DRN-3640037

The complaint

Mr T and Ms C complain that Society of Lloyd's (SoL) unfairly declined claims on their Premier Guarantee building warranty policy. The policy covers their apartment and its building. There's external damage to the building, and water damage in some of the apartments and communal areas.

In addition to being a leaseholder of one of the apartments, Mr T is a director of the property management company.

What happened

The subject of this complaint is a building of 21 apartments. The other 20 leaseholders have the same, but separate complaints, with our service. Mr T and two other directors (who are also leaseholders) brought the complaints to our service on behalf of the leaseholders. All the parties are aware that what I say here in respect of Mr T and Ms C's complaint, also applies to the same complaints brought by the other leaseholders.

The ground floor of the property is a commercial unit, which I understand is occupied by a retailer.

The 21 residential leaseholders each have ten-year Premier Guarantee building warranty policies, underwritten by SoL. The policies started in 2008.

In 2017, claims were made for rainwater ingress in some of the apartments and communal areas. I understand the claims were made by apartments 14, 18, 19, and 21. Because the claims were made during the last eight years of the cover, section 3.3 of the policy terms applies. The claims were handled by a loss adjuster, but for ease, I'll simply refer to SoL when referring to the actions of its agents.

Section 3.3 covers 'major damage'. The policy terms state 'major damage' is:

- *"a) Destruction of or physical damage to any portion of the Housing Unit … b) a condition requiring immediate remedial action to prevent actual destruction of or physical damage to any portion of the Housing Unit … In either case caused by a defect in the design, workmanship, materials or components of: the Structure; or the waterproofing elements of the Waterproof Envelope…".*

In the event of a claim, a policy excess is payable. Under the policy definition for 'excess', the terms state:

- *"As noted on the Initial Certificate and Certificate of Insurance the Underwriter shall not be liable for the first part of any payment made in respect of a valid claim under the Policy for a Housing Unit."*

- *"A separate Excess shall apply to each separately identifiable cause of loss or damage for which a payment is made under the Policy by the Underwriter, regardless of whether more than one cause of loss is notified at the same time."*

In relation to section 3.3, each leaseholder's insurance certificate explains their excess will apply *"for each and every separate cause of loss for each Housing Unit".* On the date the cover commenced, the excess was £1,000, but it increased each year in-line with the RICS House Rebuilding Cost Index (or by 12% per annum compound if this is less).

In June 2018, the managing agent commissioned a survey from a company, who I'll refer to as 'C'. SoL accepted the policy definition for 'major damage' had been met. However, SoL concluded there were two 'heads of loss' and because they are common parts claims, 21 individual excesses apply, twice. SoL noted the collective excess was therefore about £53,000, and it estimated the repair costs would only be about £35,000.

A new managing agent took over the site and it appointed a third-party to help with the claim, who I'll refer to as 'B'. B appointed a further surveyor, who I'll refer to as 'H'. H estimated the repair costs to be £238,000. SoL asked for documentation to support the estimate. B then appointed a different surveyor, who I'll refer to as 'D'. D provided a report and estimated repair costs to be £250,000. SoL didn't consider the costings to be accurate, and it appointed its own engineer, who I'll refer to as 'A'.

Following A's reports, SoL concluded there was potentially up to 18 defects that could have resulted in the rainwater ingress. Therefore, SoL said there were 18 'heads of loss', which gave an excess of about £466,682. Because the excess exceeded the managing agent's £250,000 repair estimate (and SoL's updated repair estimate of about £74,500), SoL declined the claim.

The managing agent complained, making the following points:

- The original 'heads of loss' had unfairly been turned from two to 18; and these were referred to as *"potential"* defects that *"could"* or *"appear"* to have caused water ingress. The managing agent concluded liability had been denied based on speculation.

- The managing agent referred to a recent High Court judgement to support its argument the damage should be considered under a single claim.

- The managing agent said it considered the building to not be weathertight. It said this is likely due to the incorrect installation of the roof, cladding, and coping stones. It said it considered there to be only one claim, and further intrusive inspection is required as the issues may well be linked.

- The managing agent said the leaseholders had been suffering the water ingress for a significant period. It said SoL had caused delays and sought to avoid liability. It also said SoL had failed to identify the actual cause of the water ingress and the cost to make the building weathertight.

SoL didn't uphold the complaint. In its response, SoL explained the High Court judgement didn't apply. It noted the High Court judgement involved a different insurer and different policy terms.

The property management company's directors brought the complaint to our service. It was considered by one of our investigators, but he didn't think it should be upheld. Because the directors disagreed, the complaint was passed to me to decide.

I've already issued a provisional decision, explaining I intended to uphold the complaint. In my provisional decision, I said:

"I have considered all the available evidence and arguments to decide what is fair and reasonable in the circumstances of this complaint.

What type of claims are being made – common parts or demised?

The section of the policy that applies covers "… physical damage … caused by a defect in the design, workmanship, materials or components of: the Structure; or the waterproofing elements of the Waterproof Envelope…".

The policy is covering the damage caused by the defect, not the defect itself. However, it follows that to achieve an effective and lasting repair for the insured damage, the defect needs to be repaired as part of the claim. Therefore, it's the location of the damage that determines the type of claim being made.

In this case, damage has been reported to the common parts and individual apartments. As such, there are potentially two types of claims: common parts claims and demised claims.

Where there's damage to the common parts, common parts claims need to be made by each leaseholder that shares responsibility for the common parts, for their share of the repair costs. In that scenario, each leaseholder would have their own excess for every common parts claim they make.

Where there's only internal damage to some apartments, irrespective of where the defect is, demised claims needs to be made by the leaseholders who own the damaged apartments. In that scenario, only the leaseholders making a claim would have an excess to pay, for every demised claim they make.

SoL has considered the damage under common parts claims. Overall, in the context of the reports I've seen, I consider that approach to be reasonable in the first instance. I say this because, the various reports point towards damage to the common parts, i.e. cladding, walls, and the underlying structure; not just there simply being damage to some of the apartments, due to defects in the common parts.

However, should those common parts claims not succeed, SoL ought reasonably to consider demised claims for the apartments with internal damage. Leaseholders are still able to make demised claims for the damage in their apartments in the event wider common parts claims haven't been met. When determining whether a demised claim exceeds the leaseholder's excess, costings should include repairing the defects that would otherwise prevent an effective and lasting repair to the apartment in question.

SoL was aware of the building-wide water ingress issues within the ten-year period of cover, even if all the leaseholders didn't log individual claims. So, I'm not persuaded SoL could fairly argue demised claims hadn't been made in time.

I'm mindful the policy contains a policy condition that states: "The maximum the Underwriter will pay for any claim relating to Common Parts will be the amount that the Policyholder has a legal liability to contribute towards the cost of repairs, rectification or rebuilding works."

However, I wouldn't consider it fair and reasonable for SoL to rely on that policy condition for a demised claim, irrespective of whether a defect in the common parts needs to be repaired to provide an effective and lasting repair for the demised damage.

I say that because, if, for a demised claim, SoL was to rely on such a policy condition to only contribute towards the claiming leaseholder's share of the defect repair costs, it wouldn't be adequately indemnifying the leaseholder in respect of the insured damage (i.e. the demised damage). In other words, if the leaseholder isn't provided with sufficient funds to repair the defect causing the demised damage, the damage would likely return.

Is SoL's position of 18 common parts claims reasonable?

SoL considers there to be 18 separate common parts claims on the basis there's 18 causes, or potential causes, of loss.

The policy terms explain an excess applies to each valid claim, and that a separate excess applies to "each separately identifiable cause of damage". So, in other words, each separate cause of damage is considered to be a separate claim.

Therefore, to determine whether the damage should be treated as 18 claims, it needs to be decided what's meant by "each separately identifiable cause". Importantly, the policy terms don't define 'cause'.

The property management company and its appointed agents have referred to a recent legal case: Zagora Management Limited & Others v Zurich Insurance Plc, Zurich Building Control Services Limited, East West Insurance Company Limited [2019] EWHC 140 (TCC).

Zagora was about a Zurich Insurance Plc building warranty policy, similar to the SoL policy that I'm considering here. Part of the judgement was about the excess for common parts claims, in relation to Zurich's policy terms.

SoL doesn't consider the Zagora judgement applies to the complaint I'm considering. But whilst Zagora involved a different insurer and a different policy, in my view, the policies provide cover on identical terms.

Zurich's policy covered 'major physical damage' and it defined this as: "A material difference in the physical condition of a load bearing element of the new home…". SoL's policy covers 'major damage', and it defines this as: "Destruction of or physical damage to any portion of the Housing Unit…". The 'housing unit' definition is simply the various parts of the building. Although Zurich's terms refer to an 'element', and SoL's terms refer to a 'portion', in the context of the cover, I don't consider 'element' and 'portion' to have wholly different meanings.

Furthermore, under the Zurich policy, an excess applied to "each and every item of claim". I also don't consider that term to be wholly different from the "each separately identifiable cause" excess term in SoL's policy. If interpreted strictly, and in the favour of the insurer, both of those excess terms achieve the same outcome.

Therefore, I find the principles of the Zagora judgment ought reasonably to apply to the circumstances of the complaint I'm considering here.

The Zurich policy didn't contain a definition for 'claim' or 'item of claim'. Zurich argued each separate item on the repair schedule was a separate item of claim for which a separate excess applies. To summarise, the judge concluded:

- *The question of what is meant by "each item of claim", should be answered by focusing on the cover given.*

- *Under the Zurich policy, for major physical damage to the common parts, there's a separate item of claim for each "element" of the building requiring repair due to a defect.*

- *Where a continuous element (such as the roof or the external walls) is affected in different areas by the same defect, this is one item of claim; and where physically separate elements are affected by the same defect, this is also one item of claim.*

Under the SoL policy, cover is given for damage to any portion of the building. So, I consider a reasonable interpretation to be that there's a separate claim for each damaged portion. In my view, the damage can reasonably be described as rainwater ingress, and the defect a lack of weathertightness. There's a single type of damage being claimed, which has been caused by a single type of defect, albeit in a few portions of the building.

It follows from the Zagora judgment, and as a matter of logic, that a continuous part of the building (such as the cladding), or the parts of the building that are the same but separate (such as roofs on different levels), can reasonably be considered recognised portions.

It also follows from the Zagora judgment that, multiple issues within a recognised portion of a building, can't reasonably be considered as separately identifiable causes of damage, if they are all contributing to the same type of damage in question.

Furthermore, irrespective of the Zagora judgement, I don't consider SoL's application of its policy terms to be reasonable. The main purpose of the policy is to protect the homebuyer against significant repair costs due to construction issues. As such, it can't reasonably be the intention of the policy to avoid cover (by applying multiple excesses) simply because there are several construction issues in a portion of the building causing a single type of damage.

SoL may well point towards its excess policy terms, in respect of an excess applying to each separately identifiable cause of damage. But in my view, it would be a wholly unreasonable interpretation of the overall policy terms to consider the individual materials or components making up a recognised portion, to be separately identifiable items or causes of damage. Because to do so, nullifies the value of the policy at a time when its most needed by the policyholders, and at a time when they ought reasonably to be able to rely on it.

The Zagora judgement referred to adopting a sensible rather than an absurd interpretation, when answering the question of how many claims. In my view, the conclusion there are 18 separate causes of damage, to put right a single type of damage in a few portions of the building, can only reasonably be considered absurd, in the context of the cover being provided.

So, having considered the Zagora judgement, SoL's policy terms, and what's fair and reasonable in the circumstances of this complaint, I consider the following to be the appropriate approach:

- *Where there are multiple defects to a continuous portion of the building, or multiple defects to a separated portion of the building, which are contributing to the single type of damage (rainwater ingress), then those defects ought reasonably to be grouped into claims by portion.*

- *For instance, if there are multiple issues with the cladding that are contributing to the rainwater ingress, the portion of the building that's defective is the cladding. In this scenario, I'm satisfied it would be appropriate to consider the cladding to be one separately identifiable cause of damage (i.e. one 'head of loss').*

I'll now go on to consider what that approach means for this complaint, in respect of the 18 defects, or potential defects, identified by SoL.

What number of common parts claims ought reasonably to apply?

SoL arranged for an engineer, A, to report on the damage. Five reports were produced. One for each of the four apartments that had made the initial claims, and one for the communal areas.

SoL's agents identified 18 causes, or potential causes, of loss. Below is a table summarising those 18 causes.

No.	**Description (as per the loss adjuster's report)**	**Cause of loss**
1	Defective cladding.	Cement fibre board cladding
2	Defective metal facia.	Main roof
3	Missing or defective weather seals to cladding.	Cement fibre board cladding
4	Aluminium upstands behind cladding not sealed.	Cement fibre board cladding
5	Window/door frames not sealed to cladding.	Cement fibre board cladding
6	Vents, flues not sealed to cladding or missing covers.	Cement fibre board cladding
7	Vent pipe not effectively sealed.	Main roof
8	Fixing bolts to perimeter capping not sealed.	Main roof
9	The perimeter sheets lack seals at the joints.	Main roof
10	No DPC under coping stones.	Perimeter parapet wall
11	Failed coping joints.	Perimeter parapet wall
12	No waterproofing of metal railing stanchions.	Perimeter parapet wall
13	Open joints in brickwork.	Perimeter parapet wall
14	No weep holes and potentially no cavity trays.	Perimeter parapet wall
15	Open joints and defective cladding.	Timber board cladding
16	Windows inadequately sealed to cladding.	Timber board cladding
17	Possible defects to and/or around flat felt roof.	Lower roof
18	Vents not sealed to cladding or missing covers.	Timber board cladding

I'll summarise my understanding of those five reports:

- *There are multiple defects with the cement board cladding, fixings, and detailing. The defects have caused damage to the cladding, and the water damage in apartment 21. The defects are also the likely cause of the water damage in apartment 14. (Defects 1, 3, 4, 5, 6).*

- *The roof edge detail is formed by folded metal panels, which are fixed to the cement board cladding. They are poorly fitted. The joints, which aren't sealed, are likely to allow water to ingress behind the metal panels; there's significant staining on the cement board cladding where the metal panels join; and the fixings could have damaged the cement boards. The fixings along the roof edge are also without washers. (Defects 2, 8, 9).*

- *One of the roof vents isn't sealed effectively. This is directly above water staining in apartment 21. (Defect 7).*

- *There are multiple defects to the parapet walls. Whilst there's no evidence damage is currently being caused by those defects, they could be a source of water ingress, the situation will only worsen, and they might be contributing to unseen damage. It's also likely that the defects to one of the parapet walls is the cause of the water damage in apartment 14. There's also the beginning of corrosion to steelwork elements which don't appear to have been adequately protected, and minor movement of some coping stones has taken place. (Defects 10, 11, 12, 13, 14).*

- *All the above defects are likely contributing to the damage seen and unseen. A believes damage will have occurred to the underlying structure.*

- *The timber cladding, breather membrane, seals, drips detail, cavity tray etc. couldn't be fully assessed due to access issues. Only a visible inspection took place. Any of those items could be defective and contributing to the damage in apartment 14 and the northern communal stairwell. (Defects 15, 16, 18).*

- *In the northern stairwell, there's damage below the low-level flat roof. But access would be required for an inspection. (Defect 17).*

- *The perimeter walls to the communal terrace on the top floor have had their cement boards overclad with uPVC-type cladding. The over-cladding appears to have left in place all the original features, the integrity of which has been called into question in the reports for apartments 19 and 21. The over-cladding has poor sealing details, and the defective folded metal panel roof trims have been repeated. Jubilee clips around a downpipe haven't been installed correctly. Those issues are possibly connected to the water staining in the southern communal stairwell.*

- *The over-cladding is an alteration and consideration should be given to the policy exclusion relating to alterations.*

- *Some maintenance needs to be carried out to ensure the outlets on the fourth-floor terraces aren't blocked, so there's the free passage of water.*

So, based on the descriptions given by SoL's agents within its reports and correspondence, and keeping in mind what I've said above about grouping claims by portion, I consider the common parts claims ought reasonably to be divided in to three claims:

- *Claim 1: cement board and timber board cladding (defects 1, 3, 4, 5, 6, 15, 16, 18).*
- *Claim 2: main and lower roofs (defects 2, 7, 8, 9, 17).*
- *Claim 3: perimeter parapet walls (defects 10, 11,12 ,13, 14).*

The cement fibre and timber boards are different types of cladding, in different areas of the building. However, it's my understanding the boards serve the same purpose. Equally, the description of the damage and defects are identical, even if some of the remedies may be different. So, in the circumstances, I'm persuaded all the cladding, and the associated weatherproof detailing, ought reasonably to be considered one portion of the building.

Likewise, overall, I consider it reasonable to treat the main roof and the smaller flat felt roof as one portion. Both roofs serve the same purpose and I haven't seen anything that persuades me they can't reasonably be considered a single portion of the building.

I also understand from the leaseholders' submissions, there are further issues with the roof areas above the third-floor apartments (i.e. the fourth-floor terraces), which are contributing to the water ingress in some of the third-floor apartments. If that water ingress is due to a defect rather than a maintenance issue, it follows the repairs should form part of claim 2, given the terraces form part of the third-floor roofs.

However, I note C's report confirmed apartment 19's decking was lifted in 2018, and whilst the roof coverings appeared sound, there was a build-up of leaves. The outlet was fully blocked with leaf matter, and the hopper and downpipes from the outlet also appeared blocked. C's report also pointed towards a lack of maintenance to the decking on the communal roof area. Apartment 19 and the communal terrace are on the fourth floor.

Ultimately, it will be for the property management company to demonstrate to SoL that the water ingress via the terraces above the third-floor apartments is mainly due to a defect, rather than a lack of maintenance. If there are defects causing damage, SoL can't reasonably use the lack maintenance as a reason to avoid covering the repairs.

In respect of the over-cladding alteration, whilst the policy excludes any damage arising from alterations, I understand from A's reports that the original defects and damage underneath the uPVC cladding are the main problem. In other words, the associated water damage is mainly due to the original issues. Therefore, I don't consider SoL can reasonably avoid liability for the defective and damaged cement board cladding, or the resulting water damage, simply because of the over-cladding, even if it has been poorly executed.

Apart from the uPVC over-cladding, SoL hasn't indicated that the issues identified within A's reports aren't covered. Therefore, I consider SoL to have accepted all those issues are covered by the policy, and the necessary repairs should form part of the three claims.

<u>How should the leaseholders' claims be moved forward?</u>

For each of the three common parts claims, the leaseholders can only claim for their share of the repair costs, and only for the amount that exceeds their excess. To determine each leaseholder's share of responsibility for the common parts, SoL will need to consider the lease agreement, and understand whether the ground floor commercial unit also has a responsibility for the common parts of the building.

I understand from the submissions that the applicable excess for each of the leaseholders is £1,234.61. If so, and if responsibility for the common parts is shared equally among those 21 residential units, for each of the three claims to succeed, their value would need to exceed the collective excess of £25,926.81, i.e. 21 x £1,234.61.

If SoL's repair schedule is taken as a starting point: claim 1 has a value of £42,228, claim 2 has a value of £14,220, and claim 3 has a value of £18,000. Based on responsibility for the common parts being equally shared between the 21 residential units, only claim 1 exceeds the collective excess of £25,926.81.

The managing agent's estimated repair costs from H, and D, differ significantly from SoL's estimated repair costs. On the one hand, the managing agent's estimates don't offer much detail, and they may include work that's either maintenance related or not necessary in the first instance. On the other hand, SoL's estimated repair costs may not reflect all the work required to remedy the damage that's covered.

The fair way forward, in my view, is for SoL to arrange a competitive tender process for the three claims, to determine what the reasonable cost of the remaining repairs are. Contractors nominated by both parties ought to be invited to take part.

I say 'remaining', because, as I understand it, in January 2021, the managing agent was to undertake some repairs to the roof/terrace areas above the third floor, due to the ongoing water ingress into some of the third floor apartments. It's also my understanding that the managing agent was to charge the leaseholders for those repairs. Providing the repairs weren't maintenance related, they should form part of claim 2's overall value.

If claim 2 exceeds its collective excess, and if the repairs so far completed by the managing agent to the roof/terrace areas aren't maintenance related, then the sums already paid by the leaseholders for those repairs should go towards their excess for claim 2. SoL would need to reimburse each leaseholder any amount they had paid above their excess, plus 8% simple interest per annum from the date they paid the related charges to the date of settlement.

A explained in its reports that further investigations are needed to understand the full extent of the required repairs to the timber cladding (defects 15, 16, and 18) and the lower roof (defect 17). So, SoL will need to arrange for that to happen before the tender.

Once the repair costs are known for each of the three common parts claims (i.e. after the competitive tender), SoL can determine whether they succeed, bearing in mind each leaseholder's share of the costs and their excess.

For any successful common parts claims, SoL will need to cover the associated demised damage. So, for example, if damaged cladding has caused some internal damage to an apartment, the internal damage should by covered; or, if defective cladding has caused damage to the underlying structure (hence the common parts claim), which in turn has resulted in some internal damage to an apartment, both the structural and demised damage should be covered.

If claims 2 or 3 don't exceed their collective excess, then SoL will need to consider whether some of those repairs need to be done as part of claim 1, either to ensure an effective and lasting repair for the damage being covered under claim 1, or because claim 2 or claim 3 items are needed to facilitate the claim 1 repairs. For example, the repairs to the cement board cladding will likely impact the metal facia that folds over from the roof.

Furthermore, defects within claims 2 and 3 are thought to be causing damage to apartments. So, if claims 2 or 3 fail due to not meeting their collective excess, SoL will need to consider whether any of the remaining internal damage in the apartments, after claim 1, should be dealt with as demised claims. As noted above, the value of those demised claims would need to include the cost of putting right the defects causing the damage in question.

Finally, I note SoL has declined to share A's reports with the property management company and its managing agent. However, those parties will need sight of A's findings to understand what damage and defects the tender is to cover. If SoL remains of the opinion that it can't share the reports in their entirety, or appropriately redacted versions, then it will need to provide the findings and recommendations in another format.

<u>Should SoL cover the property management company's report costs?</u>

In 2014, the managing agent at that time commissioned a report by a surveyor, who I'll refer to as 'S'. To summarise, S recommended the cladding be replaced and estimated costs to be £48,000. Based on the submissions, it's not clear what happened following S's report. However, I've seen claims were raised in 2017.

The subsequent managing agents also commissioned reports by C, H, and D (with H, and D, being instructed by B). I acknowledge C's report was commissioned due to SoL's request for a report, and H's report and D's report were both commissioned due to SoL's response to the claims. However, it's for the insured parties to support their claims, and I've not seen anything that would lead me to conclude SoL should cover those report costs.

C hadn't estimated repair costs, so it follows that a further report was required to support the claim. H's estimated repair costs were significantly higher than those estimated by SoL and S, and H's costings were based on a "quick estimate" without any detail. Therefore, I don't find it unreasonable that SoL asked for supporting documentation, which led to D's report.

In respect of B, I understand it was appointed to help with the claims and to challenge SoL's position. Given the complexity of the claims and the implications for the leaseholders, I can understand why assistance was sought by the property management company. However, where the insured chooses to appoint a third party to represent them in their claim, we generally don't expect the insurer to cover those costs.

In my view, the property management company could have commissioned its own survey with repair costings to challenge SoL's estimate, without the assistance of B. Equally, a complaint could have been brought to our service for free, without B's involvement. It's uncommon for us to make awards for professional representation, and I've not seen anything that persuades me I should reasonably do so here.

What compensation should be paid?

As I understand it, the claims were formerly declined in January 2020, followings A's reports and the conclusion there were 18 common parts claims each attracting 21 excesses. As explained, I don't consider SoL's approach to be fair and reasonable, and due to SoL's approach, the claim has been delayed for two and half years since January 2020.

I haven't seen SoL caused unreasonable delays before January 2020. Whilst I disagree with the outcome SoL reached, I don't consider its requests for information, or the investigations it undertook, to have been unreasonable. Much of the delay between when the claims were made in 2017 and when they were declined in January 2020, was due to SoL waiting on information from the property management company or its managing agents.

I accept SoL's claim decision and the delays since January 2020 have had an impact on all the leaseholders. I don't doubt the uncertainty about whether their claims will succeed has caused a degree of upset. Also, all the leaseholders will likely have suffered some impact due to the damage in the communal areas.

I also accept some of the leaseholders have been living with damage in their apartments since January 2020. However, so far, none of them have made submissions about the damage in their apartments or the impact on them.

Furthermore, the photos in the various reports don't show that the damage in the apartments was particularly significant. Whilst Mr T provided us with more recent photos and a video in January 2021, it's not clear what apartments or communal areas they are in relation to.

In view of the above, I'm intending to award each leaseholder £500 compensation for the delay and general impact since January 2020. However, if any of the leaseholders don't consider £500 to be fair compensation for the impact the situation has had on them personally, they are free to explain why in response to my provisional decision and I will consider their comments before making my final decision.

If any of the leaseholders wish to make submissions in relation to the compensation, they should provide information about their circumstances, the damage that's been in their apartment since January 2020, and photos of the damage where possible."

SoL disagreed with my provisional decision. It made the following points:

- SoL's policy and Zurich's policy cannot be treated as being equivalent. The definition of 'major physical damage' in Zurich's policy consists of the defect itself, whereas the definition of 'major damage' in SoL's policy only consists of the damage caused by the defect. So, the 'element' referred to in Zurich's policy is a defective part of the structure, and the 'portion' referred to in SoL's policy is a damaged part of the building.

- Similarly, in Zagora, the Zurich term *"each and every item of claim"* was interpreted as the cost of repair for each element of the building caused by a failure to comply with Zurich's requirements. So, an item of claim consisted of the loss and damage suffered as a *consequence*. This is different to SoL's excess clause, where a separate excess applies to each *cause* of loss or damage.

- Whilst 'cause' isn't defined in SoL's policy, it's clear via the definition of 'major damage', that the word 'cause' means *"a defect in the design, workmanship, materials or components of the Structure"*.

- The provisional decision makes a finding that because cover under SoL's policy is given for damage to any portion of the building, there's a separate claim for each damaged portion. However, the relevant question for SoL's policy is how many *causes* there are, not how many *claims* there are.

- The finding that a continuous part of the building, or parts of the building that are the same but separate, can *"reasonably be considered as recognised portions"*, doesn't assist in determining how the excess provision in SoL's policy is to be applied. The "portion" referred to isn't the cause of damage, rather it is an area of the building which has been damaged.

- The fundamental question posed by the excess clause is whether the damage has one or more causes. This can only be determined by referring to the opinion of the technical experts, which is contained within A's reports.

- In Zagora, the Court wasn't asking itself whether there were one or more causes of the damage. It was asking how many claims were being made, in the context of the Zurich cover and excess provision. Therefore, SoL disagrees with the provisional finding that it *"follows from the judgment that, multiple issues within a recognised portion of a building, can't reasonably be considered as separately identifiable causes of damage, if they are all contributing to the same type of damage in question."*

- SoL noted the provisional decision effectively seeks to disapply the excess provision altogether by finding that if claims 2 and 3 don't exceed the applicable excess, then those repairs should be covered as part of claim 1.

- The practical reality underlying SoL's approach is that the acceptance of the risk, and the premium paid, are based on the excess applying to each separately identifiable cause of loss or damage. To deny SoL the right to apply terms upon which the premium has been calculated is unfair and inequitable.

- The provisional finding that a demised claim should be deemed to have been made in time, whether in fact it was or not, would have the effect of abrogating SoL's entitlement to decline damage which wasn't discovered and notified during the policyholder's period of insurance.

Mr T responded to my provisional decision on behalf of the leaseholders. Mr T also enclosed a response from another leaseholder, who I'll refer to as Mr F. The leaseholders accepted my provisional decision, but they asked me to reconsider B's costs and the level of compensation.

Mr T made the following points:

- This has been a highly distressing time for the leaseholders. They have had to live with the defective accommodation for many years and the anxiety of having to pay for the repairs. The water ingress has also caused electrical faults, which have required the fire brigade to attend on more than one occasion.

- Many of the leaseholders have had their lives put on hold as they have been unable to sell their apartments. They have had to repeatedly redecorate and have been living in very damp conditions.

- One of the apartments is suffering from mould and damp, which has aggravated the pre-existing health condition of the occupant.

- Mr T explained that in relation to his apartment, the stress has led to many sleepless nights and given him significant anxiety. He noted the situation was likely much worse for those living with leaks every time it rained.

- Mr T also noted that as a director of the property management company, he's had to volunteer many hours of his personal time trying to resolve the leaks in the building.

- Some of the leaseholders will have to be moved out for the work to their apartments as it will require the removal of damp plasterboard ceilings and walls.

- At the very least, the leaseholders would expect a higher level of compensation for those who have lived with terrible water ingress and damage to their properties for several years.

- It was only after the leaseholders engaged B that they knew they could challenge SoL's approach. B helped refer the complaint to our service and brought in expert surveyors to provide evidence.

Mr F made the following points:

- The owners of apartments 13, 14, 16 and 18 have all been affected due to their living conditions. The conditions have got worse over the years due to SoL's uncooperative approach, and when a resolution eventually comes, the damage will be so severe that residents will need to move out for the repairs. They will also be spending yet another autumn and winter in poor living conditions, and due to the damage, retaining heat is impossible.

- Mr F reported the water ingress in his bedroom in December 2014, to the building's maintenance company. The situation since then has taken its toll on his mental health.

What I've decided – and why

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

Further points from SoL

Before I address SoL's response to my provisional decision, I remind SoL of the following longstanding industry rules – the Financial Conduct Authority's 'Insurance: Conduct of Business Sourcebook' (ICOBS):

- *"A firm must act honestly, fairly and professionally in accordance with the best interests of its customer"* – ICOBS 2.5.-1R

- *"A firm must not seek to exclude or restrict, or rely on any exclusion or restriction of, any duty or liability it may have to a customer or other policyholder unless it is reasonable for it to do so and the duty or liability arises other than under the regulatory system"* – ICOBS 2.5.1R(1)

- *"An insurer must provide reasonable guidance to help a policyholder make a claim and appropriate information on its progress"* – ICOBS 8.1.1R(2)

- *"A firm must not unreasonably reject a claim"* – ICOBS 8.1.1R(3)

- *"For contracts entered into or variations agreed before 1 August 2017, a rejection of a consumer policyholder's claim is unreasonable, except where there is evidence of fraud, if it is: for breach of warranty or condition unless the circumstances of the claim are connected to the breach"* – ICOBS 8.1.2R(3)

SoL points towards its policy being fundamentally different to the Zurich policy that was the subject of the Zagora judgment. However, whilst the policy terms are different, there are obvious similarities, and in the context of the cover being provided, they are, in my view, comparable. But, importantly, as I noted in my provisional decision, irrespective of the Zagora judgement, I don't consider SoL's application of its policy terms to be fair and reasonable.

I agree with SoL that the relevant question here is the number of 'causes'. So, the issue to be decided is the interpretation of the term 'cause'.

The policy doesn't define 'cause' and SoL's view is that the policy taken overall means each individual defect is a 'cause'. However, it remains my view that in the circumstances of this case, it would be a wholly unreasonable application of the term 'cause', to consider the individual materials or components making up a recognised portion, to be separately identifiable items or causes of a single type of damage. It's clear that such a broad interpretation doesn't lead to a fair and reasonable outcome.

In the absence of a clear policy definition of 'cause', and in the overall context of the cover being provided, I don't consider SoL's approach in this case to be fair and reasonable, or that it's acted with the best interests of its customers. But rather, SoL has, in my view, sought to unfairly restrict its liability for damage that's covered by an unreasonable application of the excess clause.

The basis on which the premiums are calculated for the builders who take out the cover, is not a concern for the eventual homeowners/policyholders. SoL is well aware the cover is being passed to homeowners to protect them against the risk of significant costs due to construction defects, and it's obligated to apply its policy terms, and treat its customers, fairly.

SoL's approach in this case effectively relieves it of its liability for the very circumstances the policy is intended to cover. I'm not satisfied that such an approach is fair, where there's defects causing major damage, potentially costing hundreds of thousands of pounds to repair.

So, having considered the arguments presented, I remain persuaded that the damage being claimed is rainwater ingress, and the causes can reasonably be split into three: defective cladding, defective roofs, and defective parapet walls.

SoL has argued my provisional decision seeks to disapply the excess provision altogether in respect of some claim 2 and claim 3 repairs potentially falling under claim 1. However, SoL is well aware of our approach to providing an effective and lasting repair to damage that's covered, which may also mean completing uninsured work to facilitate the insured work.

In respect of some of the potential demised claims not being made in time, my point here is, SoL needs to treat its policyholders fairly. SoL hasn't disputed it was aware of the building-wide water ingress issues before any of the policyholders' ten-year cover periods expired. In my view, in 2017, SoL could have engaged with all the leaseholders to understand if more apartments were affected by the common parts defects, as per its obligation to provide reasonable guidance to help a policyholder make a claim.

I'm also mindful of SoL's duty not to unreasonably reject a claim. I acknowledge it's a policy condition that claims must be discovered *and* notified before the policyholder's cover ends. But as per ICOBS, a rejection of a consumer policyholder's claim for breach of condition is unreasonable unless the circumstances of the claim are connected to the breach. In this case, the common parts and demised issues are clearly linked, and I haven't seen any persuasive information to show how, if at all, SoL is prejudiced by the late reporting of demised damage.

So, overall, I find it fair and reasonable to consider all the demised damage to have been reported in time.

Further points from the leaseholders

I'm sorry to disappoint Mr T and the other leaseholders, but I haven't been told anything that changes my provisional findings in relation to their report costs and the cost of professional representation. There's nothing further I can add to what I said in my provisional findings.

I'm also not increasing the £500 compensation award. Whilst I accept the situation has likely been upsetting for the leaseholders, particularly for those with damage in their apartments, the submissions don't detail the extent of the internal damage, and no further photos have been provided. Because no persuasive evidence has been provided about the impact on individual leaseholders, I can't reasonably increase the compensation award for some of them.

My final decision

For the reasons I've set out above, and in my provisional decision, I uphold this complaint. My final decision is Society of Lloyd's should:

Part 1:

- **A.** In the first instance, deal with all the damage observed in A's five reports under three common parts claims: cladding (claim 1), roofs (claim 2), and parapet walls (claim 3).
- **B.** Complete the outstanding investigations to the timber cladding and flat roof, as per A's reports.
- **C.** Consider whether the water ingress via the fourth-floor terraces has been caused by a defect, and if so, include the associated repairs within claim 2.
- **D.** Share A's findings and recommendations from its five reports, and the findings and recommendations from any further investigations, with the property management company.
- **E.** Arrange a competitive tender to determine the value of the remaining repairs, with contractors nominated by both parties to be invited to take part.
- **F.** Settle any of the three common parts claims that exceed their collective excess, based on the tender and any defect related repairs so far completed.

Part 2:

If common parts claim 2 exceeds its collective excess *and* the fourth-floor terrace repairs so far completed are defect related:

- **G.** Deduct the amount so far paid by the leaseholders for the fourth-floor terrace repairs from their claim 2 excess, and if the amount paid exceeds their excess, refund the surplus.
- **H.** Pay 8% simple interest[i] per annum on any amounts that are refunded under G, from the date the leaseholders paid the related charges for those repairs, to the date of settlement.

Part 3:

If common parts claim 2 or common parts claim 3 don't exceed their collective excess:

- **I.** Consider whether some of those repairs need to be covered under the common parts claims that have exceeded their collective excess, to either achieve an effective and lasting repair or to facilitate the repairs, for those successful claims.
- **J.** Consider demised claims for the remaining internal damage in the apartments (the value of the demised claims should include the cost of providing an effective and lasting repair, which may mean putting right defects in the common parts).

Part 4:

- **K.** Pay each of the 21 leaseholders £500 compensation for the distress and inconvenience caused since the claim was declined in January 2020.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr T and Ms C, and the other leaseholders with the same complaint at our service, to accept or reject my decision before 7 September 2022.

Vince Martin
Ombudsman

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[i] If SoL considers it's required by HM Revenue & Customs to deduct income tax from any interest paid, it should tell the recipient how much it's taken off. If requested, SoL should also give them a certificate showing the amount deducted, so they can reclaim it from HM Revenue & Customs if appropriate.