DRN-4027292

The complaint

Mr and Mrs M have complained about the way Society of Lloyd's (SoL) have handled a claim they made under their Premier Guarantee New Home Warranty (the warranty).

What happened

Mr and Mrs M are the owners of an apartment in a building comprised of 16 apartments which were completed in 2009/2010 (the building). Mr and Mrs M are represented in their complaint by Mr P. Mr P is also an owner of one of the apartments in the building and is representing the remaining owners who have separate, but the same complaints with our service. Because the complaints are about the same claim decision made by SoL, I issued a provisional decision on the complaint brought by Mr P and explained that my findings in that provisional decision would apply to the complaints brought by the other leaseholders.

I issued my provisional decision on 10 February 2023, explaining why I was intending to uphold Mr P's complaint, and by extension, Mr and Mrs M's complaint. Here's what I said in my provisional decision:

> *<u>What happened</u>*
>
> *Mr P and SoL are represented in this complaint by a number of different professionals. However, for ease of reference I will refer to Mr P's professionals as N, and SoL's professionals as A. SoL is responsible for all of the acts or omissions by the professionals acting as its agent.*
>
> *Mr P is the owner of an apartment in a building comprised of 16 apartments which were completed in 2009/2010 (the building). In addition to bringing his own complaint to this service, Mr P represents the other owners in the building who have separate, but the same complaints with our service. Because the complaints are about the same claim decision, Mr P and the other leaseholders are aware that what I say here, in respect of Mr P's complaint, will apply to the same complaints brought by the other leaseholders who are represented by Mr P.*
>
> *In 2014, Mr P and the other leaseholders noticed damage in some apartments caused by an ingress of water. SoL accepted the warranty claim for areas where damage had occurred, but didn't agree to undertake works to the building, where no material damage had been observed. SoL's agent at that time, who I'll refer to as M, dealt with the claim and applied one collective excess.*
>
> *In late 2018, Mr P and the other leaseholders noticed an ingress of water into Apartments 5, 6, 10 and 16 within the building and made a claim on the warranty for the resulting damage. SoL's agent acknowledged the claim and agreed that the damage had resulted from defects in common areas of the building.*
>
> *After investigating the claim, SoL offered Mr P and the other leaseholders a cash settlement to discharge its liability under the warranty and settle the claim. However, the proposed settlement wasn't accepted. Mr P complained to SoL about the way the*

claim had been handled, and also about the way it had interpreted the policy terms to arrive at the net settlement offer of approximately £8,000. Mr P said the scope of works that SoL based its offer on was incomplete, and he disagreed with SoL's application of five separate excesses to the claim.

Mr P complained to SoL about its claim decision and received SoL's second stage response to his complaint on 27 August 2021. In that response SoL said that, having carried out an extensive review of the complaint files, it found no fault on the part of the underwriters in the decisions they'd made or the proposals they'd put forward. Unhappy with SoL's response, Mr P brought his complaint (and those of the other leaseholders) to this service in early 2022. Our investigator considered all the issues Mr P had raised and issued his view partially upholding the complaint in October 2022.

Mr P accepted all but two of the conclusions in our investigator's view. In particular, he didn't agree with our investigator's conclusion that SoL's settlement offer didn't need to cover costs relating to the installation of cavity trays for the parapet walls. He also didn't agree it was reasonable to omit the removal and refitting of the glazed balustrade from the scope of works, on the basis that it is a major cost item the leaseholders are required to pay because of regulation requirements. Mr P expressed the view that SoL declined the opportunity to find an alternative contractor to carry out the repairs because they were aware that no contractor could carry out the repairs based on SoL's estimate or method of working.

SoL didn't accept our investigator's view on the application of multiple excesses to the claim. However, it did accept the other conclusions he reached.

As the parties haven't agreed on how Mr P's complaint ought to be resolved, the matter has been passed to me for a decision to be made.

What I've provisionally 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.

In making my provisional decision, I've first considered whether SoL has fairly applied the policy terms relating to the application of excesses to the settlement offer. The second issue I've considered is whether SoL has made a fair offer to Mr P and the leaseholders to settle the claim. While I haven't addressed each and every point raised by the parties, I have considered all of their evidence and submissions in making my provisional decision on this complaint.

What is covered by the warranty?

Mr P's warranty is divided into different sections of cover which apply to different circumstances and different periods of the term of the warranty. Mr P's claim (and that of the other leaseholders) for damage to the building has been accepted by SoL. However, I've detailed the relevant terms and definitions below, for ease of reference, as I will refer to these terms in the remainder of this decision.

Section 3.3 'Structural Insurance', is relevant to Mr P's complaint as the claim was made during years three to ten of the warranty.

Section 3.3 states that SoL will indemnify Mr P, the Policyholder, against all claims discovered and notified to SoL during the Structural Insurance Period in respect of

'the cost of complete or partial rebuilding or rectifying work to the Housing Unit which has been affected by Major Damage….'.
It goes on to say that in the event of a claim under this section, the Underwriter has the option either of paying the cost of repairing, replacing or rectifying any damage referred to in section 3.3 (1) and (2), or itself arranging to have the damage corrected.

The warranty defines 'Major Damage' as:

'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…'

The 'Waterproof Envelope' is defined as: 'the basement, ground floors, external walls, roofs, skylights, windows and doors of a Housing Unit'.

'Housing Unit' is defined as (among other things): 'The property described in the Certificate of Insurance comprising the Structure, all non-load bearing elements and fixtures and fittings for which the Policyholder is responsible; and any Common Parts retaining or boundary walls forming part of or providing support to the Structure'.

The 'Common Parts' are defined as: 'Those parts of a multi-ownership building (of which each Housing Unit is part), for a common or general use, for which the Policyholder has joint ownership and/or legal responsibility'.

The 'Structure' of the 'Housing Unit' is described as being comprised of the following elements (among others):

- *load-bearing parts of ceilings, floors, staircases and associated guard rails, walls and*
- *roofs, together with load bearing retaining walls necessary for stability;*
- *non-load bearing partition walls;*
- *roof covering;*
- *any external finishing surface (including rendering) necessary for the water-tightness*
- *of the external envelope;*
- *floor decking and screeds, where these fail to support normal loads;*

The warranty defines 'Excess' in the following way:

'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'.

However, it's important to note that the warranty does not define what is meant by 'separately identifiable cause of loss or damage'.

Paragraph 5 of the conditions set out in section 6 provides for an increase in the Excess as follows:

'The…….Excess referred to within the Certificate of Insurance will be increased in line with the RICS House Re-Building Index or 10% per annum compound, whichever is the lesser, on each anniversary of the commencement of the period of insurance for Sections… 3.3…'

Lastly, the financial limits for claims involving common parts are set out in section 7 of the warranty, which says:

'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. Claims are subject to the financial limits for the individual sections detailed above and the Excess as detailed in the Initial and Certificate of Insurance'.

So, in summary, Mr P's warranty covers him for damage to his apartment and his proportion of the cost of repair of damage to any common parts he's responsible for, if caused by a defect in the structure of the building or the waterproof envelope. Cover is subject to the cost of repairs exceeding the Excess. And a separate Excess can be applied for each separate cause of loss or damage, and/or for each leaseholder/policyholder who shares responsibility for the common parts – in the event of a common parts claim.

<u>Has SoL fairly applied the Excess clauses to the claim?</u>

The warranty provides that an excess may be applied to: 'each separately identifiable cause of loss or damage for which a payment is made under the Policy by the Underwriter.'

The first point of disagreement between Mr P and SoL is in relation to how many causes of loss are relevant to the claim. Although 'cause' isn't defined in the warranty terms, understanding what 'cause' means, informs how many excesses ought reasonably to be applied to the claim, in line with the warranty terms and conditions. Mr P believes only one excess ought to be applied, on the basis there is a single cause of damage, namely the failure of the waterproofing envelope of the building (or put more simply, a lack of weather-tightness).

However, SoL has applied five excesses to the claim, resulting in a settlement offer of approximately £8,000. The five separately indemnifiable causes of loss it has identified include:

1. *<u>Cavity Trays:</u> Damage caused due to water ingress via open cavities in the external elevations. No cavity trays were fitted which had allowed water to pass freely from the point on entry at Apartment 16 into Apartment 6, via the open cavity of Apartment 10 (with repairs totaling £10,906.50 excluding VAT, in SoL's scope of works (SOW)).(Note: for ease of reference and for clarity all*

amounts referred to in this decision are exclusive of VAT, unless otherwise stated).

2. *Defective membranes to balconies: Further defects caused water to enter into apartments, being poorly installed / missing membranes on the balcony surfaces of Apartments 16, 10 and 6, located under the raised patio slabs (with repairs totaling £23,424.50 in SoL's SOW).*

3. *Rainwater discharge issues: The rainwater discharge system is poorly designed causing rainwater to back up on the patios of the apartments and enter the building via defects in the balcony membrane and surrounding upstands. The rainwater passes from Apartment 16's main roof and balcony via rainwater downpipes and onto the balcony of Apartment 10 below, then passes via the same method to the balcony of Apartment 6 below. All rainwater outlets that discharge the rainwater are undersized, blocked with shingle, debris, or sand deposits (with repairs totaling £4,108.50 in SoL's SOW).*

4. *Glazed balustrade: Apartment 16 has a glazed balustrade located on its balcony over a low parapet wall that is set in between coping stones located over the cavity structure in the parapet wall. The glass screen is sealed with defective and inadequate silicone and there is no damp-proof course as a secondary defense against water ingress. Further, the parapet wall does not appear to have any internal cavity tray and water ingress passes through the open cavities of the parapet wall via the open cavity wall of Apartment 10 below, and into the ceiling of Apartment 6 below (with repairs totaling £6,271.10 in SoL's SOW).*

5. *Render: The render elevations to the upper floor apartments are cracked, defective and show signs of water penetration, in a location that cavity trays should be installed. Due to the lack of any weep holes, SoL's engineer, A, suggests no cavity trays exist (with repairs totaling £9,625.00 in SoL's SOW).*

Our investigator concluded that the second, third and fourth causes of loss identified by A, all related to the balconies, and therefore comprised one identifiable cause of loss, namely, defects in the balconies leading to an ingress of water. Our investigator also concluded that the first and fifth causes of loss identified by A, all related to the external walls, and would comprise a second identifiable cause of loss, namely, defects in the external walls leading to an ingress of water.

The warranty covers physical damage to any portion of the building, caused by a defect in the design, workmanship, materials or components of the structure or the waterproofing elements of the Waterproof Envelope.

The two reports completed by A in January 2020 and June 2020, and the two reports completed by N in December 2018 and November 2019 provide details of the damage and defects, affecting the building. The content of these reports is particularly relevant when considering the question of how many separate causes of loss may have caused the damage.

In their first report, N observed from their inspection, that no cavity trays had been provided at various locations. They said that the cavity could be viewed from

Apartment 6 at the lowest level, up into the cavity above Apartment 10, carrying on up through to the balcony of Apartment 16. N also said it appeared that rainwater was hitting either the glass screen to Apartment 16's balcony, or the blockwork, and the French door on the junction with Apartment 10's balcony. From there the water ran down the blockwork on the inside face of the cavity and discharged into Apartment 6's ceiling.

N commented that the blockwork to Apartments 10 and 16 were provided with a rendered finish which was permeable so would allow for moisture ingress to pass to the inside fabric of the building. N also advised that a cavity tray should have been provided, which would ensure the moisture doesn't travel to the apartment below.

N said that the balcony arrangement to Apartment 16 was provided with glazed balustrading and coping stones, but it was highly likely that there was no cavity tray provided at the top of the parapet wall, which was allowing water to emanate down through the glazed balustrading and coping stones into the cavity. N concluded that the lack of cavity trays at various floor and parapet levels was allowing water to pass down through the building, eventually coming down into the inside fabric of the building, affecting Apartment 6 internally. N recommended that cavity trays were fitted at two different levels, at Apartment 16's level, along the top of the parapet wall and at Apartment 10's level, along the line of the threshold to the bi-fold doors.

The supplementary report issued by N in November 2019 added that the parapet walls and glass balustrading that hadn't been completed at lower ground/ground floor level, first floor level and the end gable to Apartments 10 and 16 are all contributing to the current problems. The other issue highlighted by the supplementary report was the cold bridging on the underside of the concrete slabs to the balconies, and the absence of insulation that was causing interstitial condensation. N said the only way to fully resolve the problem would be to remove the lower ground floor ceilings, at least in the front sections where to step in the building occurs, to provide additional insulation to the underside of the concrete slab.

On A's second inspection of the building, which was reported on in the June 2020 report, A concluded that major defects had been found and the cause of water ingress appeared to be from the balconies who's original design and water flow had been incorrectly calculated and catered for. The outlets on the balconies were considered two small for the area and were all obstructed. The balcony base structure was missing a membrane and was inadequately sealed leading to water ingress into the recess below. Incorrect downpipes, gutters and waterflow detail and design of various balconies meant they were clogged and had inadequate outfall, resulting in water ingress. A recommended, for Apartments 16, 10 and 6, that the balcony floor be replaced and sealed using a membrane type product, tanked to all upstands. A also recommended the downpipes be extended and replaced, and the outlets enlarged for faster water flow incorporating leaf guards and debris prevention measures.

A noted that Apartment 16 and Apartment 10's external render had cracked in many places and vegetation and green algae was observed to be growing from the gaps. A said that water penetration was evident with zero cavity weep holes, suggesting that cavity trays hadn't been installed. A recommended that the existing render system be removed and replaced and cavity trays be installed as required.

In summary, both A's and N's reports confirmed damage has occurred, caused by defects in two portions of the Housing Unit. The portions in question are the balconies and walls, which are allowing water ingress into the apartments below. So,

I think it's reasonable to conclude there are two separately identifiable causes of loss, i.e. defective balconies and defective walls. I'm therefore currently of the view that SoL's application of five excesses is unreasonable and results in an unfair application of the warranty terms to Mr P's claim.

The purpose of a building warranty is to protect a homebuyer against significant repair costs due to construction issues. SoL's approach of applying an excess to each and every defective component within a recognised portion of the building effectively avoids, or significantly limits, its liability to provide cover for the cost of repair of the damage. SoL's approach effectively relieves it of its liability for the very circumstances that the warranty is intended to cover, causing it to be essentially worthless. I'm currently not satisfied that SoL's approach is fair as it effectively moves the risk of having to pay significant sums to repair damage caused by construction defects, to homeowners, in circumstances where, such costs ought to be covered by the warranty.

In my view, and as previously communicated to SoL by my ombudsman colleagues in their final decisions in other cases similar to this, there is a more reasonable interpretation of the policy terms, which reflects the purpose of the warranty. And that is, where there are multiple defects in a recognisable portion of the building, which are contributing to a single type of damage, the defects ought to be grouped into one claim. Bearing in mind the purpose of the policy, I'm satisfied its only reasonable to consider the separately identifiable causes of loss to be the defective portions, rather that the individual components that make up those portions. So, in Mr P's case, the lack of cavity trays in the external walls and the damaged render ought to be grouped into one claim as they make a separately identifiable cause of damage, i.e. defective walls. And the defective waterproof membranes on the balconies, failed sealant around the glazed balustrade, and inadequate facilitation of rainwater discharge from the balconies, ought to be grouped into one claim as they make another separately identifiable cause of damage, i.e. defective balconies.

Having provisionally concluded that only two excesses (for each leaseholder) ought to be applied to the settlement offer, I've next gone on to consider the offer SoL made to Mr P and the other leaseholders, to indemnify them for the cost of repair of the damage covered by each claim.

<u>My role, the informality of this service, and considerations relevant to the available evidence</u>

Before I explain the decision I've provisionally reached, I think it helpful if I first clarify a few preliminary matters which are relevant to the way I've come to my decision. As the parties may be aware, the Financial Ombudsman Service is an informal dispute resolution service, established under Part XVI of the Financial Services and Markets Act 2000 as 'a scheme under which certain disputes may be resolved quickly and with minimum formality by an independent person'. As the independent person, it's my role to resolve this dispute by reference to what is, in my opinion, fair and reasonable in all the circumstances of the case.

SoL has had a significant period of time in which to assess and comment on the SOW provided by N on behalf of Mr P and the leaseholders (N's SoW). However, the comments it provided to our investigator on that scope of work could be described as 'broad brush'. The lack of detailed comment has made it more difficult for me to come to a provisional decision on this complaint that resolves the dispute between the parties. Given the time that's passed since the claim was first made and given the works that have been completed to mitigate further damage to the building, I don't

think requiring a further investigation and scope of works would be productive in resolving this complaint.

My role in resolving this complaint isn't to loss adjust the scopes of work that have been provided, however, I am responsible for resolving the dispute. I think that can most fairly be done by considering the elements of the scopes of work in dispute, taking account of the comments from their surveyors on the other's scope of works, and then giving my reasoned view as to why I think particular items should, or should not, be included in SoL's cash settlement.

Is SoL's offer to settle the common parts claim fair in the circumstances?

SoL's SOW separated the total cost of £65,202.72 (including VAT), into five separate claims. The only claim that exceeded the common parts excess of £20,044.48 was in relation to defective waterproof membranes on the balconies, which was costed at £28,109.40 (including VAT). After deducting the common parts, or 'collective' excess, SoL made Mr P and the leaseholders a Mr P, for the claim, of £8,064.92 (including VAT).

The leaseholders obtained two estimates for the repair works to the building and apartments. The first estimate was for £142,553 and the second was for £111,009.18. The leaseholders decided to proceed with the lower estimate, provided by the contractor who had carried out the repair works to other parts of the building in 2014. The leaseholders had the balcony repair works carried out the first half of 2021. The works relating to the installation of the cavity trays were due to be commissioned later in the year. The current status of the repair works hasn't currently been provided.

Mr P explained that the scope of works the leaseholders decided to proceed with was provided by contractors who'd made detailed visits to the property, whereas SoL's SOW was completed by a quantity surveyor who had never visited the site and had no detailed knowledge of the building or its location. Mr P's surveyor explained that he'd quantified the scope of works based on his previous experience of the site and working in the area for the last thirty years. He believed the scope he'd provided was required to resolve the current issues with the building. SoL's surveyor said their SOW was based on tender returns from previous repairs so were proven to be market rates.

Given the significant difference in costs between the two scopes of work, our investigator requested comments from the parties' surveyors to try and elicit what contributed to such a large divergence. After considering their responses, our investigator concluded that SoL only needed to cover the items included in its SOW, but the cost of those items needed to be based on the costs included in the lower quotation provided by Mr P and the leaseholders.

While that approach can be helpful in some cases, I don't think it serves to facilitate a fair and final resolution of this complaint, because in this case, the scopes of works aren't easily comparable. Also, there are some items that I think have been omitted from SoL's SOW, which should be included in the cash settlement.

In deciding whether SoL's settlement offer is fair and reasonable, I've considered the scopes of works, and the parties' surveyors' comments on the scopes of work. Having done so, I've identified a number of significant items of repair that have been omitted from SoL's SOW. Where the evidence is inconsistent, inconclusive or

contradictory, I make my decision based on the balance of probabilities – i.e. what I think more likely than not, is the case.

I've first considered the works included in the SOWs which relate to claim 1: installing cavity trays in the external walls and repairing the render. I've then gone on to consider the works included in the SOWs which relate to claim 2: balcony membrane, sealing of glass balustrade, installing cavity trays in parapet walls, defective discharge of water from the balconies. As the water ingress from the balconies is the larger cause of damage, I've also considered the inclusion of repair costs for internal repair and redecoration of the affected apartments under claim 2. Lastly, I've considered the inclusion of costs for provisional or contingency items.

Claim 1: Installation of cavity trays in external walls and repair of render

SoL's SOW allowed £10,906.50 for the works required to install cavity trays in the external walls. No comments have been made on this by either party, so I don't need to make a finding on this item of repair.

However, the parties haven't agreed on the costs that should fairly be included in SoL's cash settlement for the external render.

In A's June 2020 report, it was observed that the external render had cracked in many places and water penetration was evident, suggesting that no cavity trays had been installed. It was stated that the existing system would need to be removed and replaced, installing cavity trays as required.

In response to a question about this, SoL's loss adjuster advised our investigator that it wouldn't be possible to install cavity trays without opening the blockwork which would effectively remove the render in those areas.

Mr P's surveyor explained that the render allowed for in N's SOW was to completely re- render the panels as the leaseholders didn't want scars on the panels, which seemed reasonable given the value of the apartments. In N's report it was recorded that it would be difficult to patch repair the areas of render, following installation of cavity trays. N said that it would be more aesthetically pleasing to undertake a complete repair to the front face of the block work, to appease the otherwise aesthetic difference between the two types of render finish which would be clearly visible externally. In A's June 2020 report, they also commented in relation to Apartments 10 and 16 that the existing render system will need to be removed and replaced, suggesting that a 'patch repair' wouldn't provide an adequate repair.

However, SoL's surveyor commented that rendering the whole surface would amount to betterment. They've said that N's SOW allowed for 56sqm of render to be replaced, however, only 25sqm of render is required to be replaced, as the only area of render damaged by the defect is that on Apartment 10 where an additional cavity tray is being installed above the French doors.

I don't agree with SoL that rendering complete panels amounts to betterment. The purpose of the warranty is to provide an indemnity to the leaseholders for the damage covered. Having considered the comments included in both A's and N's reports regarding the repair of the render and having considered Mr P's surveyor's comments on this point, I don't consider that carrying out patch repairs to the render would provide that indemnity. I'm therefore of the view that SoL's cash settlement should include the cost of replacing the 56sqm of render, not just the 25sqm deemed reasonable by its surveyor.

In N's SOW the 56sqm of render was allocated a cost of £5,320. This constitutes 31sqm more than SoL's surveyor thought should be covered. So, I'm currently of the view that SoL's cash settlement, in relation to the render, should be increased by £2,945 (31/56 x £5,320). When the additional costs for the render, and VAT are added to the two amounts allocated by SOL to this claim, the total comes to approximately £28,000 which exceeds the common parts excess of £20,044.48.

Claim 2: Balcony membrane, glass balustrade, installation of cavity trays in parapet walls and defective discharge of rainwater from balconies.

There are seven elements of the SOWs that are in dispute, regarding the repairs to the balconies. I've addressed them under the following headings: 1. Preliminaries, 2. Installation of cavity trays in parapet walls, 3. Removal and refitting of the glazed balustrade, 4. ACO drainage channels, 5. Discharge of water from balconies, 6. Internal repairs and redecoration, and 7. Additional sums.

1. *Preliminaries*

SoL's surveyor said they felt the preliminaries (at £14,908.00) included in N's SOW to be approximately twice what would be expected on works of this scale, and they didn't consider a fully covered scaffold necessary to carry out the proposed works. In response, Mr P's surveyor explained that the fully covered scaffold was necessary due to the exposed location of the building.

N's SOW included £7,500 for covered scaffolding. Given that the location of the damaged portion of the property is sea-facing and given the contactor's obligation to protect the building whilst carrying out the repair works, I think allowing for covered scaffolding is fair in the circumstances. SoL haven't provided any other specific comment on the items included in the preliminaries.

2. *Installation of cavity trays in parapet walls*

The first point Mr P raised in response to our investigator's view was in relation to the parapet walls, cavity trays. Mr P believes the costs of installing cavity trays in the parapet walls, which is an industry recognised standard, recognised by Premier Guarantee, should be included in the settlement offer. His surveyor has explained that the alternative repair proposal put forward by A doesn't meet the industry recognised standard, and in this exposed location in which the building has been constructed, cavity trays are required to prevent water ingress into the internal fabric of the building.

Page three of the warranty terms and conditions, under the heading, 'The Quality of Your Housing Unit': says:

'The Developer has been issued with Premier Guarantee's Technical Manual. This sets out the functional requirements the Developer and/or the Builder has to comply with when constructing a Housing Unit'.

In the definition section of the warranty terms, 'Defect' is described as:

'A failure to comply with a functional requirement in the Technical Manual in respect of the construction of the Housing Unit. Failure to follow the performance standards or guidance supporting the functional requirements does not in itself amount to a

Defect, as it may be possible to achieve the recommended performance in other ways'.

A proposed an alternative repair, in SoL's SOW for the 2019 claim, to installing cavity trays in the parapet walls, as is permitted by the warranty term quoted above. A specified that the balcony waterproof membrane was to be terminated into the inner skin of the parapet wall and a lead cover flashing was to be installed over the top to protect the membrane.

However, Mr P's surveyor recommended the installation of cavity trays to achieve a lasting repair. He noted that repair had been agreed by SoL when settling the 2014 claim and had achieved a lasting repair.

The standards relevant to the installation of cavity trays are included in: 'Chapter 7: Superstructure (External)' of version 9 of the Premier Guarantee Technical Manual (which is relevant to the construction of this building). Chapter 7 says a cavity tray should be used, especially where the balcony above forms part of the roof below (see paragraph 7.1.16), which is the case with this building.

The affected area of the building in question is to the rear of the property, which has a series of stacked, but offset terraces serving the residential apartments. The terraces form the roofs of the apartments below. The terraces are guarded by a glazed balustrade system, secured in a steel shoe. As the balconies form part of the roof below in this building, paragraph 7.1.16 is particularly relevant to the question of whether it would be reasonable to include the cost of installing cavity trays in the parapet walls, in the cash settlement.

In addition, the location of the building is also a relevant consideration. In A's reports it is recorded that the development is located on an elevated sea facing clifftop. All of the main habitable areas are sea facing with external balconies which are partially enclosed by stone walling and glazed screens overlooking the beach.
Taking these factors into account, I'm currently of the view that it's reasonable to include the cost of the installation of cavity trays in the parapet walls, in the cash settlement.

3. <u>Removal and refitting of the glazed balustrade</u>

The second point Mr P made in response to our investigator's view was regarding the removal of the existing glass and stainless-steel balustrade. Mr P says that adherence by any contractor to the Construction (Design and Management) Regulations 2015 (CDM regulations) would require the balustrade to be removed while the works are carried out, and refitted. Mr P said that as it is a major cost item they are forced to pay because of regulation requirements, it should be included in the settlement offer. SoL disagrees.

I note that the schedule of works prepared for SoL, dated March 2014, did allow for the 'careful removal of the existing glass and stainless steel balustrade in existing channel set into the head of the wall and dressed coping stones; all to be set aside in a safe and secure store for re-use (page 3 section 3)'.

I've also considered the CDM Regulations when coming to my provisional conclusion on this element of the settlement offer. Regulation 19 requires all practical steps to be taken, where necessary to prevent danger to any person, to ensure that any new

or existing structure does not collapse if, due to the carrying out of construction work it may become unstable, or is in a temporary state or weakness or instability.

Paragraph 3.3.1 of SoL's SOW says:

'c. the Contractor shall remove the internal and external concrete parapet coping stones either side of the glass balustrade and carefully store for reinstatement'.

Paragraph 3.7 'Health & Safety' says:
'a. The Principal Contractor shall comply with all enactments, regulations, and working rules relating to the safety, health and welfare of work people and other persons authorised to be on site.'

SoL's SOW doesn't provide for the removal of the glazed balustrade. Instead, A had specified that the defect to the glazed balustrade could be repaired by leaving the glazing in place then applying waterproof membranes up to and under the stone copings.

SoL's surveyor commented that the removal and re-fitting of the glazed balustrade, along with a provisional sum to replace the glazing, increased the costs by £16,078.00.

Taking the above points into account in respect of the accepted safety requirements, I'm currently of the view that it's reasonable to include the costs relating to the removal and reinstatement of the glazed balustrade in the cash settlement.

4. ACO drainage channels

SoL's surveyor said that SoL's SOW was drawn up to remove the requirement for ACO drainage channels on the affected balconies. He said that would be achieved by using plastic pedestals on which the paving slabs are fitted, to allow rainwater to flow under the slabs and out of the outlets.

SoL's surveyor also explained that A had chosen to not use ACO drainage channels in SoL's SOW as they would bring water up on top of the paving slabs and closer to the underside of the door frame, potentially allowing water ingress under the door frame. A was also of the view that as the slabs would be laid on a sand and cement screed that would clog the drainage. They felt that N's SOW, in this respect, amounted to betterment.

However, Mr P's surveyor said the new ACO channels would ensure that the surface water was taken directly to the outlet, and not left sitting on the top of the balcony deck. He said that was good practice in that geographical area. Mr P's surveyor explained the arrangement proposed by A is currently in situ and is not working effectively due to its location and wind driven sand blocking the underside of the slabs.

SoL's surveyor said the installation of ACO drainage channels increased the proposed repair costs by £1,195.

Taking account of the evidence of Mr P's and SoL's experts, I'm currently of the view that the proposed repair recommended by Mr P's surveyor is, on balance, more reasonable. So, I'm intending to require SoL to cover the cost of installing ACO drainage channels in the cash settlement in order to deliver a lasting and effective repair.

5. Discharge of water from balconies

SoL's surveyor commented that costs for works to increase the drainage discharge from the balconies had been omitted from N's SOW. A specified that the drainage outlets needed to be increased in size to allow the greater flow of water off the balconies. Paragraph 6.3 of SoL's SOW appears to address this issue, allowing £1,450 for new, wider through-wall outlets, rainwater downpipes, and hopper system. N said that if it was agreed that this needed to be done, then an appropriate sum needed to be agreed. As SoL's surveyor has confirmed this work needs to be done, to complete an effective repair, then the related costs need to be included in the cash settlement. As A had made provision for £1,450 in SoL's SOW to cover this, I'm currently of the view that this amount should be included in SoL's cash settlement.

6. Internal repairs and redecoration

Mr P's surveyor said that the redecoration of the internal parts of the building, in the affected apartments, was due to the external defects and shouldn't be treated as a separate claim. However, SoL's surveyor said that the internal repairs and redecoration for the three affected apartments would need to be the subject of independent claims from each apartment owner, subject to their own excess. Those works were calculated to amount to £8,638.14.

Having considered the arguments on this point, I don't agree that the owners of the three affected apartments need to make additional claims, which would be subject to additional excesses. The damage to the inside of the apartments was caused directly by the defect which caused major damage to the common parts. So, I agree with Mr P's surveyor, that the internal repairs and redecoration should form part of this claim. I'm therefore currently of the view that the cash settlement should include the £8,638.14 allowed for in N's SOW for the internal repairs and redecoration.

7. Additional sums

I've next considered the additional sums highlighted by SoL's surveyor. These included contractors' overheads and profits (OH&P) in relation to the glazed balustrade and stone copings of £650, and a contractor's mark up (or profit) of £8,991.02. SoL's surveyor objected to these costs being included in N's SOW. However, Mr P's surveyor explained that the costs that have been put forward are a result of two separate pricing exercises and these are at the current market level. He said that in the current buoyant market, it is difficult to obtain quotes as all the contractors are busy and choosing which projects to price. Having considered the arguments on this point, I find Mr P's surveyor's comments persuasive, and I think it reasonable to include these costs in the cash settlement.

Provisional sums included in N's SOW

The SOW prepared for the leaseholders also included a contingency of £5,825, a provisional sum of £7,650.00 and a sum of £2,100 in case any existing cavity trays need to be removed. In arguing for these costs to be included in the cash settlement, Mr P's surveyor said that not allowing for any contingency or provisional sums is dangerous and not recognised as good industry practice. SoL's surveyor didn't dispute this and commented that contingency was to be negotiated and was not part of A's costings.

Given the approach SoL have taken in considering Mr P's claim, and given the ongoing damage that was being caused to the building by the defects, I think it was entirely reasonable for the leaseholders to proceed with the lower estimate, in carrying out repairs to the building. I also think it's reasonable to make provision for works necessary to repair the damage, which aren't able to be quantified at the outset (such as the removal of any existing cavity trays). However, I'm not able to make an award in relation to costs that remain unknown. So, with regard to the provisional sums referred to, once the works have been completed, Mr P should present the invoices to SoL, for an appropriate reimbursement to be made. If any final 'provisional' costs are disputed by SoL, then Mr P and the leaseholders can make a second complaint about that, and if necessary, refer it to this service.

How should the leaseholders' claims be moved forward?

While this decision has been made in respect of Mr P's complaint, and his proportion of legal responsibility for the common parts, SoL and the other leaseholders understand that my decision applies to the complaints of the other leaseholders, as they arise from the same claim decision.

For each of the two common parts claims, Mr P and the other leaseholders can only claim for their share of the repair costs. To determine each leaseholder's share of responsibility for the common parts, SoL will need to consider the lease agreement.

I understand from the submissions that the applicable excess for each of the leaseholders is, in respect of the apartment(s) they own. If so, and if responsibility for the common parts is shared equally among those 16 apartments, for the claim to succeed its value would need to exceed the collective excess of £20,044.48, that is, 16 x £1,252.78. As I've explained above, I'm satisfied that claim 1: walls, and claim 2: balconies both exceed the collective excess.

I think the leaseholders' decision to proceed with carrying out the repair works, in light of the ongoing and worsening damage to the building, and in view of the unreasonable approach SoL was taking in seeking to apply five excesses to the claim, was reasonable in the circumstances. Having considered the two SOWs and the parties' surveyors' comments on the SOWs as detailed above, I'm currently of the view that SoL's SOW has omitted significant repair costs in relation to the following:

- *Full repair of the render*
- *Preliminary items such as the covered scaffolding*
- *Removal and reinstatement of the glazed balustrade*
- *ACO drainage channels*
- *Internal repairs and decorations*
- *Additional sums*

In addition, I think the cost of remediating the discharge of water from the balconies also ought to be included in the cash settlement.

However, the provisional sums shouldn't be included in the cash settlement at this stage. Once the actual sums have been established, Mr P can present the invoices to SoL and at that time, that part of the claim can be settled.

I'm therefore intending to uphold this complaint and require SoL to settle the claim by paying the amount detailed in N's SOW, subject to the deductions and additions set out below.

I concluded by saying that SoL should pay Mr P and the leaseholders a settlement amount of £76,172.06.

I explained that some of the repairs have already been completed. So, where the leaseholders have already paid for repairs (either directly or via a service charge), I said SoL will need to pay 8% simple interest per annum on that part of the settlement, from the date the leaseholders paid for their share of the repairs, to the date that the awards in this final decision are paid.

I said that I had reached my provisional conclusion on what the fairest settlement is, based on the limited information I have available, which I think is fair and reasonable in the circumstances of this case.

I invited Mr P and SoL to provide any final comments or information they would like me to consider, before issuing my final decision on the complaint. Both parties provided additional submissions. The submissions provided by Mr P were made on behalf of himself, Mr and Mrs M and the other leaseholders whom he represents.

Mr P said that he and the other leaseholders have been pursuing a fair and equitable settlement of their claim for a period now approaching four years. He explained that having to deal with the costs of the necessary repairs during that period has led to various challenges for the leaseholders, and during that time costs for building repair and construction have increased dramatically. As a result, there are additional points he would like to make, but as he and the other leaseholders are worn down by the process, they are of a mind to accept the provisional decision without reservation. However, that would only be on the basis that SoL doesn't dispute or challenge any aspect of the provisional decision with a view to mitigating the proposed settlement amount.

SoL provided a detailed response, from the underwriters, in response to the provisional decision. However, rather than setting out their arguments in this background section, I will refer to them in the next part of this decision, when giving reasons for my final decision on this complaint.

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.

While SoL have made detailed submissions, on behalf of the underwriters, in response to the provisional decision, they haven't caused me to change my conclusions on this complaint, as I will explain. Therefore, while I understand the frustration expressed by Mr P, on behalf of Mr and Mrs M and the other leaseholders, as SoL's comments haven't mitigated the settlement amount, I consider it appropriate to proceed to now issue my final decision on this complaint.

SoL strongly disagreed with the findings reached in my provisional decision. They have commented that the provisional decision does not correctly take into account the law that applies to the interpretation of the excess provision in the policy. However, they have not explained which piece of legislation they think I have failed to consider. In any event, while I have considered all of the relevant information relating to this complaint, I am making my decision based on what I consider is fair and reasonable in the circumstances of this case.

And having done so, I remain of the view that the way SoL have applied the excess provision in the policy, to the leaseholders' claim, creates an unfair outcome for them.

SoL say they are concerned by my comments that by correctly applying policy excesses to a shared common part liability it has rendered this policy 'essentially worthless'. They say that they appreciate a policyholder may be unhappy about the excesses and limits that apply, because they make the settlement amount smaller and will not cover the total loss. However, SoL believes the policy terms clearly set out the excess provision and say that, as is obvious from the settlement sum offered, the payment of excesses doesn't render the policy 'worthless'.

I have considered SoL's comments, but I remain of the view that their application of five excesses to the claim is unfair. By applying an unreasonable number of excesses to the claim, they have reduced the settlement offer from a sum in excess of £140,000 to approximately £8,000. Clearly, that is not a 'worthless' sum, as it is £8,000. However, in my provisional decision, I referred to it being 'essentially worthless', which I maintain is the case, given that the indemnity it provides for repair works that it purports to cover, equates to approximately 5% of the cost to the leaseholders of those repairs.

SoL also considers that I have taken the wrong approach to the interpretation of the wording of the policy, by conflating '*item of claim*' with '*cause of loss or damage*' and by considering it in the context of section 3.2 of the policy which is not applicable, as the claim falls under section 3.3 of the policy. They point out that the excess wording in the policy expressly contemplates there may be more than one excess applied. SoL also say that I have mis-applied the case of *Zagora Management Property Limited & Others v Zurich Insurance Plc and others* [2019] EWHC 140 (TCC) ('the Zurich case') to the policy wording and circumstances relevant to the present case, which are quite different.

First, I have neither referred to '*item of claim*' nor the *Zurich* case in my provisional decision. SoL may be referring to comments made by my colleagues in the two previous final decisions that have been issued by this service, explaining why SoL's approach in applying multiple excesses is unfair and unreasonable. As per my ombudsman colleagues' previous decisions, and my provisional decision, our approach is based on what we consider to be fair and reasonable, not necessarily the Zurich case.

Second, I explained in the provisional decision that as the claim was made in years 3 to 10 of the policy, it is section 3.3 that applies, not section 3.2. While I did refer to the *Premier Guarantee Technical Manual* when commenting on SoL's surveyor's views regarding the installation of cavity trays, that was intended to be indicative of the standards applicable at the time of construction. It was not intended to imply that the claim ought to have been considered under section 3.2.

Third, I did not say in the provisional decision that only one excess could apply. I explained that a reasonable application of the excess clause would, in this case, lead to two excesses being applied to the claim.

SoL says that as the excess provision refers to a '*separately identifiable cause'* these '*clear and concise words*' give rise to an excess for each separately identifiable defect that materially contributes to the need for the remedial work. And on the basis of the independent expert technical evidence, SoL maintains there are five separately identifiable proximate causes of loss, so the application of five excesses under the policy to the claim is therefore fair and reasonable.

I gave detailed reasons in the provisional decision for why I disagree with SoL's submissions on this point. A repetition of their original arguments has not caused me to come to a

different conclusion. As I explained in the provisional decision, both the leaseholders' and SoL's surveyors confirmed that damage has occurred, caused by defects in two portions of the Housing Unit. The portions in question are the balconies and walls, which are allowing water ingress into the apartments below. So, I think it is reasonable to conclude there are two separately identifiable causes of loss, i.e. defective balconies and defective walls. Therefore, only two excesses should be applied to the claim.

I went on to say that in my view, and as previously communicated to SoL by my ombudsman colleagues in their final decisions in other cases similar to this, there is a more reasonable interpretation of the policy terms, which reflects the purpose of the warranty. And that is, where there are multiple defects in a recognisable portion of the building, which are contributing to a single type of damage, the defects ought to be grouped into one claim.

Bearing in mind the purpose of the policy, I am satisfied it is only reasonable to consider the separately identifiable causes of loss to be the defective portions, rather that the individual components that make up those portions. So, in this case, the lack of cavity trays in the external walls and the damaged render ought to be grouped into one claim as they make a separately identifiable cause of damage, i.e. defective walls. And the defective waterproof membranes on the balconies, failed sealant around the glazed balustrade, and inadequate facilitation of rainwater discharge from the balconies, ought to be grouped into one claim as they make another separately identifiable cause of damage, i.e. defective balconies.

As I remain of the view that only two excesses (for each leaseholder) ought to be applied to the settlement offer, I have next gone on to consider SoL's comments in relation to my provisional conclusions on the offer SoL made to Mr and Mrs M and the other leaseholders, to indemnify them for the cost of repair of the damage covered by each claim.

SoL have provided a seven-page letter from their surveyors in response to my findings regarding the settlement offer which I have also considered.

I note that this claim has been ongoing for approximately four years, so there has been ample opportunity for SoL to obtain advice from their experts and make a fair offer to settle this claim, before now. Having reviewed the submissions from SoL's surveyors, A, I don't consider they provide any further clarity on the points in dispute. Rather, A has provided comments, based on their interpretation of the policy terms, which support SoL's attempt to apply five excesses to this claim. But I've already explained why I do not agree with SoL's arguments on the application of the excess clause. And while A has gone into some detail to explain why they support SoL's view on the excess clause, they have not persuaded me to come to a different conclusion on this key issue.

I also disagree with A's assertion that I am seeking to re-write the policy terms and I disagree with their interpretation of what they consider to be the '*ordinary meaning of the contractual terms*'. I would also point out that I am not the first to disagree with how the excess clause has been interpreted in this policy. As A will be aware, from their review of the reports relating to the 2014 claim, in that case the surveyor, loss adjuster and the same underwriter also took a different view and applied only one excess to a similar claim.

A has made a number of observations on the preliminary conclusions I reached in my provisional decision regarding the render, the preliminary costs, the cavity trays, the glazed balustrade, and the ACO drainage channels.

I have considered A's detailed comments on these points, however, I would re-iterate what I said in my provisional decision, that my role is not to loss-adjust the scopes of works provided. Rather, as I explained in my provisional decision, given the number of elements in the leaseholders' scope of works that I consider SoL haven't fairly accounted for in its scope

of works, and taking account of the approach SoL chose to follow in seeking to apply five excesses to the claim, I remain of the view that it was entirely reasonable for the leaseholders to proceed with the lower estimate, in carrying out repairs to the building.

I also remain of the view that it is reasonable to make provision for works necessary to repair the damage, which are not able to be quantified at the outset (such as the removal of any existing cavity trays). However, I am not able to make an award in relation to costs that remain unknown. So, with regard to the provisional sums referred to, once the works have been completed, Mr P, on behalf Mr and Mrs M should present the invoices to SoL, for an appropriate reimbursement to be made. If any final 'provisional' costs are disputed by SoL, then Mr and Mrs M and the leaseholders can make a second complaint about that, and if necessary, refer it to this service.

I understand there will remain some elements of disagreement between SoL's surveyors and the leaseholders' surveyors, as to the detail of the works that are required to repair the damage covered by the warranty. But, given the time that has passed since the claim was made, and given the unreasonable approach SoL have taken to settling the claim, I remain of the view that a fair and reasonable way to resolve this complaint is to require SoL to settle the claim by paying Mr and Mrs M and the other leaseholders, the total amount detailed in the leaseholders' surveyors (N's) scope of works, subject to the deductions and additions set out below.

So, SoL should pay Mr and Mrs M and each of the leaseholders their proportionate share of the settlement amount of £76,172.06 calculated as follows:

Leaseholders' scope of works	£111,009.18
Less the provisional costs allowed for in N's SOW	-£15,575.00
Plus, the costs included in SoL's SOW for fixing the discharge of water elements of the balconies	£1,450.00
Plus, VAT (on the total amount)	£19,376.84
Less two excesses	-£40,088.96
Total:	**£76,172.06**

Some of the repairs have already been completed. Where the leaseholders have already paid for repairs (either directly or via a service charge), SoL will need to pay 8% simple interest per annum on that part of the settlement, from the date the leaseholders paid for their share of the repairs to the date of settlement.

This decision has been made in respect of Mr and Mrs M's complaint, and their proportion of legal responsibility for the common parts. For each of the two common parts claims, Mr and Mrs M and the other leaseholders can only claim for their share of the repair costs. To determine each leaseholder's share of the repair costs ('their proportionate share'), SoL will need to consider the relevant lease agreements. I have issued decisions in relation to the other leaseholders' complaints, regarding their proportion of legal responsibility for the common parts, on the same date as this decision, as they arise from the same claim decision.

Putting things right

I uphold this complaint and require Society of Lloyd's to pay Mr and Mrs M:

- their proportionate share of £76,172.06 (including VAT) in settlement of the claims; and

- 8% simple interest per annum on any parts of the settlement where they have

already paid for the repairs (either directly or via a service charge), from the date of that payment, to the date of payment of the awards detailed in this final decision.

(NB: If Society of Lloyd's considers it's required by HM Revenue & Customs to deduct income tax from any interest paid, they should tell Mr and Mrs M how much they've taken off. If requested, Society of Lloyd's should also give them a certificate showing the amount deducted, so they can reclaim it from HM Revenue & Customs if appropriate).

My final decision

My final decision is that I uphold this complaint and require Society of Lloyd's to pay the awards detailed above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr M and Mrs M to accept or reject my decision before 20 April 2023.

Carolyn Harwood
Ombudsman