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| Crest |  | FIRST-TIER TRIBUNAL**PROPERTY CHAMBER** **(RESIDENTIAL PROPERTY)** |
| **Case reference** | **:** | **LON/00AT/LSC/2021/0084** |
| **Property** | **:** | **Apartment 17, Provenance House, 8 Kew Bridge Road, Brentford TW8 0HS** |
| **Applicant** | **:** | **Mr Charles James Sehmer and Mrs Karin Margaret Sehmer** |
| **Representative** | **:** | **Mr James Richardson** (Kew Bridge Owners Association) |
| **Respondent** | **:** | **St George West London Limited** |
| **Representative** | **:** | **Mr Carl Fain (Counsel)**Instructed by Forsters (Mr Ryan Didcock) |
| **Type of application** | **:** | **For the determination of the liability to pay service charges under section 27A of the Landlord and Tenant Act 1985** |
| **Tribunal members** | **:** | **Deputy Regional Judge N Carr****Ms Sarah Phillips MRICS** |
| **Venue** | **:** | **10 Alfred Place, London WC1E 7LR** |
| **Date of hearing** | **:** | **4 April 2023** |
| **Date of decision** | **:** | **11 May 2023** |

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| **DECISION AND REASONS** |

**Decisions of the Tribunal**

1. The insurance premiums incurred in the years 2017 – 2021 are reasonable in amount and are payable.
2. The Respondent’s costs in and of the application to strike out and associated application for permission to appeal are not to be regarded as relevant costs in determining the amount of the Applicants’ service charge.

**The application**

1. The Applicant seeks a determination pursuant to s.27A of the Landlord and Tenant Act 1985 (“the 1985 Act”) as to the amount of service charges payable by the Applicant in respect of the service charge years 2017 – 2021 in respect of insurance premiums.
2. There has been an unfortunate administrative history in this case which is not the fault of either party. The Application was made in December 2020. Directions were initially given on 15 April 2021.
3. In March 2022, the Tribunal (Mr Holdsworth FRICS MCIArb and Mr Roberts DipArch RIBA) made a preliminary issue determination on the Respondent’s application that, there being no specific assertion of set-off, the Tribunal should refuse jurisdiction. The Tribunal refused that application on the following grounds: “*The tribunal identifies the issue in dispute as the reasonableness of the charges made for building insurance and public liability insurance premiums during the relevant years. The tribunal regularly determines such issues. It is a core role of the tribunal to decide the reasonableness of service charges and it confirms jurisdiction in this matter. The jurisdictional issue of set- off raised by counsel does not impair the powers of tribunal to determine reasonableness of building insurance and public liability premiums*”.
4. The Respondent sought permission to appeal to the Upper Tribunal, who refused permission on 4 May 2022. New directions were given by the Tribunal on 26 July 2022 on paper, and then again on 30 August 2022 at a case management hearing, which were extended at the request of the Applicant on 23 January 2023. As recently as 2 March 2023, the Applicants were given permission to rely on expert evidence.
5. The core of the dispute is as set out in Judge Dutton’s directions of 30 August 2022. The Applicants challenge the payability and reasonableness of insurance premiums for the years ending 2017 to 2021. They say that the premiums are excessive because of a poor claims history, largely because of leaks in some of the apartments that make up the development. They do not make any claim for set off instead seeking to argue that the premiums have not been reasonably incurred and are excessive under the provisions of s.19 Landlord and Tenant Act 1985 (‘the Act’).
6. At the hearing on 4 April 2023, the Applicants were represented by Mr James Richardson, who (we were told) is an honorary KC by reference to his work establishing Criminal Law Week, but is not a practising barrister. Mr and Mrs Sehmer also attended, as did Mr Gregoir Chikaher to give evidence on their behalf.
7. Mr Carl Fain of counsel represented the Respondent, and was attended by his instructing solicitor Mr Ryan Didcott. Messrs Ian Kennett and Robert Elliott attended to give evidence for the Respondent, and Mr Ben Harrington attended to observe. There were also present two other members of the public, who observed parts of the hearing.
8. In advance of the hearing we were provided with a bundle of 1450 pages, in addition to skeleton arguments from both parties’ representatives, and an authorities bundle of an additional 180 pages. We have read those documents, and absence from the below of reference to a particular document reflects only its relevance to the issues we must determine. References to the bundle appear in bold square brackets **[…]**.

**BACKGROUND**

**The Lease**

1. The development in question is at 8 Kew Bridge Road, on the north side of the Thames at Kew Bridge, Brentford. The Respondent is shown as the freeholder on the freehold title (registered 7 February 2008). It is said, however, that St George PLC is in fact the beneficial owner of the whole of the freehold, and the property is held on trust for it by the Respondent **[221]**. The Respondent is, according to Companies House, a dormant company. St George PLC owns 75% of its shares.
2. In or around July 2011 the Respondent, apparently acting as agent for St George PLC, entered into a contract for the development of the site at 8 Kew Bridge Road **[220]**. It comprises 6 buildings; Strand House (Block A), Belvedere House (Block B), Rothschild House (Block C1), Provenance House (Block C2), and Quayside House (Block D), and a two-storey commercial building used as a pub (One over the Ait). The construction of the first two of these was completed in 2012-2013. Provenance House was completed in 2015. There is no information on when Rothschild House was completed, but Quayside House was certainly completed later in 2016. These are the ‘Blocks’ for the purpose of the lease **[184]**.
3. On 16 April 2015, the Applicants and Respondent entered into a lease of what was then known as ‘Plot 195 Kew Bridge, Block C2’ for a period of 999 years from 1 June 2011 at a premium of £1,909,950.00, and for an annual rent of £400, doubling each 20th anniversary of the commencement date for the first 100 years.
4. By the third schedule of the lease, the following is the Applicants’ demise:

*ALL THAT flat specified in Paragraph 4 of the Prescribed Clauses and shown edged red on the Plan forming part of the Development TOGETHER WITH (for the purpose of obligation as well as grant):*

*1. the doors and windows thereof but not the external decorative surfaces thereof*

*2. the ceilings up to the underside of the joists slabs or beams to which the same are affixed*

*3. the floors down to the upper side of the joists slabs or beams supporting the same*

*4. the internal plaster face of all external and structural walls*

*5. the Demised Premises’ half of the non main structural wall(s) (severed medially) which divide the same from any adjoining Properties or from the Common Parts*

*6. Service Installations used solely for the purpose of the Demised Premises*

*…*

*EXCEPTING AND RESERVING from the demise any part of the Development comprised within the Maintained Property.*

1. Service Installations are defined (for present purposes) in the Definitions (paragraph 1) as “*sewers drains channels pipes watercourses gutters mains wires cables conduits aerials and any other conducting media tanks and apparatus and other services and for the disposal of foul and surface water or any of them…*” **[186]**.
2. The Maintained Property is defined in Part IV of the Second Schedule. It comprises:

*1. The Main Structure*

*2. The Common Parts*

*…*

*4. All service installations not used solely for the purpose of individual Properties*

*…*

*6. All other parts of the Block which are from time to time intended to form part of the Maintained Property*

*…*

1. The Main Structure is, by Part I of the second schedule (so far as relevant):

*All main structural parts of the Block and in particular (but without prejudice to the generality of the foregoing):-*

*…*

*3. The main walls and other main structural parts of the Block and for the avoidance of doubt including internal structural walls within the Demised Premises*

*…*

*EXCEPTING AND RESERVING from the Main Structure the following parts comprised within the Properties namely the glass in the windows the interior joinery plaster work tiling and other internal surfaces of the walls the floors down to the upper side of the joists slabs or beams supporting the same and the ceilings up to the underside of the joists slabs or beams to which the same are affixed the exterior doors and the Service Installations which exclusively serve any of the Properties*

1. By Clause 3 and paragraph 10 of part I of the eighth schedule the Applicants have the obligation to:

*repair and keep the Demised Premises and all Service Installations exclusively serving the same and every part thereof and all the landlord’s fixtures and fittings therein and all additions thereto in good and substantial repair order and condition at all times during the said term including the renewal and replacement forthwith of all worn or damaged parts but so that the Tenant shall not be liable for any damage which may be caused by the risks covered by the insurance referred to in the Sixth Schedule hereto (unless such insurance shall be wholly or partly vitiated by any act or default of the Tenant or any member of the family employee visitor of the Tenant or other such occupiers) for any work for which the Landlord may be expressly liable under the covenants on the part of the Landlord herein contained.*

1. By clause 4 and paragraph 5 of the ninth schedule, the Respondent has the following material obligations:

“*To carry out the works and do the acts and things set out in the Sixth Schedule hereto as appropriate PROVIDED THAT:*

*5.1 the Landlord shall not be liable for any breach of such obligations where the breach arises from:*

*…*

*(vi) any act omission or negligence of any person undertaking such obligations on behalf of the Landlord; or*

*(vii) any other cause beyond the reasonable control of the Landlord*

*PROVIDED THAT the Landlord shall take all reasonably practical steps to restore performance of its obligations or provide a reasonable suitable alternative (where necessary) as soon as reasonably practicable*

*5.2 The Landlord shall in no way be held responsible for any damage caused by any want of repair to the Development or defect therein for which the Landlord is liable hereunder unless and until notice in writing for any such want of repair or defect has been given to the Landlord and the Landlord has failed to make good or remedy such want of repair or defect within a reasonable time of such notice*

*5.3 Nothing in this covenant contained shall prejudice the Landlord’s right to recover from the Tenant or any other person the amount or value of any loss or damage suffered by or caused to the Landlord or the Development by the negligence or other wrongful act or default of the Tenant or the Tenant’s licensee or such person*

*…*”

1. Part I of the sixth schedule obliges the Landlord to carry out (although in the lease it is framed as the Tenant’s obligation to pay for) the following for the Internal Block:

*1. Inspecting maintaining resurfacing rebuilding repainting renewing replacing cleaning redecorating or otherwise treating the Common Parts and all other parts of the Maintained Property forming part of the Block which are properly attributable to this Part I so often as in the opinion of the Landlord it shall be reasonably necessary and in accordance with the covenants herein contained*

*2. Repairing maintaining inspecting and as necessary reinstating or renewing the Service Installations forming part of the Common Parts*

*…*

*6. Inspecting maintaining renting renewing reinstating replacing and insuring all or any of the electro/mechanical apparatus and such other equipment relating to the supply of domestic cold water and sewerage services by way of contract or otherwise to the Block as the Landlord may from time to time consider reasonably necessary or desirable for the carrying out of the acts and things mentioned in this Schedule*

*…*

*11. Providing such further services as may from time to time be consistent with the principles of good estate management and/or preserving the amenities of the private residential parts of the Block.*

1. Part II of the sixth schedule obliges the Landlord to carry out (although it is framed as the Tenant’s obligation to pay for) the following for the Block Structure/Estate (the latter remaining undefined in the lease, but presumably meant to refer to the Development):

*1. Inspecting repairing maintaining resurfacing rebuilding repainting renewing replacing cleaning decorating and otherwise treating the Main Structure and all other parts of the Maintained Property forming part of the Block and Communal Areas and Facilities which are properly attributable to this Part II so often as in the opinion of the Landlord it shall be reasonably necessary and in accordance with the covenants herein contained*

*2. Insuring and keeping insured the Block and the Maintained Property and the Communal Areas and Facilities without prejudice to the generality of the foregoing against all comprehensive risks applicable to a reasonably normal insurance policy covering a property similar to the Block and such other risks as the Landlord shall reasonably decide in the full reinstatement value and causing all money received by virtue of such insurance (subject to obtaining all necessary consents and approvals and subject always to matters beyond the control of the Landlord) to be laid out as soon as reasonably possible in rebuilding and reinstating that part or those parts of the Block in respect of which it is received PROVIDED ALWAYS THAT:*

*2.1 This provision is subject as mentioned in paragraph 4 of the Seventh Schedule*

*2.2 The Landlord shall determine the company or office with which the insurance is placed and (being a reputable company) the sum insured and the risks covered*

*2.3 The policy shall be subject to such excesses exclusions and conditions as the insurers shall require (but not otherwise)*

*2.4 The insured amount shall include provision for the cost of demolition and clearance of buildings reinstatement and architects and surveyors and statutory fees*

*2.5 Without prejudice to the obligation of the Landlord as to the extent of the risk and reinstatement value as aforesaid any excesses under the policy and any deficiency in meeting the cost of rebuilding repair or reinstatement shall be treated as a further item of expense under this schedule recoverable from the tenant accordingly*

*2.6 The interest of the Tenant for the time being of the Demised Premises and his mortgagees shall be noted on such policy whether generally or specifically*

 *…*

*6. To Pay for the carrying out of any other works, services facilities which the Landlord from time to time properly and reasonably considers desirable to the benefit of the Development*

*…*

1. Part IV of the sixth schedule sets out the Maintenance Expenses, for which the Applicant is liable under the seventh schedule. The Maintenance Expenses include:

*1. All sums spent in and incidental to the observance performance by or on behalf of the Landlord of the covenants contained in Parts I II and III of this Sixth Schedule and any of the matters referred to in Clauses 2 – 15 of this Part IV of the Sixth Schedule which are relevant or attributable thereto*

*2. Insuring any risks for which the Landlord may be liable as an employer of persons working or engaged in business on the Maintained Property or as the owner of the Maintained Property or any part thereof in such amount as the Landlord shall think fit*

*…*

*18. All other expenses (if any) incurred by the Landlord in and about the maintenance and proper and convenient management and running of the Block including in particular but without prejudice to the generality of the foregoing any interest paid on any money borrowed by the Landlord to defray any costs expenses or liabilities incurred by it and specified in this Schedule all Bank charges properly incurred any costs imposed on the Landlord in accordance with Clause 4 of the Seventh Schedule any legal or other costs bona fide incurred by the Landlord and otherwise not recovered in taking or defending proceedings(including arbitration) arising out of any lease of any part of the Block or any claim by or against any tenant or tenant thereof or by any third party against the Landlord as owner Tenant or occupier of any part of the Block*

1. By paragraph 17 of part I of the eighth schedule, the lessees have the obligation:

*Not to do or permit or suffer any act or omission which may render any increased or extra premium payable for the insurance of the Development or any part thereof or which may make void or voidable any such insurance or the insurance of the premises adjoining the Development and so far as the Tenant is liable hereunder to comply in all respects with the reasonable requirements of the insurers with whom the Development or any part therefore may for the time being be insured.*

And by paragraph 18:

*Forthwith to make good to the Landlord all loss or damage sustained by the Landlord consequent upon any breach of the last mentioned provisions.*

**The Dispute**

1. In short, the relevant background to the dispute is encapsulated in the Particulars of Claim filed in the High Court on or around 9 November 2022 **[220]**. In carrying out the construction and installation works in the development, it is alleged (though it has not yet been decided) that St George PLC’s contractors (Ardmore Construction Limited – henceforth ‘Ardmore’) failed to install two 24mm rubber washers inside each service valve union nut so that no, or alternatively only temporary, and in any event an insufficient seal was formed within the sealed shower mixers in some or all of the apartments in Strand House and Belvedere House. Over time water began to leak from the mixers. The first such leak appears to have been discovered in or around 22 March 2016 **[224]**. Insurance claims were made, and the subrogated claim being pursued by one of the insurers in the High Court against Ardmore amounts to almost £2.7 million. That dispute has yet to come to trial **[46 ¶23 - 25]**. There is an intimation that another insurer may be looking to pursue a claim **[131]**.
2. The increased cost of the insurance premiums, which the Applicants ascribe entirely to the claims history brought about by the alleged breach of contract/negligence of St George PLC’s contractors, form no part of that claim as they do not form a loss to St George PLC or the relevant insurers.
3. The Respondent’s calculations regarding the value of the escape of water claims with the various insurers to the date of the hearing in 2023 show that the total value of such claims on the policies has been £4,840,097.99, of which £3,751,727.68 relates to the shower valves **[42 Table B]**.
4. There are various matters that are not disputed (or indeed agreed) between the parties:
* The lease requires the Respondent to insure against comprehensive risks at the Respondent’s discretion with a reputable insurer (Part II of schedule 6 of the lease) **[199]**;
* Schedule 8 of the lease requires the lessees to pay a proportion of that insurance cost calculated in accordance with schedule 7 of the lease **[203]**;
* No dispute is raised by the Applicants over apportionment;
* No argument is made that the insurance policy insures against a risk it ought not to **[64 ¶17]**;
* No dispute is raised that the various insurers over the years in question are or have been reputable;
* No issue is taken that the insurance obtained is a portfolio policy and that is likely to have led to more competitive premiums due to St George PLC’s ‘purchasing power’ **[136 ¶9]**;
* No argument is made that the insurance could have been obtained more cheaply or that it was not competitively marketed to alternative insurers;
* No dispute is raised that the Respondent engaged Marsh Limited to ensure that the market was tested before the ‘best value’ policy was placed **[131 ¶6]** and **[128 ¶26]**;
* There is no dispute that the policies exhibited in the bundle insure for the benefit of the Respondent **[237 – 907]**;
* No dispute is raised that the Respondent has in fact incurred the sums for insurance recharged to the leaseholders **[64 ¶17]**;
* The Applicants accept that the insurer was entitled to increase the sum for the premium to reflect the claims history **[64 ¶17]**;
* The Respondents accept that the claims history in respect of this development is unusual and unfortunate – there have been in total 84 claims on the insurance since substantial completion of the development in 2015/2016 until year end 2022, at least 54 of which have been in relation to escape of water attributable to the installation of the shower mixers **[122 – 123]**;
* The Respondent does not deny that it is now its insurers’ belief and understanding, after carrying out investigations over the period2016to in or around 2019, that the incidents of escape of water are due to the breach of contract and/or negligence of the constructors of the development, this resulting in the High Court claim and a potential second action **[131 ¶7 and 8]**, though it purports to reserve its own position and disavows knowledge of or participation in those proceedings **[*ibid* and 44 ¶13]**;
* The Applicants do not assert that the issues caused by the escape of water were not such as to engage the Respondent’s repairing covenants in the lease. In fact, the opposite is true: the Applicants deny that the service installations involved (the shower mixers) were the responsibility of the leaseholders, on grounds that they were latent defects caused by the negligence of the Respondent and its contractors. They therefore deny that, had the Respondent not made the insurance claims and carried out the investigations and repairs required, the individual leaseholders would have been responsible under their leases **[62 ¶5 and 6]**;
* In 2019, Aviva and the Respondent or St George PLC jointly installed an early detection system in order to try to identify any such ongoing issue with the escape of water before it caused substantial damage (partly at the cost of St George PLC and partly funded by Aviva’s contribution from its risk management bursary fund). If the early detections system had not been installed, the insurance would have been offered on much worse terms including as to the excess to be paid on each claim (which would have been £250,000 instead of the standard £500) **[17 ¶7]** **[29 ¶20] [46 ¶28]** and **[128 ¶25]**.
* The Applicants admit they have been unable to demonstrate that cheaper insurance could have been obtained for the development, with or without its particular claims history **[64 ¶17]**;
* The Applicants do not deny the different characteristics of the development in Dickens Yard that they use as a comparator, identified at **[141 ¶14]**. What they take issue with is the amount of difference that would make to the insurance premium;
* The Applicants have not brought any cross-claim by way of set off to the sums incurred for the insurance **[64 ¶17]**;
* The Applicants will not be compensated as a consequence of the High Court claim, and it is of no benefit to them except perhaps it may result in a future reduction of premiums **[29 ¶17]**.
1. We did not permit Mr Richardson to pursue other matters raised orally for the first time at the hearing. We reminded him that the parties had been in receipt of the Directions for some time, and even if the granular detail of the claims history had been available only since 27 February 2023, that had been sufficient time for any application to be made to include new bases of the application rather than expecting a witness to be able to address any such issues unforewarned. These included:
* A collateral attack on the decision of the loss adjusters of the various insurers, who it was said should never have permitted any claim on the insurance in respect of the relevant escape of water events, as those concerned were, Mr Richardson submitted, excluded claims under the policies in question;
* a further attack on inclusion of sums for insurance of a now-removed pier (which had been constructed as required by the local authority who granted planning permission);
* an attack on the sufficiency of the as-built flood defences from local overground drainage overflow, and what was said to be inadequate remedy even after the insurance paid out for works of defence against such events.
1. Much of the Applicants’ case turns on Mr Richardson’s interpretation of caselaw. The only real factual dispute we must consider is the comparability of the development with one at Dickens Yard in Ealing, of which St George PLC is also the developer.
2. The Applicants’ position is quite simply that it cannot be reasonable that they, as the lessees, have to foot the bill for the increased insurance premiums in consequence of the claims history, insofar as those insurance claims were made in regards the escape of water claims **[17 ¶8]** and **[18 ¶11]**. They say that, to the extent of the ascertainable increase, those insurance sums are not reasonably incurred **[28 ¶11]**. The Respondent (as agent for St George PLC or on its own account) is liable for selling to them or to others apartments with inherent defects, which defects cannot be reasonably regarded as within the leaseholders’ maintenance obligations under the lease **[17 ¶5]**. The cost of fixing the inherent defect should have fallen on the Respondent or St George PLC from its own pocket, not the insurance **[17 ¶5]** and **[28 ¶15 - 16]**, or have been funded by timeously bringing claims against the relevant contractors, or under some other insurance policy which the Applicants believe most developers hold **[64 ¶14]**.
3. They assert that the fact that St George PLC put its hand in its own pocket for the early leak detection system is proof-positive of its admission of responsibility for the negligent plumbing installations **[30 ¶20]**. Mr Richardson argues that the provisions of paragraphs 17 and 18 of part I of the Eighth Schedule must apply equally to the Landlord – what is sauce for the goose is sauce for the gander. To hold otherwise would be to penalise the Applicants for doing nothing wrong – indeed, their own shower mixer has not leaked. They are, in effect, paying for the Respondent’s wrongdoing (by way of its contractors) because they now have to pay higher premiums **[30 ¶21]**.
4. Fundamentally, the question is this: how can it be fair that they have to pay, if St George (whether as PLC or the Respondent) sold them a pup?
5. The sums in question are set out by the Applicants in a table found at **[33 ¶25]**. The Applicants say that the unreasonable proportion of their apportioned insurance premium is as follows in each of the years in question, had 8 Kew Bridge Road’s premiums gone up by the same percentage increases as those in Dickens Yard, which they say is the appropriate comparator development:

2017 £220

2018 £286

2019 £646

2020 £940

2021 £1,085

 \_\_\_\_\_\_\_\_

Total: **£3,177**

**The Law**

1. Section 19 of the Act, so far as applicable, places a statutory limitation on recoverability of service charges:

**19 Limitation of service charges: reasonableness**

* + - 1. Relevant costs shall be taken into account in determining the amount of a service charge payable for a period –

(a) only to the extent that they are reasonably incurred, and

(b) where they are incurred on the provision of services… only if the services… are of a reasonable standard

and the amount payable shall be limited accordingly.

1. Section 27A of the Act confers jurisdiction on the Tribunal to determine whether a service charge is payable, and if so by whom, to whom, in what amount, when and how.
2. As identified above, no issue is taken with the standard of the insurance policies with which we are concerned, and so our determination is confined to a challenge only to 19(1)(a).
3. The parties are at odds as to the approach the Tribunal is to take to the question of the reasonableness of the insurance charges concerned. After much debate, Mr Richardson conceded that the test for global ‘reasonableness’ identified in *Cos Services Limited v Nicholson* [2018] L. & T.R. 5 (citing *Forcelux Limited v Sweetman* [2001] 2 E.G.L.R. 173 and *Waaler v Hounslow LBC* [2017] EWCA Civ 45) is the correct one, in two stages, i.e.:
	1. has the landlord acted ‘rationally’ (in the sense that the contract sustains its course of action); and
	2. even if the course taken is a rational one, is the sum being charged a reasonable charge in all of the circumstances (both in process, and outcome)?
4. Mr Richardson’s acceptance of that two-stage test was, however, made the subject of a number of provisos, which we are required to address before we can leave the question of the applicable test.
5. First, he says that it presents the question the wrong way around. It is his submission that we should first look at the outcome, and if the outcome is unfair then it is unreasonable *per se*, regardless of whether the choice made was contractually open to the Respondent.
6. In support of that submission Mr Richardson points to the following caselaw and passages (which we have cited in full so as not to omit the context in which the comments were made).
7. *Avon Ground Rents v Cowley & ors* [2019] EWCA Civ 1827 (a case involving on account demands engaging section 19(2) of the Act):

“*33. As to what is “reasonable”, that is for the relevant tribunal to determine… It is an exercise which the tribunal is well-equipped to perform, assessing the relevant facts in each individual case and arriving at a determination based on the evidence. The question as to whether the possibility of third party payments can be taken into account in deciding what might be reasonably demanded on account will depend on the facts of an individual case. If certainty were to be required this would constrain the discretion of the tribunal when in reality what is required is a test which allows account to be taken of all relevant matters and to those matters will be attributed the appropriate weight. This is particularly so when the purpose of the statutory provision is to protect tenants from unreasonable demands.*

*34. The appellant’s submission that in construing section 19(2) and determining what represents a reasonable amount, no account should be taken of likely payment, ignores the reality of many situations. It would result in unnecessary expenditure, by leaseholders having to embark upon what could be lengthy proceedings in order to recoup money which had been overcharged.*

*35. The imposition of rigid rules by this court, the practical effect of which would be to constrain the discretion of the tribunal in its determination of what is reasonable, is neither helpful or cost effective*.”

1. We pointed out that we were not considering section 19(2), not the potential of likely payments. Nevertheless, we agree that the principle to be derived is that we should approach the individual facts of the case before us.
2. *Ashworth Frazer Ltd v Gloucester City Council* [2001] UKHL 59 (a case involving construction of user covenants of a lease, and whether, where consent to underlet or to assign was *per* the lease not to be unreasonably withheld, such consent was unreasonably withheld if the intended use was contrary to a user covenant):

“*67. The test of reasonableness is to be found in many areas of the law and the concept has been found useful precisely because it prevents the law becoming unduly rigid. If effect it allows the law to respond appropriately to different situations as they arise. This has to be remembered when a court is considering whether a landlord has “unreasonably withheld” consent to the assignment of a lease…* [cites Lord Denning MR in *Bickel v Duke of Westminster* [1977] QB 517 p524]…

*That statement of the general approach to be taken was endorsed by Roskill and Lawton LJJ, with whom Megarry LJ concurred, in* West Layton Ltd v Ford *[1979] QB 593, 604H, 606C-D. I would respectfully adopt it. In* International Drilling Fluids Ltd v Louisville Investments (Uxbridge) Ltd *[1986] Ch 513 Balcombe LJ distilled a number of propositions from the earlier authorities on covenants of this kind but then, under reference to* Bickel *and* West Layton, *added, at p521:* “*Subject to the propositions set out above, it is in each case a question of fact, depending on all the circumstances, whether the landlord’s consent to an assignment is being unreasonably withheld…*”

*68. Approaching the matter in this way, I am satisfied that it cannot be said, as a matter of law, that the belief of a landlord, however reasonable, that the proposed assignee intends to use the demised premises for a purpose which would give rise to a breach of a user covenant cannot, of itself, be a reasonable ground for withholding consent to the assignment.*

*69. I accept that, as Mr Lewison stressed, in proceedings such as the present the court is not concerned with whether or not the terms of the contract are reasonable as between the parties. The court is concerned only with the assignment and whether or not it is reasonable for the landlord to withhold consent to that assignment. But in determining the matter, as Bickel shows, the correct approach is to consider what the reasonable landlord would do when asked to consent in the particular circumstances…*”

1. The question with which the Court was concerned in that case was not one relating to section 27A of the Act. Nevertheless, we agree that, as is again asserted, the question of reasonableness is to be approached on the facts of an individual case. There is no single objective ‘standard’.
2. In his oral submissions Mr Richardson rejected the application of *Waaler v Hounslow LBC* [2017] EWCA Civ 45 when cited by the Respondent, but in his skeleton he relied on the ‘principled approach’ set out in it (though he cited no particular paragraph).
3. That case was concerned with repairs carried out by the landlord and what the standard of reasonableness to be applied was. We expect that he intended to rely on the following passage:

“[para 14 of *Hayes v Willoughby* [2013] 1 WLR 935 reproduced, in which the difference between reasonableness and rationality is identified]

*23. Both these passages were approved by the Supreme Court in the* Braganza *case. In my judgment Hounslow’s contractual ability to undertake improvements whose cost is to be passed on to the lessees is constrained by these principles. In my judgment therefore the rationality test applies both to a choice as between different methods of repair and also to the decision whether to carry out optional improvements.*

*24. That, however, leads on to the next question: is the question whether costs are reasonably incurred within the meaning of section 19 to be answered by reference to an objective standard of reasonableness, or by the lower standard of rationality?*

*25. If the landlord incurs costs that are not justified by applying the test of rationality, then the costs in question will fall outside of the scope of the contractually recoverable service charge. The Landlord and Tenant Act 1985 must have been intended to provide protection against costs which, but for its operation, would have been contractually recoverable. It follows in my judgment that merely applying a rationality test would not give effect to the purposes of the legislation. The statutory test is whether the cost of the works is reasonably incurred…*

*28. Mr Beglan argued that the focus of the inquiry must be on the landlord’s decision-making process. What mattered was whether the landlord had acted reasonably in reaching his decision to carry out the works… The views of the tenants were equally immaterial where the works in question contained elements of improvement if their overall purpose was to deal with an underlying defect in the property itself. What was critical was the landlord’s decision-making process…*

*29. I cannot accept this argument. Consider a case in which the issue is whether the work in question has been carried out to a reasonable standard. The landlord may have acted entirely properly and rationally by entrusting the work to a reputable contractor with a good track record. But if, as things turn out, the work is carried out badly then the work will not have been carried out to a reasonable standard, and the leaseholders should not have to pay for it. Whether the costs themselves were reasonable for the works in fact carried out must also, it seems to me, be decided by reference to an objective test just as that test would be applied to deciding whether a price was a reasonable price… Section 19 must have been intended to protect the leaseholder against charges that were contractually recoverable otherwise it would serve little useful purpose.*

…[*Forcelux* is considered]

*34. Thus, although the Landlord’s decision-making process was not criticised, what mattered was the outcome.*

*35. In the* Garside *case [2011] UKUT 367 (LC) the UT listed a number of potentially relevant factors and said, at para 19:*

*“These are only examples of the factors that may or may not be relevant and there may be others to take into account. All are factual issues and matters of judgment for the LVT to weigh up against the hardship of substantial increased costs when deciding on the evidence before it whether the service charge costs are reasonably incurred.”*

*36. This does not suggest that the function of a tribunal is simply to review the landlord’s decision-making process. The interests of the tenants are to be taken into account in “weighing up” the relevant factors.*

*37. In my judgment, therefore, whether costs have been reasonably incurred is not a simple question of process: it is a question of outcome. That said it must always be borne in mind that where a landlord is faced with a choice between different methods of dealing with a problem in the physical fabric of the building (whether the problem arises out of a design defect or not) there may be many outcomes each of which is reasonable. I agree with Mr Beglan that the tribunal should not simply impose its own decision. If the landlord has chosen a reasonable course of action which leads to a reasonable outcome the costs of pursuing that course of action will have been reasonably incurred, even if another cheaper outcome was also reasonable*.”

1. *Waaler* therefore supports the test that we identified from *Cos*, no doubt because it was itself relied on in the latter.
2. Mr Richardson also placed reliance on *Daejan Investments Ltd v Benson & Ors* [2013] UKSC 14, in which Lord Neuberger gave the judgment of the Supreme Court in respect of the landlord’s failure to comply with the consultation requirements in the Act. Mr Richardson again refers to the ‘principled approach’ therein. However, the passage he cites (paragraph 42) does no more than similarly identify the purpose behind section 19 in a dispensation context:

“*42. So I turn to consider section 20ZA(1) in its statutory context. It seems clear that sections 19 to 20ZA are directed towards ensuring that tenants of flats are not required (i) to pay for unnecessary services or services which are provided to a defective standard, and (ii) to pay more than they should for services that are necessary and are provided to an acceptable standard. The former is encapsuled in section 19(1)(b) and the latter in section 19(1)(a).*”

1. Again, the Court was concerned with a different type of application. Nonetheless, it neatly identifies what we must consider in the application of section 19(1)(a) – the leaseholders should not be made to pay more than they should for insurance that is necessary and insures to a reasonable standard. However, there is no dispute that the Respondent in this case is obliged contractually to enter into insurance, nor is it the Applicant’s submission that it could have been obtained less expensively or that the policy covers anything it should not.
2. As we indicated to Mr Richardson on a number of occasions, to some extent he was pushing against an open door. We know we are not constrained by the contractual position in giving effect to section 19(1)(a). The contractual position, is, nevertheless, **one** of the factors to be considered. If, hypothetically, were we to discover that the contract did not permit the landlord to insure or to recover insurance premium, we have no doubt Mr Richardson would be making the submission it should not be ignored, and that indeed it would be a folly to look at the second question. We cannot simply jump to the end to suit the Applicants’ most powerful argument, which appears to be Mr Richardson’s submission. Neither can we assess the outcome on the basis of what ‘feels right’ and x post facto seek to interpret the caselaw in a way to justify the conclusion any such feeling would lead to.
3. Second, Mr Richardson argues that the question of what is the (as we understood his submission, *morally*) “right” course of action is not founded in the contract. He says that, regardless of what a contract allows, if the “right” thing to do was for a landlord to put its hand in its own pocket in order to minimise a service charge, and/or to sue its contractors for the money, that is the only reasonable course for it to have taken. He suggests that the contract must be read in that way and paragraphs 17 and 18 of part I of the eighth schedule read to apply equally to the Respondent as to leaseholders. What’s sauce for the goose is sauce for the gander.
4. As we said to Mr Richardson, we are constrained from reading into a contract any additional or different reading of a provision from that which is on the page unless it can be established that a reasonable person with all the background knowledge available to the parties would have understood the contract to mean other than what it says on the words used. As *Arnold v Britton* [2015] UKSC 36 confirmed at paragraph 19 “*The mere fact that a contractual arrangement, if interpreted according to its natural language, has worked out badly, or even disastrously, for one of the parties is not a reason for departing from the natural language.*” We don’t have the power to read into the contract a new term just because with hindsight that would have been preferable, or to remedy a feeling of injustice. The lease, as set out above, specifically covers the different clauses that apply to the Respondent *vis a vis* the Applicant, at clause 4 and paragraph 5 of the ninth schedule.
5. We must also take into account that the Applicants were advised by solicitors, and have not put forward any evidence that they understood the Respondent’s covenants, or their own, to mean anything other than what they said. Mr Richardson’s submission was that leaseholders negotiating with a landlord are in a weak position; if they want the property they are almost duty-bound to accept the terms offered. Firstly, that submission implies that any such leaseholder as Mr Richardson had in mind was aware that there was an imbalance and accepted it, and secondly it admits of the potential to negotiate or to walk away, in accordance with the desirability-value the leaseholder ascribes to the property in question. Although we have every sympathy with leaseholders who we know fine well are in the weaker position in negotiating such contracts, we cannot let our sympathy trump the legal principle that parties are free to make such a bargain as they choose, and our jurisdiction does not (without more) extend to rescuing them from a bad bargain made with their eyes open.
6. Turning then to Mr Fain’s position, he said that we need go no further than the admissions made to come to our decision. As there has been no cross-claim in damages by the Applicant, it is not open to the Tribunal to make any assessment of the reasonableness of the charges. As can be seen **[82 – 91]** the exact same proposition was the subject of the Respondent’s failed attempt to establish that the Tribunal had no jurisdiction in this case. He supported that submission by reference to *Continental Property Ventures Inc v White* [2006] 1 E.G.L.R. 85.
7. We consider that Mr Fain’s submission takes the decision in *Continental* too far. It is well established, and the Upper Tribunal has repeatedly endorsed the approach, that the Tribunal can, in assessing a case, use its own knowledge to fill in a gap in an unrepresented party’s ability to correctly identify the legal implication of a matter they factually raise. Mr Fain omits the beginning of the paragraph of the judgment on which he relies in support of his approach, which is where the relevant part supporting our conclusion is set out (paragraph 14). This is further reflected at H(11), in which Judge Rich QC held that the Tribunal was entitled to come to its *own* conclusion that:

“*the breach of a landlord’s repairing covenant would give rise to a claim in damages and if the breach resulted in further disrepair imposing a liability on the lessee to pay an increased service charge that is part of what might be claimed by way of damages. Such a claim would give rise to an equitable set-off within the rules laid down in* Hanak v Green *[1958] 2 QB 9 and as such constitute a defence. This would not mean that these increased costs were not reasonably incurred but it would mean there was a defence to their recovery*”.

1. This was in the context of an historic repair case. As can be seen from the judgment, Judge Rich QC upheld the decision of the Tribunal, just not the reasoning for it. That is therefore another factor properly to be taken into account, though it is not a section 27A question, on the individual facts of a case (and bearing in mind that unrepresented parties seldom formulate their cases with the precision of drafting or language that experienced counsel might, such that they might indeed accept they have no cross-claim but the factual matrix it might be clear that is precisely what they do have).
2. We nevertheless agree with Mr Fain that it is for the Applicant to demonstrate the justification for (by identifying the factual allegations that would amount to a breach) and amount by which any reduction should be made to insurance premiums (as *Continental* above, and *Daejan Properties Ltd v Griffin* [2014] UKUT 0206 (LC) paragraph 88-98 both make that clear).
3. There is one further matter that we must deal with. Mr Richardson asserts that *Continental* does not apply to this case, as they were specifically concerned with historic neglect. He says that *Griffin* added nothing to *Continental*, and that they are therefore neither of application.
4. While it is true that we are, in this case, concerned with what all parties agree is a latent defect in the construction rather than historic neglect, we cannot accept the proposition that *Griffin* is therefore of no application. Firstly, although there appears to be no authority on the point (none having been raised by Mr Richardson, and Mr Fain having described Mr Richardson’s argument as ‘novel’ which we choose to interpret non-pejoratively), we consider that latent defects must be subject to the same considerations by analogy as set out in *Continental* and echoed in *Griffin*. The question must be whether the costs of repair – or in this case of insurance – were reasonably incurred. If they were, is there a defence to their recovery by way of an equitable set-off.
5. All of that leaves us back at our two-stage test in *Cos*:
	1. has the landlord acted ‘rationally’ (in the sense that the contract sustains its course of action) in incurring the costs of the insurance; and
	2. even if the course taken is rational one, is the sum being charged a reasonable charge in all of the circumstances (both in process, and outcome)?

**Evidence**

1. The Applicants did not themselves provide any witness evidence.
2. We heard from Mr Gregoir Chikaher BSc, MSc, DIC, MCIBSE, C.Eng, a retired Consulting Engineer on behalf of the Applicants. We found him to be an entirely honest witness doing his best to help. His evidence was confined to the comparability of a development in Ealing, namely Dickens Yard, New Broadway, Ealing W5 2XA, of which St George PLC is also the developer, which he had visited on 23 February 2023 to access accessible parts (though he had not been able to access anything but common parts). He adopted his witness statement, in which his evidence was that the two developments were comparable externally because the sales and marketing, and planning information were similar, the fixtures and fittings in the (non-affordable homes) flats were similar or the same, the architects for each development were the same, the construction of each had started at around the same time, each had ground floor commercial units, underground parking and a public square, each had high efficiency double glazing and door units from the same manufacturer, each had cantilevered balconies of similar construction, communal heating and hot water systems, fire detection systems and lifts, and each had building management, CCTV and video entry phone systems.
3. Internally, based on the marketing materials and (as he told us in evidence) his own consideration of a purchase at Dickens Yard before instead purchasing at 8 Kew Bridge, he posited that the design, fixtures and fittings, and stud walling was of similar construction and/or installation, including for example underfloor heating, ventilation and comfort cooling systems.
4. Under cross-examination, Mr Chikaher quite properly accepted that he had not in fact seen any of the affordable homes in either development and had mostly based his internal assessment on the marketing materials. He agreed that none of the materials that he had consulted were exhibited, save for a number of marketing photos he had obtained from the internet at **[231 - 233]**. He agreed he was not giving expert evidence, and as he had done so in the past he knew the difference. He agreed that he had highlighted various differences in the construction of the developments, for example that unlike Dickens Yard, 8 Kew Bridge Road had likely been constructed with concrete pillars and piles with *in situ* cast concrete slabs, whereas Dickens Yard was constructed using slip form and concrete frames by virtue of the restricted accessibility of the site. He agreed that there were various other differences between the developments, including their size (both in number of units and buildings, and height), postcode, and number of commercial units. He accepted that he did not know the difference between the developments in the proportion of affordable homes and the remainder of units, the tenure of the units in each, or the surface-flood risk in respect of each. He accepted that he did not know what an insurer looked at when assessing the risk to be ascribed to each site.
5. We heard next from Mr Robert Elliott for the Respondent. In his witness statement he identified himself as the Divisional Finance Director for St George PLC. In oral evidence he clarified that he was also a statutory Director for the Respondent, and had authority to give evidence on its behalf. He had made two witness statements in the proceedings and adopted both. Again, we found that he was an honest witness.
6. In his first witness statement **[130]**, Mr Elliott first answered a number of questions that the Applicants had posed in the course of the preparation of the case, regarding how the insurance premium had been arrived at. He explained that Marsh Limited (‘Marsh’) were instructed, as brokers, to arrange the insurance for St George PLC portfolios. He stated that Marsh is an industry-leading broker, who supply St George’s PLC with a dedicated team who use their expertise to develop the insurance strategy for St George PLC and negotiate terms to ensure that its insurance obligations are met. He explained the increase of reinstatement costs of the development at 8 Kew Bridge Road between 2015 – 2022, and the almost doubling in that sum between 2015 – 2018 in particular as further parts of the development reached completion.
7. In his second witness statement **[134]**, Mr Elliot reiterated Marsh’s role, and explained that this allowed St George PLC to obtain the most competitively priced policies and cover, to cover all risks of loss or damage to buildings, loss of rent or alternative accommodation costs, third party liability and terrorism.
8. On being notified of any incident involving an insured risk, such as escape of water, the typical experience is that the tenant, lessee or estate agent of the unit in question will notify the managing agent of the development (in 8 Kew Bridge Road’s case, Premier Estates), who will then notify the event to the insurer, whose loss adjuster will review it to ascertain whether it is an insured peril. If it is, a claim will be opened. Sedgwick was the loss adjuster involved in the claims for escape of water in respect of 8 Kew Bridge Road. Mr Elliott exhibited to his statement details of claims collated from the information held by Premier Estates, Marsh and Sedgwick.
9. Mr Elliott did not agree that Dickens Yard was a relevant comparator with 8 Kew Bridge Road. He incorporated the differences he considered relevant into a table, and highlighted that the development at Dickens Yard was 70% larger than 8 Kew Bridge Road, in a different postcode area (Ealing), had much lower risk from surface water flooding, the individual units are on average 37% larger than those at 8 Kew Bridge Road, has 10% more affordable homes, and is a far larger development.
10. In cross-examination, Mr Elliott admitted that St George PLC holds itself out as a market leader and responsible developer, and that its profits for the year end 2022 might well be £122 million if that is what Companies House said (though he said he would need to look it up). He also admitted that St George PLC was part of Barclay Group Holdings, which itself might well have showed a 2022 year end net profit of £1.128 billion if that is what Companies House showed (there was no evidence in the bundle so he could not say for sure). He stood by the St George PLC product. It was put to him that there was a two year warranty on the flats (which was again not in the bundle), and he agreed.
11. He agreed that a responsible landlord would do its best to minimise the service charges a leaseholder has to pay, and that as a general principle if there is an ability to recover sums that would otherwise be recovered elsewhere than from a leaseholder that is what a responsible landlord would do.
12. He did not have the most recent information in the subrogated claim RSA was bringing against Ardmore. St George PLC was not the driver of those proceedings, though he admitted that it was not completely uninvolved (contrary to the impression he had given in his witness statement) as no doubt there would be some necessity of witness evidence. He was unaware where Aviva had got to in their intimated proceedings.
13. He denied that St George PLC had a separate latent defect insurance policy as asserted by Mr Richardson. It was his experience that such a policy was rare, and only obtained where there was something unique about a development. He denied that he had overstated the advantages of a portfolio policy. He confirmed that year on year the portfolio changed in accordance with Marsh’s advice on how developments should be bundled up. He agreed that in the year 2017 – 2018 the portfolio value said to be covered was £4.1 billion. In bundling up, what St George PLC was seeking to obtain was the best value in aggregate and development by development. 8 Kew Bridge Road and Dickens Yard were in separate portfolios, now, but had previously been in the same portfolio. Various different insurers had been engaged over the period as they had offered better prices for the level of cover concerned. Allocation of the premium between developments in the portfolio was the role of the insurer decides how to allocate the gross premium between developments.
14. Mr Elliott confirmed that, from what he knew today, he believed that the escape of water claims were attributable to the leaks caused by the defective shower-mixer installations. He admitted that he had not prepared the schedules identifying those claims (which had been provided by the loss-adjuster), and there might be more examples on the schedule than those that appeared highlighted at **[990 – 992]**. In terms of what had changed about the insurable development since 2015, he referred back to what he had said in his witness statement but did not deny that the claims for escape of water were likely to have had a significant impact. He maintained that, if damage was incurred through an insured peril, whether or not a claim was made in respect of it the insurer would have to be notified and it could have an impact on the cost of insurance in the next year. He admitted he did not know who had the right to claim under the policy, but as could be seen from the evidence it had been the managing agent that had notified the issue each time, and he was sure that individual tenants had the right to contact the insurer, though he did not know if the policies were routinely given to tenants.
15. In terms of the obligation to remedy the leaking mixers, Mr Elliott confirmed that no individual leaseholder had been told it was their problem to fix. The loss adjuster had accepted that the issues caused by the escape of water from the shower mixers were insured perils, even if the lease strictly states that the service installations are demised. The escape of water claims were what was described by the insurer as ‘fortuitous loss’, because they were exactly the kind of peril the insurance was held against.
16. Mr Elliott would not be drawn on whether he considered the Respondent had done anything wrong in accordance with the lease. No specific allegation of breach of the lease was put to him. He accepted that the missing rubber seals was a very unfortunate situation, but he could not comment on the ongoing High Court proceedings. They had now been put right.
17. Paragraph 17 of Part I of the eighth schedule **[207]** was put to Mr Elliott, as a clause that supports holding a leaseholder liable for anything they do to increase insurance costs. Mr Elliott explained that it was his understanding that this was about big issues like structural change of the demised premises – about changing the risk status of the building. Mr Richardson proposed that it was unfair that the landlord should not be held liable like-for-like. Mr Elliott conceded that he understood the argument, but he did not understand how it linked to the 8 Kew Bridge Road argument. Mr Richardson asserted that no insurance claims should have been made at all. Mr Elliott stated that process had been followed; the Respondent had needed the loss adjuster to quickly assess so that the appropriate action could be taken. It was not in anyone’s interests to do anything other than what the loss adjuster recommended.
18. Mr Richardson asked whether Mr Elliott agreed that the shower mixer issue was a latent defect. Mr Elliott replied that with the evidence the Respondent now had, yes he believed so. Investigations had taken a long time. If one looked at the schedule of escape of water claims, the risk address was not clear. It had taken a huge amount of effort and time to get to the source of the problem. Every apartment in 8 Kew Bridge Road had been investigated, which had taken a year. When the correlation with the shower mixers had been identified, work was undertaken to correct it, but until that work had begun the precise problem was still unknown. The issue had caused slow leaks which had caused substantial damage to the fabric of the building, but water pools in such a way as the immediate cause is not always obvious. Some of the particularly large claims had been due to the accumulated damage over a long period, and some had been in respect of units that had been vacant or from which there had been no leaseholder response to enquiries. The property had been damaged, which was an insured peril, and the insurers responded accordingly.
19. Mr Elliott agreed that the leaseholders of 8 Kew Bridge were free from culpability for the claims. The board had taken the decision to progress the insurance claims as it was a reasonable response to the issues being experienced and the peril involved was covered. The board had also approved the insurance contract year on year for the past 5 years and they were satisfied that it was being obtained at the best price for the appropriate cover. Mr Elliott was not able to calculate the impact of the escape of water claims on the premium. He was unable to say whether the cost would be as high or lower for the insurance, as the Respondent had to insure the property as it stood, with its claims history, and therefore that was not an answer they could get to.
20. Mr Ian Kennett also gave evidence for the Respondent. Again, he had provided a witness statement, which he adopted **[121]**. Mr Kennett is a (or the) Managing Director of Marsh. As with the others, we found Mr Kennett to be an honest witness. Alike Mr Elliott, Mr Kennett answered the Applicants’ questions raised in preparation of their case and provided various documents including the insurance policies and certificates of cover. He stated that, when coming to a decision on premium, an insurer has various considerations in mind, principally constructions, occupation, declared value (rebuild cost) and claims history. He accepted that the two primary considerations of any insurer in quoting for cover are the claims history, and the declared value.
21. The loss ratio for the prior at 8 Kew Bridge Road was 337% for the five years from 1 October 2017. He tabulated the claims history, demonstrating that in addition to the claims for escape of water over the period, there were other claims that were not related, though these represented only 30 out of the total 84 claims. He explained the process for competitive market testing for the renewals year on year, and the specifics of the insurance entered into for each year from the 2016 renewal. He explained Marsh obtains a commission from insurers of 4.5%. The Respondent receives no commissions. He explained that the best ‘value’ insurance is more subtle than just whether it is the cheapest. Considerations include: the security rating of the insurer; the policy coverage, exclusions and conditions; the benefit to the landlord and/or occupiers; and the level of the excess. Installing the early detection system for leaks in 2019, which the leaseholders did not pay for, reduced the excess per claim on the Aviva policy from £250,000 to £500. Marsh had managed to get the insurer to agree to sign this off on a unit-by-unit basis (they had originally been told that the excess would only be reduced when all units had been checked and any necessary works done). It cannot be said when this might be reflected in a reduction in the premium more generally, as it is not the only consideration. Considerations include: inflation in building and claims costs; general market conditions; increased claims from various sources e.g. flash flooding; legislative change; and the cost and availability of reinsurance protection for insurers.
22. The portfolio policy had covered between 12 – 17 blocks over the period 2015 – 2020 to Mr Kennett’s recollection. Renewal reports had been prepared (an example being on **[951]**). His experience was that escape of water claims for residential developments, and as reflected in the Association of British Insurers’ research, made up 65 – 75% of all claims made by residential households, which is why they were always covered (and thus considered a ‘fortuitous loss’).
23. The insurer itself (by its underwriter) allocates the premium across each development in the portfolio, but Marsh is able to appeal against the allocation if they consider it unfair. Mr Kennett’s view was that Mr Richardson’s assertion that all the insurer cares about is the total is untrue. His experience was that the insurer is ever-conscious of fair value across the portfolio, and that an insurer won’t falsely allocate low premiums into something that is the Landlord’s P&L. The evidence from a Scottish website relied on by the Applicants **[981 – 982]** simply was not his experience. Marsh also reduced its commissions if the higher commission resulted in higher insurance rates – Marsh’s commission had been higher pre-2017.
24. Mr Kennett confirmed Marsh only dealt with leading insurers (such as RSA and Aviva). Mr Richardson alleged that, as leaseholders, the Applicants did not have access to those insurers and Mr Kennett had refused to disclose their contact details. Mr Kennett stated he had in fact given the contact details to Mr Didcock. He had answered all ten questions the Applicants had asked.
25. Mr Kennett also confirmed that all potential claims in respect of insured risks must be notified to insurers, whether a claim is proceeded on or not. Even if no claim was pursued, and no money paid out, this would have a negative impact on the premium in the next year.
26. Mr Kennett agreed that the loss ratio in the period in question could be described as appalling.

**Decision and reasons**

1. We say at the outset that we have a great deal of sympathy with the leaseholders in this case. They are having to pay very large sums for the insurance they could never have predicted or budgeted for, largely because (and without deciding who is responsible, bearing in mind that at least one case remains unresolved in the High Court and there may in fact be two) of some missing rubber rings in shower mixers.
2. That is, we are afraid to say, bound to continue (unless the changing claims profile or any resolution of High Court action has some effect sometime soon), for the reasons set out below, though it gives us no satisfaction so to decide.

**(1) has the Respondent acted ‘rationally’ (in the sense that the lease sustains its course of action)**

1. We have to remind ourselves that we are confined, for the purposes of section 19(1)(a), to considering whether the insurance itself was rationally incurred at the first stage. Questions about reasonableness, in process and outcome, and any set off, arise at the second stage.
2. We find as a fact that the Respondent is obliged to insure the development, as reflected in paragraph 2 of part II of the sixth schedule. The Applicants took no issue with this proposition.
3. Despite the admissions/concessions or absence of challenges made in the Applicant’s statements of case, as recorded in paragraph 27 above, and despite his confirmation of the position at the outset of the hearing, as can be seen, Mr Richardson’s cross examination was sufficiently wide-ranging as to potentially put those admissions/concessions and absence of challenges in doubt. For the avoidance of doubt, in light of the evidence given by Mr Kennett, we are satisfied that the Respondent has fulfilled the other obligations in the clause:
* The insurance is and has been against comprehensive risks, as can be seen from the policy documents;
* The insurance is and has been against the full reinstatement value, as can be seen from the policy documents and from the witness evidence of Mr Elliott;
* The insurance, in each year, is and has been with a reputable company, as is shown in the policy documents and from Mr Kennett’s evidence;
* There is no evidence that the insurance is or has been subject to any excesses beyond those which the insurance companies themselves require; and
* The Respondent (by its parent company, St George PLC) has noted the interest of the tenant on each policy, as demonstrated by each years cover note.
1. In circumstances in which the Respondent is obliged to insure, it cannot but insure the property as it stands, with its claims history. Again, this was a concession made by the Applicants, but for the avoidance of doubt we make a finding in the same terms. *Continental*, *Waaler* and *Griffin* apply. It speaks for itself that no insurer will, in knowledge of the claims history of a development, turns its eye against it. No responsible landlord will arrange for insurance for a development that does not disclose the relevant details of the property, as this would at best lead to the policy being vitiated (and at worst, might amount to fraud). For the purposes of the insurance, the development must be taken as it is found, warts-and-all, just as a property in historic neglect must. Whether a set-off arises, because of the reasons behind the claims on the policy, is a different question.
2. The insurance premiums in each year are therefore rationally incurred.

**(2) even if the course taken is rational one, is the sum being charged a reasonable charge in all of the circumstances (both in process, and outcome)?**

 **(i) reasonable process**

1. Again, the admissions/concessions or absence of challenges from the Applicants’ statement of case made clear that they did not consider that the process was unreasonable. Again, Mr Richardson’s wide ranging cross-examination and closing submissions put this into doubt, so we set out findings briefly to put the matter beyond doubt.
2. Although Mr Richardson cross-examined Mr Elliott and, more particularly, Mr Kennett, on the process of obtaining the insurance for the blocks, at no point was it put to either individual that the process for obtaining insurance, leading to the particular policies being put in place over the period, was in error or insufficient. Mr Richardson made some unsupported allegations about another policy of insurance being in place, of which there is no evidence, and a sweeping statement about the insurers’ lack of care over which development was attributed what proportion of the block premium, which was also unsupported by evidence.
3. The Applicants’ statements of case made no issue of allocation between blocks, nor did it dispute that the premium incurred through the portfolio policy was indeed lower than they could obtain on an individual block basis.
4. We are satisfied that the steps Mr Kennett and Mr Elliott described to us were a reasonable process to obtain competitive quotes for insuring the development against comprehensive risks on the open market, and to engage the insurer offering ‘best value’ after consideration of the recommendations at board level of the Respondent and St George PLC.
5. We are therefore satisfied that the Respondent engaged in a reasonable process in obtaining the insurance policies.

**(ii) (a) reasonable outcome**

1. The question of whether the claims should have been made against the various policies is not a question about the process of obtaining the insurance, that the Applicants concede the Respondent was obliged to obtain.
2. Neither, realistically, is it a question of the outcome of that process. Another of the Applicants’ concessions is that the insurance could not have been obtained more cheaply on the open market. That, it appears to us, and again despite Mr Richardson’s cross-examination, to answer the question of whether the sum is reasonably incurred.
3. It is a question of whether there is a defence by way of equitable set-off because there is a breach of the lease by the Respondent leading to loss and damage to the Applicants.
4. Although Mr Richardson made much of his submission that the only two reasonable options open to a reasonable landlord in the circumstances pertaining to the latent defects with the shower mixers was to either put its hand in its own pocket, or pursue a claim against the wrongdoers, those are not questions of whether it was reasonable to insure. They are allegations that there has been some kind of breach, leading to the obligation for remedy falling back on the Respondent or St George PLC, and removing the obligation for payment in connection with that remedy from the leaseholders. By not keeping the two questions separate, it is our assessment that Mr Richardson has confused the principles to be applied.
5. For the avoidance of doubt, we refuse to make a finding that it was not reasonable for the insurance to be claimed against for the purposes for which it was obtained, i.e. to provide financial cover to remedy insured risks. The specific risk was insured against and the incidents of escape of water are, we accept, ‘fortuitous losses’ for that reason. It would undermine the purpose and benefit of the insurance were we to find that it was unreasonable for a landlord to make such a claim in these circumstances.
6. Mr Richardson posits that the only reasonable options open to the Respondent were to put its own hand in its pocket (though, as a dormant company, it has no pockets and he must mean the pocket of St George PLC), or to sue Ardmore. The first of these is predicated on the Respondent or St George having done something wrong that they are obliged to make good for. It is a classic example of a set-off scenario, and not a section 19(1)(a) scenario. The second of these may have been a reasonable option in another case, though in this case we consider it was likely to have been an unreasonable approach. As we noted to Mr Richardson, given the time that litigation takes, any such damages as might be obtained in result might still be awaited now, with the ongoing escapes of water continuing to damage the substance and fabric of the development. That is the very reason claims are made in insurance and recovery of the sums expended are subrogated to insurers – so that funds can be obtained quickly and works can be carried out expeditiously to prevent any continuing damage to the freehold - and indeed leasehold - interest in the development.
7. We disagree with Mr Richardson that the damage done to the structure of the two buildings was not covered by the lease. It is squarely within the Respondent’s repairing covenants regarding the Maintained Property. While the service installations are demised to the individual leaseholders of each unit, and so the shower mixer units in question would appear on a true construction of the lease to be the leaseholders’ obligation to maintain, Mr Richardson’s own position is that is an outrage. Why should the individual leaseholders be liable? Again, he comes back to the submission that the Respondent is in some kind of breach. It appears that the insurers have taken the approach that as the escape of water is an insured risk, the insurance should inure for the individual leaseholders’ benefits in each claim as regards the shower mixers, despite the demise. We will not allow a collateral attack on the decision of the loss adjuster that the risk was an insured one by reason of the policy which was itself obtained in accordance with the lease, which would then go directly contrary to Mr Richardson’s own submission that they are the Respondent’s responsibility.
8. The installation of the early warning system appears to have been carried out at the cost of the Landlord with the support of a bursary from the insurers. We have no evidence that they are costs that have increased the insurance premiums, and we accept Mr Elliott and Mr Kennett’s evidence that the opposite is true; the system was put in place to reduce excesses, and with the hope that premiums would be reduced.
9. Turning back to the question of the insurance itself, the outcome of the process was that the Respondent obtained insurance, at what it says are favourable rates because of its clout in the marketplace and careful curation of its various portfolios of properties, given the features of 8 Kew Bridge Road, in particular its claims history.
10. This is not gainsaid by the Applicants. Nor is it disputed that the policy was a comprehensive one, or asserted that it covered anything that was not reasonable to cover. This was obtained at a higher price year-on-year during the period in question due to the increasing number of escape of water claims. That itself is not an unreasonable outcome. As we have already said, the reality of the Applicants’ position is that they acknowledge that insurance could not have been obtained more cheaply. They are aggrieved because they believe the need for the claims made, which are a substantial reason behind the increased premiums year-on-year, is because of some wrong-doing of the Respondent. Again, that is a classic set-off scenario, not one arising from section 19(1)(a).
11. In the circumstances and pausing there, we are satisfied that the Respondent’s decision to insure and to enter into the insurance contracts at the increasing premiums year-on-year is both rational and reasonable. That is not the end of the story. As we said above, whether the outcome is reasonable requires us also to consider the Applicants’ position on the Respondent’s alleged wrongdoing.

**(ii) (b) is there a defence by way of set off/cross-claim**

1. Despite the Applicants’ stated case admitting that they have no cross-claim for set-off, as set out above, their assertions regarding the Respondent’s wrongdoing and its consequences for the sum of the premium they should be recharged are a classic example of exactly that. It is in fact on this that the success or failure of their case turns.
2. In essence, their submission is that it was not reasonable for the Respondent to make claims on the insurance at all. The flats were sold to leaseholders with inherent defects. They were sold a pup. Mr Richardson stated that this was a breach of contract, although when pressed he conceded he was referring to the contract of sale, which is separate to the lease and not before us. Any warranties (which are again not before us, and we only discovered the existence of in the course of Mr Richardson’s cross-examination) were for 2 years only.
3. In light of what he said was that breach, in his submission the Respondent, or rather its parent company, the dominant shareholder, freeholder and the developer of 8 Kew Bridge Road, St George PLC, is liable for the defects in the development, and as such should have remedied them without recourse to the insurance but from its own pocket, or by bringing proceedings against Ardmore for its negligence/breach of contract.
4. Firstly, and importantly, if the alleged breach does not arise from the lease but from some other contract, then it is not an equitable set off situation because it does not arise from the same contractual relationship, even if the circumstances of the purchase and of the lease are intertwined and properly considered together. It is a true cross-claim situation. It would appear to us that it is a cross-claim not within the Tribunal’s jurisdiction to determine, but within the jurisdiction of the County Court.
5. Even if we were wrong in that, there is nothing that has been placed before us that demonstrates that St George PLC or the Respondent was in breach of any contract with any leaseholder. It is asserted that the Respondent (or, if it was St George PLC’s agent, St George PLC) must have committed some wrongdoing, by for example failing to supervise the works or (by its Chartered Surveyor signing off such works as were done) without adequate inspection, and thus must be liable for the asserted negligence/breach of contract of its subcontractors, Ardmore, in Strand and Belvedere House. This is simply not evidenced at all, rather it is based on the presumption that the existence of the High Court proceedings mean that the Respondent/St George PLC must also have done something wrong as otherwise Ardmore’s neglect/breach would have been prevented, or discovered before sale, and the leaks would not have occurred at all or to such an extent.
6. Such an assertion is for the Applicants to demonstrate on the balance of probabilities and, it appearing that there is no more than the assumption that the Respondent is somehow in the wrong at the foundation of that assertion, they have not done so. Nor, on what was presented to us, have they or their representatives taken any steps to turn that assumption into a substantial allegation founded in evidence.
7. Secondly, even if the Applicants were able to prove that the Respondent had indeed failed in some duty, they would have to establish the Respondent’s duty to *them* on which they rely, whether contractual or otherwise, bearing in mind that their block was not affected by the issue. No latent defect has been discovered in Apartment 17, and none is relied on before us.
8. They would then have to go on to establish causation, loss and damage.
9. We are satisfied that the Respondent has not breached the lease contract. Mr Richardson could not gainsay this, without asking us to apply a lessee’s covenant to the Respondent on the basis of ‘what is sauce for the goose is sauce for the gander’.
10. We cannot do so; firstly the natural language of the lease, and the existence of separate provisions for the lessee and landlord repeated at the beginning of this decision, mean that we should not interfere with the covenants unless that is necessary for the proper interpretation of the lease. There is no such necessity demonstrated here, Mr Richardson’s submission being founded only on his view of what is morally right. Nor is there any evidence regarding the Applicants’ understanding of the lease when they entered into it.
11. Secondly, even were we to be wrong in that, in any event the Applicant has not established that the Respondent has “*do[ne] or permit[ted] or suffer[ed] any act or omission which may render any increased or extra premium payable for the insurance of the Development or any part thereof*”. The Appellants’ own case is that the defect in question was latent, such that the Respondent cannot without more be found to have acquiesced in it such as to engage the clause. As we have said, it is no more than Mr Richardson’s supposition that it would have been discovered if the Respondent or St George PLC had properly supervised or inspected their contractors’ work, which supposition is without any current evidential foundation.
12. We would not be able to find on the evidence presented, even if were we entitled to do so, that on the balance of probabilities St George PLC or the Respondent (and we should say we do not even know who the contract of sale was made with) is in breach of any conditions of the contract of sale. It seems to us likely that, there being no claim in relation to faulty installation of shower mixers at Provenance House, there would be a remoteness argument in relation to any such loss and damage as the Applicants could prove (being the elevated insurance premium), though that does not mean that, in a proper case in the correct forum (which is not this Tribunal, but likely the County Court), any such claim would be impossible.
13. Even were we satisfied, however, that the Applicants had established the liability of the Respondent to them in order to equitably set-off any such loss for a breach of the lease, the quantification of such loss is not ascertainable on the evidence with which we have been presented.
14. The Applicant relies on the comparator development, Dickens Yard. Although we can understand why on its surface Dickens Yard looks like a relevant comparator, in truth the relevant comparator is 8 Kew Bridge Road itself, without the escape of water claims history. Comparing 8 Kew Bridge Road with Dickens Yard is comparing apples with oranges. They have substantially different core features when one looks beneath the surface, as highlighted by Mr Elliott and Mr Kennett and as quite properly agreed by Mr Chikaher.
15. As we heard from Mr Kennett and Mr Elliott, insurance prices are affected by a number of things. Particular developments will, for example have different statistics for flood risks, and Mr Kennett highlighted the difference between 8 Kew Bridge Road and Dickens Yard. Taller buildings might have a greater fire safety risk. A development with more or fewer commercial units might be considered to have a higher or lower risk depending on a number of factors, as will one with a greater proportion of affordable housing (for a number of reasons, including the one tilted at by Mr Fain but never expressed in so many words, that the materials used may not be of such a high standard in the affordable homes as in the general market units). Different overall methods of construction are likely to lead to different risk profiles. Though we accept that the reinstatement value and the claims history are significant in the eyes of an insurer, we accept that they are not the whole of the relevant picture.
16. Though we can and do find that if the claims history had not been as it is, the insurance premiums would be lower (which is also quite properly Mr Kennett’s evidence), we have not been provided with evidence that would permit us to come to the conclusion that the insurance would have been £x-amount cheaper if the claims had not been made, nor any alternative quote or expert insurance evidence to assist us to come to a figure.
17. Despite what we can see is a considerable amount of work on the Applicants’ behalf preparing the comparative data for each development before providing mathematical formulae for what they say is the percentage difference, we fundamentally do not agree, for the reasons above, that we can extrapolate the data from Dickens Yard and cross-apply the percentage difference to the premiums at 8 Kew Bridge Yard to show what the Applicants would have been paying, had the escape of water claims not been made, and thus quantify their cross-claim for damages. The extrapolation that Mr Richardson asks us to apply also fails to account for the other insurance claims at 8 Kew Bridge Road that are unrelated to escape of water, and so his figures start from the wrong basic premise.
18. No alternative quotes for 8 Kew Bridge Road were provided. While we note that Mr Richardson says that he could not access the Respondent’s insurers directly, and it is a regrettably difficult task for any Applicant seeking to challenge his insurance service charge, especially where there is a portfolio policy involved, it is our experience that it is not impossible. While we were also not impressed to hear that the contact details Mr Kennett provided were not passed on, as appears to have been the Applicants’ experience in this case, the Applicants were not prevented from approaching any reputable insurance broker to obtain a quote for a comprehensive policy for the development alone, with or without its claims history, which would at least have provided a baseline. We note that the Applicants had apparently obtained expert advice, on which they had requested and been given permission to rely, but was not forthcoming in the bundle or in oral evidence, and so we are satisfied that it was not beyond their or their representative’s wherewithal to obtain such quotes or seek advice on how to do so.
19. We reiterate however that although we can and do find that the insurance would have been lower but for the claims history, even had we been able to quantify the sum in question, that does not get the Applicants home. The Applicants having failed to adduce sufficient evidence to demonstrate that the Respondent (or St George PLC) owed them a duty (contractual or otherwise), in respect of which they are in breach, and that breach has caused any such quantifiable loss, and so they have not established any defence by way of set off that could reduce the premiums in question.

**CONCLUSION**

1. We acknowledge that this is not a ‘fair’ outcome, the escape of water incidents being no fault of the leaseholders generally or the Applicants in particular, and it is with no pleasure we come to that conclusion.
2. However, we must be astute not to conflate what feels ‘fair’ with what is ‘reasonable’. As any homeowner knows, crime rates in their postcode increase insurance premiums. As any car owner knows, any bump you claim for, despite being someone else’s fault, results in a reduced no-claims bonus, leading to higher premiums. Those are but two examples of insurance going up through no fault of the person paying the premium, and are thus ‘unfair’. That does not mean that in accordance with the insurance industry’s way of calculating risk, the insurable risks are not greater, and therefore it is not unreasonable for the person to pay increased premiums against those insured risks despite the unfairness of the situation from which the increase arose. That, unfortunately, is simply the nature of asset ownership and the insurance industry.
3. However, we can see no justification nor legal reason to find that the Respondent unreasonably made claims on the insurance, which insured against these precise risks. Nor are the sums incurred unreasonable – they are the cost of insuring the building with the risks and claims history it has. The Applicants have not established any wrongdoing by the Respondents that could amount to a defence to some of the total sum by way of equitable set-off, and even had they have done so, any loss has not been adequately quantified.
4. The insurance sums are therefore reasonably incurred and reasonable in amount, and payable. It may be that the Applicants do have a remedy arising from the contract of sale, about which we know nothing. If they do, however, it lies elsewhere, after the cause of action has been identified.

**COSTS**

1. The Applicants make a section 20C application for the costs of and incurred by the Respondent in these proceedings not be regarded as relevant costs to be added to the Applicants’ service charge.
2. Firstly, Mr Richardson makes the submission that any such costs order should be for the benefit of all of the leaseholders at 8 Kew Bridge Road.
3. No list of those leaseholders was provided by the Applicants. Mr Richardson points to the Skeleton Argument for the Respondent in the application to strike out for lack of jurisdiction, to say that the Respondent ought to have provided it to the leaseholders.
4. Mr Richardson also asked us to take judicial notice of the fact that none of the leaseholders at the development would wish to have to pay the legal costs of these proceedings, and Mr Fain had no objection to us doing so.
5. As we made Mr Richardson aware, we cannot simply trammel the requirement for the Applicants to any such application to be identified, and to have indicated that they do in fact make such an application and that Mr Richardson is appointed on their behalf to make the application for them. That is quite clear from the decision in *Plantation Wharf Management Limited v Fairman* [2020] L&TR 7. The fact that we might take judicial notice that no leaseholder would want to pay the Respondent’s costs of the proceedings does not allow us to distinguish from *Fairman* as suggested. We can only make an order in favour of Applicants who have given notice to the Tribunal that they join in the application.
6. Mr Richardson went on to state that a section 20C order should be made for the whole of the proceedings, even if the Applicants were unsuccessful, because of the Tribunal’s acknowledgement of the unfairness that resulted from the legal position. We cannot accede to his request. We should not visit the perceived unfairness resulting from the legal position on the Respondent. That would be equally unfair, especially as they have won. We refuse to do so.
7. Mr Richardson’s final submission was the at the very least the Respondent’s costs in and of the failed application to strike out for lack of jurisdiction, and subsequent application for permission to appeal, should be the subject of a section 20C order.
8. We agree with Mr Richardson. It seems to us that the application was bound to fail as it did. The question was not one of jurisdiction – and as we say above, we consider that the representatives for the Respondent set their stall too high in respect of the lack of cross-claim, which it seemed to perceive as some kind of golden bullet. As Judge Rodger KC stated in his refusal of permission to appeal, the application under 9(2)(a) was ‘*misconceived and not supported by the arguments advanced in the grounds of appeal*’. At best what it was, was a rule 9(3)(e) application dressed up as a jurisdiction point. What the Respondent was really suggesting was that on the admission by the Applicants that there was no cross-claim, there was no prospect of the Tribunal holding that the sums for insurance were unreasonably incurred or unreasonable in amount. That was not something that the Tribunal was ever going to be able to decide without a full hearing of this particular case..
9. In the circumstances, we agree and order that the costs of and in the application to strike out and associated application for permission to appeal are not to be regarded as relevant costs to be added to the Applicants’ service charge.

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| --- | --- | --- | --- |
| **Name:** | Judge Nikki Carr | **Date:** | 11 May 2023 |

**Rights of appeal**

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber), then a written application for permission must be made to the First-tier Tribunal at the regional office which has been dealing with the case.

The application for permission to appeal must arrive at the regional office within 28 days after the tribunal sends written reasons for the decision to the person making the application.

If the application is not made within the 28-day time limit, such application must include a request for an extension of time and the reason for not complying with the 28-day time limit; the tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed, despite not being within the time limit.

The application for permission to appeal must identify the decision of the tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal and state the result the party making the application is seeking.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).