

ENGLAND AND WALES / JUDGMENT

Better Intelligent Management Limited & Anor v Zaid Alothman Holding Limited & Ors

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Neutral Citation Number: [2026] EWHC 371 (Ch) Case No: CH-2025-000292 IN THE HIGH COURT OF JUSTICE BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES CHANCERY APPEALS (ChD) The Rolls Building 7 Rolls Buildings Fetter Lane, London EC4A 1NL Date: 6 th February 2026 Before: MR JUSTICE RAJAH

- ----- Between:

(1) BETTER INTELLIGENT MANAGEMENT LIMITED

(2) PHOENIX PLACE (LIVERPOOL) MANAGEMENT

- and - Appellants/Defendants ZAID ALOTHMAN HOLDING LIMITED & ORS Respondents/Claimants

- ----- Kerry Bretherton KC and Santosh Carvalo (instructed by HM3 Legal Services Limited) appeared for the Appellants/Defendants Jonathan Upton (instructed by Mishcon de Reya) appeared for the Respondents/Claimants

- ----- APPROVED JUDGMENT If this Transcript is to be reported or published, there is a requirement to ensure that no reporting restriction will be breached. This is particularly important in relation to any case involving a sexual offence, where the victim is guaranteed lifetime anonymity (Sexual Offences (Amendment) Act 1992), or where an order has been made in relation to a young person. This Transcript is Crown Copyright. It may not be reproduced in whole or in part other than in accordance with relevant licence or with the express consent of the Authority. All rights are reserved. Digital Transcription by Marten Walsh Cherer Ltd 2nd Floor, Quality House, 6-9 Quality Court, Chancery Lane, London WC2A 1HP Tel No: 020 7067 2900. DX: 410 LDE Email: info@martenwalshcherer.com Web: www.martenwalshcherer.com Approved Judgment MR JUSTICE RAJAH MR JUSTICE RAJAH: Better Intelligent Management Limited & Anor v Zaid Alothman Holding Limited & Ors 06.02.2026 1. 2. 3. 4. This is an appeal from the decision of HHJ Monty KC on 29 September 2025. The case was tried before the judge in March 2024, resulting in a judgment on 7 May 2024. That judgment was appealed and the appeal was partly successful; Better Intelligent v Alothman [2025] EWHC 392 (Ch). Richard Smith J, the appeal judge, remitted

the case to HHJ Monty KC to reconsider and determine a particular issue. This appeal relates to the judge's decision on that remittal. Permission to appeal was granted by the judge. I heard the appeal on 4 February 2026 and reserved judgment to today. The claimants in this case are the long leaseholders of various units of student accommodation in two blocks at a development in Liverpool. The first defendant is the freeholder of the development and is the immediate landlord of each of the claimants under their respective leases. The second defendant is the management company. It is the defendants who are the appellants in this appeal. The dispute below centred around liability for alleged disrepair to windows in the two blocks and whether the party responsible for repairing the windows, if there was disrepair, was the lessor or the lessee. Phoenix Place in Liverpool was built in 2018. It comprises 348 units of student accommodation in two blocks known as Block A and Block B. There are two types of units in the blocks which are known as studios and cluster rooms. The cluster units have areas with communal kitchens and other communal areas, whereas the studios are self-contained. The developer of Phoenix Place went into liquidation and the first defendant, Better Intelligent Management Limited, acquired the freehold on 20 April

2020. Phoenix Place was constructed with brick cavity walls with rendered section infill around a steel frame. Exterior walls are finished with clay bricks to the ground and first floors, with the upper floors being finished in coloured render. The windows were installed by a company called K2 Aluminium Systems Limited. There have been problems with damp since 2019. In 2021, Mr Gardner of Gardner & Co produced a report recommending further investigation and a complete building survey. Mr Mark Lee of Kershaw Surveyors Limited, who was the defendants' expert in this case, first attended in April three times, and again in May 2021, and produced a report dated 20 September 2021 in which he concluded that the problems he identified were: "...attributable to a poor standard of workmanship, particularly in relation to the supply and installation of the windows." He said: "The defects present with the windows as further described herein are likely to be the main issue and root cause of the issues being experienced, including the excessive salt staining to the elevations, water ingress in and around the windows, and failed glazed units." 5. The particular problems identified following the removal of some windows to facilitate inspection were said to be (a) no cavity closers or membranes to the window surrounds;
- (b) defects with the frames; (c) defective installation; and (d) a number of failed Approved Judgment MR JUSTICE RAJAH Better Intelligent Management Limited & Anor v Zaid Alothman Holding Limited & Ors 06.02.2026 window units. Mr Lee attended again in October and November 2022 and produced an addendum report on 24 November 2022. By this stage, Mr Lee reported that more of the window units had failed. 6. Mr Christopher Sullivan, who was the claimants' expert, had his first inspection in December 2022 and he produced a report on 12 April 2023. He reported damp issues but he took the view that there was no defective construction. Mr Lee had recommended replacing all the windows but Mr Sullivan did not agree that that was necessary and he said that some of the work recommended by Mr Lee was an improvement rather than repair. There was then an

exchange of addendum reports between Mr Lee and Mr Sullivan. They produced a joint statement on 27 November 2023, and then each produced a report setting out areas of disagreement. The fundamental difference between them was that Mr Lee said that the wholesale replacement of the windows was required, whereas Mr Sullivan said that the existing windows could be repaired at a much lower cost than replacement. 7. There were four principal issues before the judge, namely:

- (1) Whether, as a matter of construction, the external windows were demised to the lessee under the terms of the relevant leases;
 - (2) If so, whether there had been a breach of the lessee's repairing covenant in clause 4.2 of the lease requiring the lessee to keep the property in a good state of repair and condition;
 - (3) If so, whether the extent of remediation required was that proposed by Mr Lee or Mr Sullivan; and
 - (4) Whether the notices of wants of repair served on 31 May 2022, pursuant to clause 4.24 of the leases, were valid. 8. On the first issue, the judge found that the lessee was obliged to keep in repair the windows in the individual premises with the lessor being obliged to do the same for the other windows in the block. On the second issue, the judge concluded that none of the problems identified amounted to disrepair rather than construction or installation defects such that they did not engage clause 4.2 of the lease. On the third issue, the judge concluded that if he was wrong about the absence of disrepair, he had no doubt that the required works were those suggested by Mr Lee, not the more limited works suggested by Mr Sullivan. On the fourth issue, the judge concluded that the notices were invalid, not merely because of the absence of disrepair but due to their insufficient particularisation as well. In relation to the windows, which is the subject matter of this appeal, HHJ Monty set out the law in his first judgment at paragraphs [51]-[55]: "51. It is well established that such an obligation means not just to repair, but to put and keep in repair: see the cases cited by Ms Bretherton, namely *Saner v Bilton* ... and *Anstruther- Gough-Calthorpe v McOscar*...
52. Does this also require a covenantor to make good an inherent defect in design (as opposed to poor workmanship)? This is a matter of fact and degree, which largely turns on whether the carrying out of the works would amount to giving Approved Judgment MR JUSTICE RAJAH *Better Intelligent Management Limited & Anor v Zaid Alothman Holding Limited & Ors* 06.02.2026 back to the covenantee a wholly different thing from that which was demised. See *Ravenseft Properties Ltd v Davstone* ... and *McDougall v Easington*... 53. In *Quick v Taff Ely BC* ... the Court of Appeal held that a landlord was not liable for the damage caused by condensation arising from a design defect because there was no identifiable disrepair. 54. In *Post Office v Aquarius Properties Ltd* ... the Court of Appeal held that where defects in the building had existed since the date when it was constructed, but there had been no damage to or deterioration in the condition of the building, a repairing covenant did not require the defect to be eradicated, however the original defect arose.

55. Minja Properties Ltd v Cussins Property Group Plc ... was a case where rusted window frames were replaced by new ones, and it was held that the rusted frames were out of repair, imposing an obligation on the landlord to repair them.” 9. The judge then summarised the issue for him to decide in this way. He said: “56. ...in the present case, the issue is whether the damp problems are disrepair within the meaning ascribed to that word in the authorities, or whether they are design or installation defects which have not caused disrepair.” 10. He went on to consider that question in relation to the windows at [72]-[74]: “72. The alleged disrepair is the moisture between the panes of the glazed window units. Mr Lee says this is disrepair because ‘some of the prime objectives of a window is for the admission of light as well as thermal performance’. This is an issue which has got worse over time (he describes it as ‘a progressive issue’). He says that ‘one of the key contributing factors to the failure of the windows is the insufficient packing of the windows which was undertaken at the time of installation’. Mr Sullivan says that it is not disrepair, because it only amounts to heavy misting, and in any event this is a design or workmanship issue.
73. When Mr Lee was cross-examined, he confirmed that the damage to the windows was the misting (the condensation) and the damage to the building was the damp insulation. He agreed that poor manufacture, transit, storage and installation were all possible causes of the problems, although he had not seen any evidence of poor manufacture. He said that his belief was that the spacers and packing were too thin and narrow to support the glazing, which he did not think was a manufacturing flaw. He thought the misting was more likely to be due to insufficient packers as the misting was mostly to Approved Judgment MR JUSTICE RAJAH Better Intelligent Management Limited & Anor v Zaid Alothman Holding Limited & Ors 06.02.2026 the opening casement sections of the windows. He agreed that if that was right, the issue with the packers was an installation defect, but that in his view the seals have progressively failed over time. As to the silicone sealant, he agreed that it was a defect in installation, not disrepair, and similarly agreed that the problems with the cavity closers and the sills were also installation defects. 74. I have no doubt that the condensation is not disrepair when applying the principles set out in the authorities. The experts seem to agree that these are design or installation defects which have caused the problem. This is not disrepair.” 11. An appeal against that decision was allowed by Richard Smith J on one ground relating to the failed seals to the glazed units of the window. There are two errors in the judgment which were identified by Richard Smith J. The first error is identified in [46] and [47] of Richard Smith J’s judgment: I address first the Appellants’ main point under Ground “46. 1 as to the failed seals and glazed units. As to the latter, although the Respondents took issue with the characterisation of the glazed units as themselves having failed, it seems to me that the loss of gas therefrom and resulting deterioration in terms of their diminished thermal properties can, in principle, constitute disrepair, and that this is not limited to the physical failure of the seals.

47. As to the Judge's treatment of the matter, taking his cue from the first 'alleged issue' identified in the experts' joint statement, his focus was on the moisture and condensation and its increasing manifestation through misting between the glass panes. Noting the experts' apparent agreement that design or installation defects caused the problem, the Judge concluded that, when applying the principles set out in the authorities, the condensation was not disrepair. Although it seemed to me (differently from the position in Quick) that the condensation here did detrimentally impact the subject matter of the covenant, such that the condensation between the window panes might in principle constitute disrepair, the Appellants did not argue this before me. Nor, as the Respondents accepted, did they do so below. I therefore need say nothing further about it save to note, as the Judge did (at [73]), Mr Lee's acceptance in cross-examination that the damage to the windows was the misting. However, such testimony did not, in my view, prevent the Appellants from arguing, as they did, that the relevant disrepair for the purpose of clause 4.2 of the leases was the progressive failure of the window seals and units, an argument supported by other aspects of Mr Lee's evidence." Approved Judgment MR JUSTICE RAJAH Better Intelligent Management Limited & Anor v Zaid Alothman Holding Limited & Ors 06.02.2026 12. 13. 14. So Richard Smith J's review of the judgment therefore concluded that the judge had focused on moisture and condensation and misting, and not on the progressive failure of the window seals. HHJ Monty had concluded, based on the decision in Quick, where there had been condensation on the walls inside a home, that such issues amounted merely to a loss of amenity and not to physical damage to the premises, and therefore was not disrepair. However, the appellants' case had been that it was the progressive failure of the seals and resulting failure of the glazed units that amounted to disrepair and the judge had not directly addressed that. Richard Smith J said that such failure could constitute disrepair. He also expressed the view, albeit obiter, that condensation between the window panes might, in principle, constitute disrepair but this had not been argued before either him or the County Court judge. The second error which was identified is dealt with in [48]-[50] of Richard Smith J's judgment. He explained that the language which HHJ Monty had used in the judgment was consistent with, and could suggest, that he took the erroneous view that problems arising from installation defects were incapable of giving rise to disrepair. He consequently decided to remit the matter to the County Court judge. The order itself simply remitted the issue of whether the windows were in disrepair but what Richard Smith J thought needed to be addressed was identified in the judgment in paragraphs [49] and [58]. So at [49], the judge said this: "49. The Judge did note the experts' agreement that there were design or installation problems I do not consider it a strained reading to say that he accepted their evidence at that level of generality at least. As such, it would also appear that the Judge did not accept, for example, that these problems arose from the manufacture, transit and storage of the window units as had been suggested to, and accepted as a possibility by, Mr Lee (although the form N460 does refer to manufacture). However, it is still not possible to say from the Judge's acceptance of the presence of a design or installation defect how and why, as is common ground occurred, the seals failed. The Judge clearly noted (at [73]) Mr Lee's views as to the

issue with the packers (an installation defect) and as to progressive seal failure. However, that was not Mr Sullivan's view. Although not specifically considered in the judgment, Mr Sullivan's evidence appeared to be that the problem more likely arose in the manufacture of the windows or through damage to the seal at the point of installation." 15. In [58], when he allowed the appeal, he said: "58. ... Given that there is no dispute that the window seals and (in the sense described above) the glazed units failed, I remit to the Judge the question of the nature and cause of those defects, including whether such failure was progressive..." 16. The remitted issues were then the subject of a hearing on 5 August before HHJ Monty and his judgment was handed down on 29 September 2025. Having set out the background, he identified the problem at [6] and [7] as follows: Approved Judgment MR JUSTICE RAJAH Better Intelligent Management Limited & Anor v Zaid Alothman Holding Limited & Ors 06.02.2026 "6. The problem with the triple glazed sealed windows at the property is that over the years since construction of the building and the installation of the windows at that time, more and more of them have 'blown', which means that they have increasingly shown signs of condensation and the gas between the panels has escaped. This was caused by the failure of the window seals. It is 7. the Defendants' case that the failure of the seals was the cause of both the condensation and the loss of gas: 'There was overwhelming evidence before the court that the windows had lost gas: the condensation could not be present if the gas was present. This was caused by the failure of the window seals.' (Defendants' written submissions, paragraph 44)." 17. The judge then summarised Richard Smith J's reasons for allowing the appeal, although the passages which he quoted did not identify the issue that the appellants were arguing, namely that it was the progressive failure of the seals which constituted the disrepair. He then reviewed the law in more detail than in his first judgment. He referred to the relevant leading authorities, including *Ravenseft Properties Ltd v Davstone (Holdings) Ltd* [1980] QB 12; *McDougall v Easington DC* (1989) 58 P & CR 201; *Quick v Taff Ely BC* [1986] QB 809; *Post Office v Aquarius Properties Ltd* [1987] 1 All ER 1055; *Lee v Leeds City Council* [2002] 1 WLR 1488; *Janet Reger International Ltd v Tiree Ltd*

[2006] EWHC 1743; and *The London Borough of Hounslow v Waaler* [2017] 1 WLR

2817. These cases establish that there can be no disrepair without physical damage or deterioration to the subject matter of the covenant. 18. He summarised his conclusions on the law at [37]: "37. Drawing all of this together, in my judgment for the present situation to fall within the covenant:

- (1) There must be some physical change in the windows from their original state such that their condition is now different and worse from how it was at an earlier time.
- (2) Lack of amenity and efficiency is not sufficient - a physical change is required. (3) If such physical change is present, the 'inherent defect' approach established by *Ravenseft* would apply and whether the works are of repair and thus within the covenant is a matter of fact and degree.

- (4) However, the ‘inherent defect’ approach is not engaged if there is a defect in design or installation which has not caused physical damage and physical change from one state to another (worse) state.” 19. He dealt with the expert evidence at [41]-[47]. He said: Approved Judgment MR JUSTICE RAJAH Better Intelligent Management Limited & Anor v Zaid Alothman Holding Limited & Ors 06.02.2026 In my judgment, the expert evidence was clearly that the “41. cause of the problems now exhibiting in the windows was the defective seals.
42. At paragraph 1.4.20 of his Report of 12 April 2023, Mr Sullivan noted: ‘The glazed units themselves consist of a series of panes of glass that are sandwiched together to form a composite unit. ... There is a seal and a desiccant to hold moisture around the perimeter. This seal is the element which, if pierced, damaged or poorly formed will allow moisture to enter the cavity between the panes of glass, and will either be lightly misty or in some cases will have water in the base.’
43. Mr Lee was cross examined about whether his evidence was that the damage or deterioration was limited to the condensation. ‘So, yes, so in terms of the windows themselves there are the misted units and that is the extent of visible deterioration to the - to the window itself.’
44. Mr Lee agreed that ‘the vacuum has been compromised because the seal has failed’. He also accepted that by ‘failed units’ he meant that the seal had broken or been damaged.
45. He was then asked about possible causes of the faulty seals: ‘Q: ... And Mr Sullivan’s evidence is that the seal will have been - or is very likely to have been pierced, damaged, or poorly formed either because of poor quality manufacture, or transit to site, or the way it has been stored before it has been installed, or during the installation process itself when it is being picked up and moved around and put in. Do you accept that they are all likely causes of the seal being compromised or damaged? A: They’re - they’re possible causes. I wouldn’t like to say - or I wouldn’t be able to say how likely that they are to have occurred but yes, they are possible causes.’
46. Mr Lee was then asked about timing: ‘But, like I say, that isn’t to say that the - the seal itself, your Honour, would have been, you know - we couldn’t say whether that seal was at the time of construction or whether it was later. I think from observations there’s been an increase in number of misted windows as time has gone Approved Judgment MR JUSTICE RAJAH Better Intelligent Management Limited & Anor v Zaid Alothman Holding Limited & Ors 06.02.2026 on. So, that would suggest to me that the seals around the window have progressively failed with - with time.’
47. Mr Lee said this, at paragraph 4.2.2 of his report of 2 February 2024: ‘I believe that it is not disputed by the Claimant or their Expert that there are windows which are suffering from condensation; however, there does seem to be a difference of opinion as to the extent of the windows effected and whether this constitutes disrepair. I am of the opinion that the misted/ failed glazed units do constitute disrepair based on the belief that a generally accepted

intended function of a window is to be transparent and provide thermal insulation. The fact that the panes illustrated in the drawings are observed to have condensation and, in some limited cases standing water between the panes, is evidence that the vacuum forming the glazed sealed unit has been compromised. The purpose of the vacuum is to provide an environment by which heat cannot be conducted through the window/glass, as heat cannot be transferred in a vacuum - if there is no vacuum then heat can be conducted/lost through the glass and thereby defeating one of the key purposes of double/triple glazing being in the form of a sealed unit.” 20. He then set out his findings of fact and [49]-[53] are key: “49. The seals are more likely than not to have been defective at the time they were installed. It is not possible to say on the evidence whether this was the result of poor manufacture, transportation or installation. However, the defects in the seals were there at the time of completion of the works of installation. It is the defective seals which have caused the escape of 50. gas and the condensation.

51. This has progressively worsened over time. The failure of an increasing number of units over the successive inspections by Mr Lee shows this to be so. I accept Mr Lee’s evidence about that. Mr Lee also said in his oral evidence: ‘...based on the vast majority of blown misted units being on the opening casement of the window ... So ... those windows in particular would be subject to the most amount of movement obviously being an opening casement. So ... if it was a manufacturing flaw then it would be a bit more consistent as to the spread of windows.’ 52. I find as a fact that the progressive manifestation in one window after another of loss of gas and condensation is the result of the defect present at the time of installation, and the Approved Judgment MR JUSTICE RAJAH *Better Intelligent Management Limited & Anor v Zaid Alothman Holding Limited & Ors* 06.02.2026 problems which have occurred in one window after another are the result of that defect. The progressive emergence of these problems is not the result of new defects appearing as time goes on, but is rather the manifestation of the defect present at the time of installation. The defective seals were always present; it took time for the results of the defect to manifest. I accept Mr Lee’s evidence in paragraph 51 above, but in my view this evidence supports what I think is the common-sense conclusion that the opening and closing of the casements was the trigger for the manifestation of the defect which was present from the outset, and that this is what Mr Lee meant when he talked about progressive failure. I deal with whether this manifestation was disrepair below.
53. Ms Bretherton said in her oral submissions that it was a matter of common sense that one would not expect gas to seep out over many years, and it was likely to have happened quickly, not over time. However, I agree with Mr Upton that there was no actual evidence as to when gas escaped from the units, how soon after the seals failed air entered the units, and how soon thereafter condensation formed. Similarly, Ms Bretherton’s written submissions observed: ‘There was no evidence that a manufacturing error could take years to manifest and it seems inherently unlikely that this would be the case.’ The same point can be made; there was no evidence to suggest that this was ‘inherently unlikely’ and in the absence of such evidence, I have concluded that it is more likely than not that the seals were defective

at the time of installation.” 21. He summarised his findings in [70]: “70. I want to make it clear that it is my conclusion that (i) the seals were defective at the time of installation, (ii) the escape of gas (with the associated diminished thermal properties of the windows and the condensation/misting) was the consequence of the defective seals, (iii) the progressive failure of the windows (by which I mean the matters at (ii) above) were not new incidences of physical damage, but were manifestations of the defective seals, (iv) these manifestations resulted in loss of amenity, but did not amount to physical damage.” 22. There is one ground of appeal which is that the judge was wrong to find no disrepair. This is broken down in the grounds of appeal into a number of sub-points, the most significant of which are these:

- (1) It is said that the judge has again wrongly focused on inherent defects being present at the time of installation and not on progressive deterioration of the windows;
- (2) The evidence of Mr Lee, which the judge had accepted, proved progressive deterioration, which constituted disrepair; Approved Judgment MR JUSTICE RAJAH Better Intelligent Management Limited & Anor v Zaid Alothman Holding Limited & Ors 06.02.2026 23. 24. 25.
- (3) That it was illogical and contrary to the evidence of Mr Lee, which he had accepted, for the judge to find that gas could have been stored in the window units for years after the seals had broken; and
- (4) That condensation could amount to disrepair. It is common ground that many of the glazed units in windows at the premises have been compromised in the sense that the airtight, inert atmosphere filled with inert gas between the panes of double or triple glazing has been compromised. The ‘vacuum’, as everyone in this case has described the airtight, inert atmosphere, has been lost. It is no longer airtight and the inert gas has been lost. It is common ground that this occurred because the seal around the perimeter of the glazed unit has been broken. Various terms have been used to describe this state of affairs by the experts, and the lawyers, and the judges in this case before me. The units have been described as ‘blown’, or ‘failed’, or, because a key sign of such failure is condensation, as ‘misted’. I will refer to the point at which the inert atmosphere has been lost as the failure of the unit, and the point at which the seal has broken, thereby causing the inert atmosphere to be lost, as the failure of the seal. As I read his judgment, this is also how Richard Smith J referred to the compromised glazed units and seals. Before Richard Smith J, it was common ground that if there had been a progressive failure of the seals then there was disrepair. Richard Smith J remitted the case for the judge to determine how and why the seals failed. At [49] of his judgment, HHJ Monty concluded that the seals were probably defective at the time of installation but it was impossible to say why. Notably, the judge reached no conclusion as to how the seals were defective and whether the problem was latent. He certainly did not say, as he easily could, if this is what he meant, that the seals and glazed units had failed at the time of installation. The next issue remitted to the judge was whether the failure in the seals was progressive in the sense of happening over time and after the commencement of the leases, or whether the failure of the seals and the glazed units had taken place at the time of installation. On this, the judge’s findings in [51] appeared to accept

Mr Lee's evidence that there had been a: "...failure of an increasing number of units over the successive inspections by Mr Lee."

26. Mr Lee's evidence was that between the first and last of many inspections over about a three-year period, the number of failed units had increased from 30 to 160. The judge also accepted Mr Lee's evidence that the vast majority of the failed units were opening casements where there was the most movement. The judge appeared to find, in [52], that the trigger for the failure of the seal and the failure of the unit was the opening and closing of the casement. 27. Pausing there, applying the first of the judge's four conclusions on the law at [37(1)], if there had been a progressive failure of the glazed units, then the physical condition of the windows where the unit had failed was now different and worse from how it had been at an earlier time. Whereas there had once been windows with glazed units which had an airtight atmosphere filled with inert gas, now there were window units with no such atmosphere. That is a change in the physical condition of the windows and for the worse. The loss of the airtight atmosphere and inert gas is physical damage to the Approved Judgment MR JUSTICE RAJAH Better Intelligent Management Limited & Anor v Zaid Alothman Holding Limited & Ors 06.02.2026 28. 29. glazed units. Like Richard Smith J, I consider the failure of the glazed unit to constitute disrepair, quite apart from the failure of the seals. This is a distinct point from the loss of the insulating efficiency which the airtight atmosphere and the inert gas might be thought to confer. I am prepared to assume for the purposes of this appeal that thermal efficiency and misting from condensation do not constitute physical damage and are merely a loss of amenity. Such loss of amenity is consequent upon a change for the worse in the physical condition of the windows arising from the loss of the airtight atmosphere and the inert gas between the panes. In [52] and onwards, the judge described the loss of gas and condensation as a progressive manifestation of the defect present at the time of installation which took time to manifest. This is language which, as Richard Smith J observed about the first judgment, is consistent with and suggests that he took the erroneous view that problems arising from installation defects did not give rise to disrepair. The language used throughout the rest of the judgment is to the effect that the progressive failure of the units and seals, which he appears to have accepted occurred, were traceable to a latent defect present at the time of installation and therefore not disrepair. This was erroneous.
30. Mr Upton in his submissions says that notwithstanding the judge's apparent acceptance of progressive failure of the units, the judge must have concluded that any failure in the units and any failure in the seals had occurred on installation and he referred to a number of the judge's statements in the judgment: "The progressive emergence of these problems is not the result of new defects appearing as time goes on, but is rather the manifestation of the defect present at the time of installation. The defective seals were always present." [52] "A manifested deterioration in the state of the windows as time went on, because of loss of gas and/or reduced levels of thermal insulation and/or condensation caused by faulty seals which were faulty from the time of installation, is not physical damage." [59] "The seals were always faulty." [61] "...the seals were faulty at or from the time of installation..." [62] "...the

progressive failure of the windows (by which I mean [the escape of gas with associated diminished thermal properties of the windows and the condensation/misting] ... were not new incidences of physical damage, but were manifestations of the defective seals..." [70] 31. I cannot accept that this careful language in the judgment can be read as Mr Upton suggests. It is consistent with a defect or fault in the seals being latent and resulting in a failure of the seals at a later date. If the judge felt he had evidence on which he could find that the seals had broken and the units had failed at the time of installation, he would have said so and the judgment would have been considerably shorter. The Approved Judgment MR JUSTICE RAJAH Better Intelligent Management Limited & Anor v Zaid Alothman Holding Limited & Ors 06.02.2026 language used shows an attempt by the judge to categorise the progressive failure of the units and the seals as something which was not physical damage. Paragraphs [54]-[62] seek to explain the consequences of progressive failure of the seals and the glazed units as a loss of amenity and not physical damage but where the judge has fallen into error is in failing to conclude that the failure of the seals and the glazed units is itself physical damage, deterioration in the physical condition of the windows, and disrepair. In [53], the judge observed that there was no evidence one way or another as to how soon after the seals had failed gas would have escaped, air would have entered, and condensation formed. That was, as a matter of common sense and basic science, a surprising conclusion. In the absence of evidence to the contrary, one would expect the failure of the seals and the failure of the glazed units, including the loss of gas, to be contemporaneous. It seems that in [53], the judge was contemplating the possibility, without making a finding, that the seals might have failed at installation but that the inert gas between the panes might not have been lost immediately. However, the premise of Mr Lee's evidence, which the judge accepted, was that the progressive blown/misted units showed a progressive failure of seals and glazed units – the judge noted this at paragraph [73] of his first judgment which I have quoted above. The judge therefore had evidence before him, which he had accepted, which found that there had been a progressive failure of the seals and glazed units. Further, if the atmosphere filled with inert gas had not been lost immediately on a failure of the seal on installation but had been lost progressively over years, that would have been, itself, a deterioration of the physical condition of the window for the worse, which would have amounted to disrepair. For these reasons, I have come to the conclusion that the judge has fallen into error and the judgment should be set aside. The answer to the first remitted issue should have been that the window seals and the glazed units are in disrepair. I will adjourn this hand down hearing so that the time for appeal does not begin to run. The parties should consider the consequences which flow from this judgment and submit an agreed order, or if agreement is not possible, relist this hand down hearing to deal with consequentialia. 32. 33. 34. 35. (This Judgment has been approved by Mr Justice Rajah.) Digital Transcription by Marten Walsh Cherer Ltd 2nd Floor, Quality House, 6-9 Quality Court, Chancery Lane, London WC2A 1HP Tel No: 020 7067 2900. DX: 410 LDE Email: info@martenwalshcherer.com Web: www.martenwalshcherer.com

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CASE PAGE <https://chat.esheria.ai/case-law/england-and-wales/repairingcovenants-court-unknown--6a3ea4e53b1caa91297f2d7c>

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