dispute to a sum within the normal scope of that track; on entering judgment for the admitted part before allocation of the balance of the claim the court may allow costs in respect of the proceedings down to that date".

38. I do add for completeness that there are differences in costs likely to be awarded between the small claims track and the fast track. As was observed in *Birmingham City Council v Lee* (at paragraph 3):

> "The problem arises because there is a marked difference between the costs recoverable in a case allocated to the small claims track and those recoverable in a case allocated to the fast track".

ANALYSIS AND DISCUSSION

39. I say at the outset that I have great sympathy for the District Judge. She had clearly read the papers before her and was expecting to determine matters of allocation and instead was faced with a cost issue unique to housing disrepair claims and which had not been notified to her in any of the material submitted on behalf of the appellant. Whilst the position may not have been known about at the time of filing directions questionnaires, it emerged by the time repairs had been completed, I am told some 5 weeks or so before the hearing, and commensurate with the duty to further the overriding objective of the CPR (as per CPR 1.3) it was incumbent upon the appellant to have raised it with the court in advance of the hearing. It did not do so.

40. Whilst the District Judge could not have been criticised had she determined to adjourn the matter such that *Birmingham City Council v Lee* and any other relied upon case law could have been provided to her, although I would not promote adjournments as it causes delay, she instead listened to the submissions and then considered the case law herself before returning to deliver a judgment. She considered that case law within the confines of the time available, within what is likely to have been a typically busy day in the county court. In considering the judgment she did deliver, I now come to analyse it away from those specific circumstances and in the comfort of the appellate court with the benefit of detailed skeleton arguments and an authorities bundle, along with the luxury of time to prepare, hear and reflect.

The Grounds

41. When turning to ground 1, I find that the District Judge has erred in her classification of the claim as being and always having been a small claim. Whilst she proceeded to consider CPR 26.9, she says "I am at a loss to understand how it could possibly be argued that this case was a fast track trial involving complexity band 3". Where the District Judge has erred is that she has not followed a structured approach. A structured approach does not prohibit judges reaching the conclusion that a case may always have been destined for the small claims track, but it must be appropriately reasoned. In this case, without such analysis and reasoning the District Judge has erred and the foundation of her decision is wrong. I therefore grant the appeal in respect of ground 1. I will discuss below an example of such a structured approach and further where the District Judge erred.

42. I turn next to consider ground 2, and I do not find that the District Judge misdirected herself or misconstrued her jurisdiction in relation to the extent of her discretion to make a costs Order. Whilst the District Judge referenced the absence of an application for costs, it is clear on any reading that she is referring to the absence of a written application; she does not find that precluded her from considering it and she goes on to give a decision (ultimately refusing it). Whilst such a written application for costs is not necessary, when one looks at the dialogue that occurred prior to judgment it is evident that it relates to the District Judge's concerns about the absence of the issue being raised in advance. As I have already set out, the appellant should have complied with its duty to further the overriding objective of the CPR to have notified the court that this was an issue which it sought to be determined. At the point of submitting the allocation questionnaire it would have been preferable for the appellant to have included the issue as an alternative position should the claim be allocated to the small claims track, as that would have given notice to the District Judge, and then when the position changed once the repairs were completed that provided a further point at which the court should have been updated. However, for the reasons included in this paragraph, there has been no misdirection by the District Judge, and the appeal fails in respect of ground 2.

43. In respect of the ground 3, there is an absence of reference to *Birmingham City Council v Lee* in the District Judge's judgment. It is only the final paragraph of the judgment which addressed the substance of the issue:

> "In terms of being asked to grant costs in the cause in terms of pre-allocation costs on fast track rates, or indeed for the claimant to advance arguments in relation to pre-allocation costs at the conclusion of the trial, I am not minded to direct those things and I will issue this afternoon the standard directions in relation to a housing repair claim on the small claims track".

44. The District Judge did not address *Birmingham City Council v Lee*, and critically no reason was given for the District Judge not being minded to make such an Order, save for reference back to her earlier comment about her view that the case had always been a case suitable for allocation to the small claims track. In view of these matters, I find that the District Judge has erred such that I allow the appeal in relation to ground 3.

45. In having allowed the appeal as set out above, I turn to consider the issue which was before the District Judge. Paragraph 34 of the judgment of Hughes LJ in *Birmingham City Council v Lee*, as referred to above, is very relevant but I will not repeat it.

The "Normal" Track

46. Whilst the issue of allocation was agreed between the parties, I turn to the rules on allocation to fully assess the cost issue before the court, and to notably consider whether the instant case is one which is of the kind which *Birmingham City Council v Lee* applies.

47. Pursuant to CPR PD 7A (at paragraph 3.6), the claim form confirms that an Order is sought for specific performance, the amount estimated for the cost of repairs is over £1,000 and the appellant expects to recover more than £1,000 for other damages sought. Accordingly, the small claims track is not the normal track. It is important to note that if "either" the repair costs claimed or "any claim for damages" claimed is over £1,000, then pursuant to this PD the small claims track will not be the normal track. Therefore, as this is what is included on the claim form, the small claims track is not the normal track.

48. Of course, any claimant knowing this could, on the claim form, seek to inflate valuations to simply place it within the wording of CPR PD 7A. If that were to be done, it is a matter which would have serious consequences, including arguments of abuse of process, contempt of court and cost consequences. Given reliance is required on expert evidence to prove the claim, instances of such conscious inflated valuations are likely to be rare.

49. There is a textual differences between CPR PD 7A as set out above and CPR 26.9(2)(b), in that pursuant to the latter the small claims track will be the normal track where there is a claim for specific performance and the cost of repairs are estimated to be not more than £1,000 "and" the level of any damages is not more than £1,000, whereas pursuant to the former and as set out above if "either" is more than £1,000 the small claims track will not be the normal track. It may be a matter which the Civil Procedure Rule Committee may wish to consider.

50. Given such differences in the CPR and PD, further exploration is needed to look at the value of the claim pursuant to CPR 26.9(1)(b). In respect of the repairs, if the small claims track were to be the normal track it would require the cost of repairs to be "estimated to be not more than £1,000". As detailed above, the appellant estimates the cost of repairs above £1,000, whereas the respondent estimates the sum below.

51. When considering what amounts to be estimated, the Cambridge Dictionary provides the following definition of "estimated":

> "used when saying what the cost, size, value, etc. of something is believed to be, although it is not known for certain".

52. The basis of the appellant's estimation is upon the report of Mr. Lawson. Mr. Lawson has included the costs of VAT. The respondent submits that VAT should not be included in the calculation, noting it is the respondent who will carry out the work. The appellant has brought proceedings because she says that the works were not undertaken. It must be remembered that this is her home, and if she were to commission works herself then she would need to pay the commercial rates which would include the payment of VAT. When estimating the damages it is therefore appropriate to include VAT (unless a claimant is VAT exempt in any way) so that there is the ability to complete works without delay should the claim be successful (for example, a court may determine not to grant specific performance on the facts of any specific case and instead may only award damages). The items of

disrepair as claimed in this case, as set out above, have a degree of urgency to them, for example fixing an extractor fan which impacts on mould and consequential potential impact on health. The ability to commission on a commercial basis is appropriate. It is also consistent with the tenancy agreement, which sets out:

> "You have the right to have urgent minor repairs done quickly and at no cost to you where the repair may affect health, safety or security, and where the repair has not been completed within a specified timescale".

Where urgent minor repairs have not been done quickly, the claimant is entitled to damages to undertake them. The repairs are not "alterations" such that there is no requirement for specific consent, they are repairs.

53. Mr. Lawson has provided the estimation of costs within his report, upon which the appellant has relied. I have not heard any evidence in relation to it, but I note that it is a report which is compliant with CPR 35, as is the report of Mr. Sowden on behalf of the respondent. In considering that evidence, I must be cautious at this preliminary stage not to make findings of fact, or to delve too deeply into the evidence. It is, as was submitted on behalf of the appellant, a "light-touch" exercise, and I concur with that. When considering Mr. Sowden's he states:

> "… a description of works drawn from the National Housing Federation schedule of rates. All costs are for measured items with fixed pricing unless otherwise stated".

54. The National Housing Federation is a trade association for housing associations. Utilisation of rates from its own schedule is therefore not reflective of the cost of works on the open market. By way of example, I note that a sum of £20.77 (excluding VAT) is estimated for the following:

> "Roofers to inspect flat roof at rear for defects, small damp patch in corner of bedroom".

55. However, if one looks to Facts and Figures 2025/2026 (Sweet and Maxwell), the cost of a handyman per hour in this part of the country is £28 per hour, and £102 for a half day. It also explains that "[t]here is often a minimum period or a supplemental charge for the first hour".

56. I also note that on Mr. Sowden's report bears the respondent's logo on every page, and his email is an email address of the respondent. However, at paragraph 17 Mr. Sowden says there is no conflict of interest. The issue of whether Mr. Sowden is an employee or agent of the defendant is relevant, because in discharging his duty pursuant to Part 35 of the Civil Procedure Rules he should address whether there is an actual or potential conflict of interest, and an analysis of that should be set out. This will enable a judge to properly consider the report and determine whether permission is given to rely upon it, and where permission has been given to assist with addressing matters of weight. It is permissible to instruct an expert who is employed by a party, as per *Field v Leeds City Council* [1999] CPLR 833 CA, however, the guidance within the White Book 2025 helpful comments (on page 1123): "the fact of employment may go to the weight to be given to their evidence".

57. When balancing these matters together, I am satisfied that the estimate costs of repairs were in excess of £1,000. It is based on an assessment of costs which the appellant would need to pay on the open market as set out in the report of Mr. Lawson, and given the analysis I have set out above and for the reasons stated, I place greater weight on Mr. Lawson's report.

58. I next turn to consider the value of any other claim for damages. There is an absence of detail in relation to this. I make no criticism of the parties as the evidence has not yet crystalised. However, the particulars of claim plead notice was given in respect of the alleged defects from various dates in 2021. The letter of claim, as contained in the bundle for the hearing on 6 November 2024, provides further detail in this regard. I note the respondent disputes the adequacy of notice. I have been referred to *Fishwick v Gentoo Group Limited* (unreported, 8 May 2025), where His Honour Judge Freedman determined as follows:

> "… I have been referred to *Wallace v Manchester City Council* [1998] EWCA Civ 1166. This gives some guidance about the level of damages that might be awarded in these circumstances. It is no more than guidance, but it makes it plain that anything of the order of £200 per year over a four-year period is far less than what a judge should award".

59. Adopting a similar approach to His Honour Judge Freedman, and noting the period of time is 3 years as opposed to 4 year, I am satisfied that if successful in the claim the level of damages, considering the case of *Wallace*, would surpass the £1,000 threshold.

60. Such an assessment of value therefore reinforces the position as pursuant to CPR PD 7A that the normal track is not the small claims track, and therefore the normal track is the fast track pursuant to CPR 26.9(5)(a) (being a claim where the small claims track is not the normal track). There is certainly nothing to indicate that the claim should be the intermediate track or multi-track.

Costs incurred pre-completion of repairs

61. When the case has come to allocation by the court, the matter of specific performance has fallen away and the parties quite sensibly agreed allocation to the small claims track, and the District Judge endorsed that (and it is not a matter on appeal which I interfere with). If that issue had not resolved, I would need to consider stage 2 in respect of allocation as set out above and adopt a forward-looking approach.

62. When turning to the cost issue before the court, however, I still need to consider CPR 26.13(1) but now looking backwards in time and considering the position if the matter of specific performance had not resolved itself. This is to determine whether this is a case which is of the kind which was envisaged by *Birmingham City Council v Lee*. The financial value of the claim is as set out above, for which the fast track is the normal track. There is nothing in respect of the value of the claim which causes the claim to deviate away from normal track. Specific performance had been sought along with the damages. The facts, law and evidence are not complex, and nothing further in this regard would indicate a deviation away from the normal track. Similarly, in terms of the 2 parties and the oral evidence to be heard, there is nothing unique and again does not signal a change from the normal track. The views of the parties are noted, but there is a very structured approach

envisaged by the CPR and its PDs as I have addressed above. I also note the circumstances of the parties, noting the appellant has raised alleged defects in a home she is living in as tenant with her 2 children, and the respondent is a social landlord. There is nothing before me to suggest that the case has any wider importance to others.

63. When balancing those factors holistically, there is nothing which indicates there should be movement from the normal track. Whilst the normal track is only the starting point, to move from that starting point needs a clear reasoned approach by reference to CPR 26.13(1), and there is not one with is supported on the facts of the case.

64. In light of what I have set out above, noting the normal track was the fast track, and noting that there is no variance to that save for the completion of the repairs and with it the removal of an ongoing claim for specific performance, I am satisfied that this case is of a kind envisaged by *Birmingham City Council v Lee*.

65. I next turn to consider whether to include provision in an Order for costs in the case on the fast track for legal costs incurred prior to completion of repairs in a claim. In doing so and considering paragraph 34 of the judgment of *Birmingham City Council v Lee,* it is useful to explore whether there has been compliance with the Protocol, and what steps have been undertaken pursuant to that Protocol.

66. Both parties set out within their directions questionnaires that the Protocol has been complied with. I also note the following steps have been engaged (and matters which were before the lower court at the hearing on 6 November 2024):
    a. A letter of claim was sent on 26 October 2023.
    b. A report was commissioned from a chartered surveyor.
    c. A claim form was drafted and then issued on 8 May 2024.
    d. Particulars of claim were drafted.
    e. A statement was prepared of the appellant dated 24 June 2024.

67. The above steps require a degree of experience and skill, navigating the Protocol along the way. Such experience and skill come at a cost. The Protocol itself includes provision of costs at paragraph 11, stating:

> "If the tenant's claim is settled without litigation on terms which justify bringing it, the landlord will pay the tenant's reasonable costs".

68. Whilst the specific elements of the CPR have changed since *Birmingham City Council v Lee*, that does not alter the underlying principle of the decision. Furthermore, the principle is consistent with CPR PD 46 at paragraph 7.1(3) as I have set out above, in that when the financial value of a claim changes by way of a partial admission such that the disputed sum falls within the parameter of the small claims track, "the court may allow costs in respect of the proceedings down to that date". The principle fits entirely with the issue before the court – the claim has changed by virtue of repairs being completed, but the work undertaken pursuant to the Protocol to reach that point should have the prospect of being recovered. I appreciate there is a material difference in that there is no partial admission, but it is the wider principle I reference by way of illustration which sits comfortably with that wider principle of the Court of Appeal in *Birmingham City Council v Lee*.

69. Furthermore, there is a wide discretion available to me in respect of costs, noting CPR 44.2(1):

> "The court has discretion as to –
> (a) whether costs are payable by one party to another;
> (b) the amount of those costs; and
> (c) when they are to be paid".

70. When considering application of such discretion, I also apply the overriding objective of the CPR (CPR 1.1), I find that failing to preserve the issue of costs incurred pre-completion of the repairs is not consistent with the overriding objective of dealing with cases justly and at proportionate cost. This is starkly illustrated when placing the concerns at paragraph 36 of *Birmingham City Council v Lee* alongside CPR 1.1. I extract out those particular concerns:
    a. "the possible disadvantage of leaving too much for later decision at trial"
    b. "there may be a perverse incentive on one or other party to contest the case"
    c. "Litigation continued on the merits for the sole purpose of recovering costs".

71. I also weigh in the balance the advantage of such an Order as sought, extracted from that paragraph, notably:

> "The certain knowledge that that order will stand if she succeeds can inform any efforts to settle".

72. The effect of such cost provision in the Order is that if the appellant succeeds in her case, such costs can be duly assessed; if she is unsuccessful, she will not be awarded any such costs. Furthermore, if the appellant is successful but recovers less than the fast track lower sum for housing disrepair claims, it would be normal for the judge to permit only recovery of costs pursuant to CPR 27.14 for both pre and post completion of the repairs.

73. This is very much a neutral Order but one which furthers the overriding objective of the CPR by avoiding the concerns as set out above and having the advantage of hopefully promoting alternative dispute resolution as issues are narrowed. It will likely save expense of satellite litigation and it will enable the issues to narrow and be focussed, thus ensuring the litigation can expeditiously progress. It also provides a gloss of fairness by ensuring consistency with the underlying ethos of the Protocol as set out above.

74. For the reasons which I have set out, I direct that the Order made by the District Judge is varied to include the following:

> "Pursuant to CPR 44.2(1), the claimant shall have her costs in the case on the fast track for costs incurred prior to completion of repairs of the property subject to this claim".

75. To prevent the situation arising as has in this case, it would be useful in future for parties to set out within any case summary in readiness for an allocation hearing:
    a. whether there are any outstanding repairs (and if repairs have been completed, the date of this),

b. confirmation or otherwise of compliance with the Pre-Action Protocol for Housing Conditions Claims (England),
c. a brief chronology of the pre and post-issue steps which have been undertaken and
d. whether in the event of the claim being allocated to the small claims track the claimant seeks a direction pursuant to *Birmingham City Council v Lee* [2008] EWCA Civ 891, and if so whether the defendant consents to the same.

CONCLUSION

76. The appeal is granted in respect of grounds 1 and 3 only. The Order of 6 November 2024 (but erroneously dated 15 November 2024) is varied to include the direction as set out above at paragraph 74. This matter should now proceed to trial without delay.

HHJ Robinson