**FIRST-TIER TRIBUNAL**
**PROPERTY CHAMBER**
**(RESIDENTIAL PROPERTY)**

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| **Case references** | **:** | **LON/00AT/LSC/2021/0204**<br>**LON/00AT/LSC/2023/0008** |
| **Property** | **:** | **Bellevue Court, 141-149 Staines Road, Hounslow, Middlesex, TW3 3JB** |
| **Applicant** | **:** | **Multiple leaseholders of Bellevue Court** |
| **Representative** | **:** | **Mr Graham Smith of Counsel (Direct Access)** |
| **Respondents** | **:** | **Citicorp Limited** |
| **Representative** | **:** | **Mr Richard Alford of Counsel, instructed by Bloomsbury Law Solicitors** |
| **Type of application** | **:** | **For the determination of the reasonableness of and the liability to pay a service charge** |
| **Tribunal** | **:** | **Judge N Hawkes**<br>**Mr S Mason BSc FRICS**<br>**Mr O Miller** |
| **Dates and venue of hearing** | **:** | **22 to 27 October 2023, 20, 21 & 22 November 2024, 15 January 2025, & 21 March 2025 at 10 Alfred Place, London WC1E 7LR** |
| **Date of decision** | **:** | **22 April 2025** |

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**DECISION**

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## Decision of the Tribunal

The Tribunal finds that the service charges relating to insurance which form the subject matter of these applications (which are subject to any discounts which were agreed as part of the settlement agreement which was reached at the October 2023 hearing) are payable by the Applicants.

## The background and hearing

1. Bellevue Court, 141-149 Staines Road, Hounslow, Middlesex, TW3 3JB ("the Property") is a block containing 72 residential flats. These are applications brought by multiple leaseholders of the Property pursuant to section 27A Landlord and Tenant Act 1985 ("the 1985 Act"). The Respondent, Citicorp Limited, is the freehold owner of the Property and it has also retained several flats at the Property in respect of which it is liable to pay a service charge contribution.

2. There are two applications currently before the Tribunal. Application reference LON/00AT/LSC/2021/0204 concerns the service charge years 2015 to 2021, and application reference LON/00AT/LSC/2023/0008 concerns the service charge years 2022 and 2023.

3. The final hearing of these applications was originally listed to take place as a hybrid hearing from 22 to 27 October 2023. The Tribunal inspected the Property on 22 October 2023, in the presence of the parties' then legal representatives.

4. After hearing the oral evidence of number witnesses for the Applicants, the Tribunal gave the parties time to engage in the settlement discussions which resulted in a settlement agreement covering many of the areas in dispute. However, a substantive dispute remained concerning the service charges in respect of insurance, which was defined as follows ("the Insurance Issue"):

   *"the amount payable by the Applicants as service charge in respect of the costs of insuring the building which forms the subject of this application ("the Building") in the service charge years 2015, 2016, 2017, 2018, 2019, 2020, 2021 and the projected costs of insuring the Building for the 2022 and 2023 service charge years."*

5. The Tribunal has been informed following sums currently remain in dispute, subject to certain general discounts which were agreed as part of the settlement agreement:

| Service Charge Year | Sum |
|---|---|
| 2021 (2020-2021) | £141,835 |
| 2022 (2021-2022) | £168,348.38 |
| 2023 (2022-2023) | £181,449.75 |
| 2024 (2023-2024) | £221,220.00 |

6. It is not in dispute that concerns regarding the existence of combustible cladding on the Property have given rise to a very sharp increase in the cost of building insurance. The experts note that the premium in 2019 was £23,000. Accordingly, the cost of insuring the Property has increased from £23,000 in 2019 to in excess of £220,000 in 2024. The insurance was placed through a

broker and there are presentation reports for each year which include a summary of market condition.

7. On 27 October 2023, the Tribunal gave directions for the determination of the Insurance Issue. Procedural issues then arose which were dealt with by Procedural Judges on the papers and the paper determinations included the making of an "unless order" against the Respondent on 11 January 2024.

8. The Respondent breached this unless order and, at a case management hearing which took place on 18 March 2024, the Respondent was granted relief from sanctions and further directions were given. The final hearing of the Insurance Issue was originally listed to take place over three days on 20, 21 and 22 November 2024.

9. At a case management hearing concerning a further application to the Tribunal involving the same parties which is not currently before this Tribunal, the Respondent's representative agreed that the Respondent had failed to comply with the settlement agreement referred to above. This, understandably, caused considerable concern to the Applicants and, whilst the Tribunal has no enforcement jurisdiction, it does not reflect well on the Respondent's general credibility.

10. The Tribunal heard factual evidence from the parties on 20, 21 and 22 November 2024. Each party had been granted permission to rely upon expert evidence and the Tribunal has, throughout the proceedings concerning the Insurance Issue, expressed the preliminary view that the determination of the Insurance Issue is likely to turn on the expert evidence. After having heard a sufficient amount of factual evidence concerning the general credibility of the Respondent to enable the Tribunal to form a view, the Tribunal therefore limited Mr Smith's cross-examination insofar as it concerned general credibility rather than matters directly relevant to this determination. This was in accordance with the overriding objective pursuant to rule 3 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, which includes provision that dealing with a case fairly and justly includes dealing with the case in ways which are proportionate to the issues.

11. On 22 November 2024, the final hearing of the Insurance Issue was adjourned part-heard with directions for the parties' experts to answer the following questions which were formulated by the Tribunal:

    (1) For each year in question, are the insurance premiums within the reasonable range for the building in its current state with its current claims' history?

    (2) Does the insurance market treat different types of combustible cladding in different ways or is the market averse to all types of combustible cladding?

    (3) What would be the effect on the insurance premiums of the installation of fire barriers and the retention of the existing combustible insulation?

(4) What would be the effect on the insurance premiums of removing the existing combustible insulation (either or both types) and replacing it with insulation compatible with current building regulations?

(5) Was sufficient information provided to the insurers concerning the type of cladding which was on the building?

(6) Is it possible to say whether it would be cost effective to remove the combustible cladding on the building and reinstate building regulation compliant cladding (with all necessary associated works) in order to reduce the insurance premiums? If so, over what period of time would this be cost effective?

12. The Applicants and the Respondent were permitted to submit up to five additional proposed questions for the experts and the matter was listed for a further day on 15 January 2025, in order to hear oral evidence from the experts. It was anticipated that at least one further day would be required to conclude the hearing but, at that stage, 15 January 2025 was the only date which could immediately be fixed.

13. The Applicants submitted the following further questions for the experts:

*"A. If the External Wall Systems which contained highly flammable material had been removed from the building would the insurance have increased by 600%?*

*B. If an EWS 1 has not been completed in accordance with the guidelines for its completion and it is knowingly submitted to the insurer, has this the potential to invalidate a policy at any time?*

*C. If serious and priority fire risks have been identified in a fire risk assessment and are not addressed, has that the potential to invalidate a policy?*

*D. Is the obligation on the applicant to comply with conditions precedent and inform the insurers of such or the obligation on the insurer to check up on its completion?*

*E. Given the potential loss of approximately 20 million resulting from a claim, in the event of a claim would the insurer be in a position to / be likely to, invalidate a policy, if any of the following had not been disclosed:*

*i. A previous conviction of a company director for health and safety offence?*

*ii. The existence of a London Fire Brigade enforcement notice relating to fire safety in the building?*

*iii. The existence of a Council Improvement Notice in relation to removal of external wall system including balconies?*

*iv. Failure to inform them of the removal of the external wall system at part of the building to facilitate the extension?"*

14. Whilst recognising that there was force in the Respondent's submission that because the fifth question is subdivided into four parts the Applicant was submitting more than five questions, the Tribunal permitted these questions to be put to the experts. The Respondent was of the view that the Tribunal's questions addressed all relevant issues and therefore did not submit any further questions.

15. The parties' experts produced a joint supplemental statement dated 3 January 2025 addressing the additional questions ("the Joint Statement").

16. At the resumed hearing on 15 January 2025, the Respondent tendered their insurance expert, Mr Tim Dowlen to give oral evidence. The Applicants' expert, Mr Stephen Coates, was not available to give evidence. This was said to be due to confusion regarding the purpose of the hearing on 15 January 2025 notwithstanding the fact that, at the hearing on 22 November 2024 and at paragraph 6 of an email from the Tribunal which was sent to the parties on 22 November 2024, the parties were informed that they had permission to rely upon oral expert evidence at the adjourned hearing. In any event, Mr Smith confirmed that the Applicants would not seek to call their expert to give oral evidence.

17. On 15 January 2025, the evidence concluded and the hearing was adjourned part-heard to 21 March 2025 when the Tribunal heard oral closing submissions from Mr Smith and Mr Alford. The Applicants' skeleton argument included various assertions of fact. Accordingly, Mr Smith was asked to either obtain confirmation from Mr Alford that any fact asserted by the Applicants was agreed by the Respondent or to refer the Tribunal to any evidence relied upon by the Applicants in submitting that any disputed issues of fact should be determined in their favour.

18. The parties were informed that they could rely upon anything in the hearing bundles which was relevant to the issues within the Tribunal's jurisdiction and that permission would need to be applied for and granted by the Tribunal if the parties wished to rely upon any additional documents. It was also explained that it was for the parties to present the entirety of their cases orally at the hearing. This is so that everyone would know exactly what the other party's case was and how it was being presented, and so that any party with an alternative viewpoint would have the opportunity to make oral representations to the Tribunal in response to each point which was being raised. In *Arrowdell Limited v Coniston Court (North) Hove Limited LRA/72/2005*, it was held at [23] that the Tribunal "must not reach a conclusion on the basis of evidence that has not been exposed to the parties for comment."

19. The Tribunal has considered all the submissions that were made, and all of the evidence that was referred to during the course of the hearing. However, to keep this decision to a proportionate length, the Tribunal will only refer below to those matters which it is necessary to set out in order to understand the reasons for the Tribunal's decision.

**The issues**

20. Under section 27A(1) of the 1985 Act, the Tribunal has jurisdiction to determine:

*(1)…whether a service charge is payable and, if it is, as to—*

*(a) the person by whom it is payable,*

*(b) the person to whom it is payable,*

*(c) the amount which is payable,*

*(d) the date at or by which it is payable, and*

*(e) the manner in which it is payable.*

21. Section 19 of the 1985 Act includes provision that:

*(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 or the carrying out of works, only if the services or works are of a reasonable standard; and the amount payable shall be limited accordingly.*

*(2) Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise.*

22. It is not in dispute that, subject to the statutory limitation concerning reasonableness referred to above, the cost of insuring the Property is payable pursuant to the terms of the Applicants' leases.

23. The Applicants assert, under the heading "Issues" in the Applicants' skeleton argument, that the issues currently before the Tribunal are as follows (emphasis supplied):

*"3. Is the Applicants' service charge too high* ***due to the Respondents' failure to remove cladding****, which has led to an* ***unreasonable increase*** *in the cost of the insurance policy for the property?* ***Was it reasonable not to remove the cladding from the property****?*

*4. Further questions arise to assist the tribunal in answering the issue posed in paragraph 3 and other associated matters:*

*a. Did the Respondent withhold information from the insurer that either increased the cost of the policy or potentially invalidated the insurance?*

*b. Did the Respondent conceal the need to remove cladding, thereby increasing the cost of insurance?*

*c. Is the insurance inordinately high because of excessive or fraudulent claims made by the freeholder?*

*d. Is the insurance higher due to the extension to the building?*

*e. Has the Respondent properly accounted for insurance costs?*

*f. Has the Respondent falsely claimed on the insurance policy?"*

24. Not all of these matters are pleaded and no application was made by the Applicants on form Order 1, attaching a copy of a proposed amended pleading, to file and serve any amended Statement of Case. In addition, some of the matters listed at paragraph 4 of the Applicants' Skeleton argument are not relevant to or associated with the proposed questions for the Tribunal to answer which are set out at paragraph 3.

25. Further, the sole matters before the Tribunal are applications under section 27A of the 1985 Act in respect of the relevant service charge years. As was accepted at the hearing, there is no set off before the Tribunal. There are no Directions permitting any set off to form part of these proceedings (and no application on form Order 1, with a copy of the proposed pleading attached, has been made to include any set off). The Tribunal has no jurisdiction to hear any potential free-standing claim for damages based, for example, on the alleged breach by the Respondent of a specifically identified clause of the Lease.

26. At paragraph 11 of their skeleton argument, the Applicants state:

*"In Radcliffe Investment Properties Ltd v Meeson [2023] UKUT 209 (LC), the UT held that the cost of a waking watch had not been reasonably incurred under section 19(1), to the extent it was attributable to the landlord's failure to comply with its fire safety obligations under article 9 of the Regulatory Reform (Fire Safety) Order 2005 (SI 2005/1541). If the landlord had complied with its duty, the fire safety defects would have been discovered and the waking watch would not have been necessary. Therefore, it was open to the FTT to conclude that the cost of the waking watch was unreasonable. The UT determined that had the landlord complied with its statutory duty, the fire safety defects would have been identified, and the need for a waking watch would not have arisen. Consequently, the First-tier Tribunal (FTT) was entitled to conclude that the cost of the waking watch was unreasonable."*

27. The Applicants also expand upon their case under section 27A of the 1985 Act concerning the cladding at paragraph 17 of their skeleton argument where they submit:

*"if a landlord fails to remove cladding and this results in service charges that are not reasonably incurred or the works not being of a reasonable standard, this could be deemed unreasonable under section 19 of the*

*Landlord and Tenant Act 1985. Tenants could challenge such service charges by arguing that the landlord's failure to act has led to unreasonable costs or substandard works being included in the service charges."*

28. The reference to the cost of substandard works is noted. However, as stated above, the Insurance Issue is the only matter before this Tribunal.

29. The Respondent's primary case is set out in the Respondent's skeleton argument as follows:

*"27. The definitions of "relevant costs" and "reasonably incurred" under s.18(2) and s. 19(1)(a) of the 1985 Act direct the question to the circumstances appertaining when the costs were in fact incurred: Continental Property Ventures Inc v White [2007] L. & T.R. 4, per HH Judge Rich QC at [10]. The Honourable Judge continued (at [11] to hold that "...the "relevant costs" which by s.19(1)(a) are limited to what is "reasonably incurred" are defined by s.18(2) as the "costs ... incurred ... by the landlord ... in connection with the matters for which the service charge is payable" Those matters include "reasonably maintenance etc." The question of what the costs of repairs is does not depend upon whether the repairs ought to have been allowed to accrue. The reasonableness of incurring costs for their remedy cannot, as a matter of natural meaning depend upon how the need for remedy arose. The question of what the costs of repairs is does not depend upon whether the repairs ought to have been allowed to accrue." (at [11]).*

*28. Demonstratively, similar considerations apply to a landlord's obligation to insure the building: the question of whether and to what extent the costs of insurance were reasonably incurred is to be determined by reference to the building that the landlord was obliged by the lease to insure at the relevant time that the insurance was placed and the relevant charges were incurred."*

30. The Respondent goes on to submit that the insurance premiums were reasonably incurred as they were in line with the market for a property such as Bellevue Court. The Respondent also puts forward alternative arguments but, for the reasons set out below, the Tribunal has concluded that, as a matter of law, the Trbunal is bound to accept the Respondent's primary case.

**The experts' Joint Statement**

31. The experts set out their conclusions in the Joint Statement as follows (emphasis suppled):

*"Detail of Discussion and opinion of the experts*

*The experts discussed each of the issues as directed by the Tribunal and their views are outlined against each point below*

*1.The experts agreed that the construction of Bellevue Court and the nature of the external wall system means that the fire risk is considered by the insurance market to be much greater than normal. This means that, partly*

*guided by their reinsurance contracts, few property insurers will agree to provide terms. Those who do have limited appetites and may effectively charge whatever they like. Given this* ***in our opinion the terms are what should be expected until remedial action is taken.*** *Terms may deteriorate further given the lack of action in dealing with this problem.*

*2. The experts agreed that the insurance market does differentiate between different types of combustible cladding. Insurers are very aware of whether cladding will burn, as EPS (polystyrene) does, or whether it will just char as does PIR. Insurers will therefore offer different terms for different types of cladding. Grenfell showed what a fire looks like in the presence of EPS used on a residential block of flat: most insurers now avoid risks where EPS is a significant feature.*

*3. Should the existing external wall system be retained but fire barriers installed (note that we are insurance experts and not fire engineers), whilst a prudent underwriter would recognise the benefit of fire barriers, given the market's view of EPS the experts do not believe this would make a material difference to the insurance premium or terms. Although fire barriers may provide some mitigation in slowing down the spread of fire, depending on the brigade attendance timeframes they are unlikely to stop a fire developing in a building where EPS is extensively used, especially where other adverse features such as combustible balconies are present. Should all other adverse features (other than EPS) be removed, then it is possible the insurer may grant a discount of up to 20% but exceeding this seems optimistic. Only the actual insurer could decide the extent of any discount and given the lack of the usual competitive pressures it is possible this discount could be negligible.*

*4. The experts agreed that* ***should the current EPS based external wall system be replaced with something compatible with current building regulations (i.e. something non-combustible) then the premiums should reduce significantly****. The extent of such a reduction would depend on other factors such as whether the balconies are also replaced but assuming these are also addressed, the premium could reduce to around £50,000 – provided of course there were no significant claims in the meantime and depending on the insurance market climate.*

*5. The Cotters risk presentation for the 2017/18 year disclosed the presence of Knauf warm wall polystyrene panelling on most of the outside walls. This was repeated in the presentation for the 2019/20 year.* ***On the basis that these documents were presented to insurers, the experts agree that any insurer had all the information needed to put it on enquiry that this building contained combustible construction.*** *Insurers should have known about the issues polystyrene can cause, even pre-Grenfell, from problems with food risks where this material was used. The experts understand surveys were undertaken in 2017 and 2021, although we have not seen them, and this should have shown not only the wall panels but also other combustible features such as balconies.* ***It would seem difficult therefore for the insurers to suggest that they were not aware of the true nature of this building.***

*6.* ***The question of whether it would be cost-effective to remove the panels is a complicated question and depends on a number of variable factors. We do not believe we can adequately address the question, as we are neither qualified nor have the relevant facts and figures on this subject.*** *For example, factors in reaching an answer might include:*

- *The revised insurance premium which depends not only on the risk features but also prevailing conditions in the insurance market along with wider sentiment towards this type of risk;*
- *Claims experience in the meantime;*
- *The type of replacement external wall system to be installed;*
- *Whether or not other combustible features are removed, such as balconies;*
- *The time taken to remove and install the panels and any insurer's view of the project risk management;*
- *The cost of a replacement wall system and any other related work.*

*It should be relatively straightforward to establish the cost of the replacement project and compare this with the reduction in insurance premium. If the cost of the project was say £1m and the insurance saving is say £170,000, then the repayment period for the project is approximately 6 years.*

***The experts do not know how much the wall replacement project would cost or its complexity and timeframe****, so an expert forensic opinion in this regard would need to be sought in order to undertake a comprehensive cost/benefit analysis. Mr Dowlen believes that the cost of remedial action would in any case ultimately fall on the leaseholders of Bellevue Court and would need to be set against the potential insurance premium savings.*

*7.... – the experts agree that the insurance premium would not have increased by 600% if the external wall system had been replaced. If insurers considering renewal in 2020 had not needed to reflect the presence of the Knauf wall panels, assuming these had already been removed and replaced by something complying with building regulations and considered to be non-combustible, then the only real change that needed to be underwritten was the claims experience.* ***The 2019/20 year had been particularly poor with approximately £195,000 of mainly water damage claims in that year. The insurance premium in 2019 was £23,000: the experts agreed that this would have increased in 2020 due to the claims experience. We estimate the increase might have seen the premium increase to around £50,000 in that year, with the £100,000 water damage claims' excess being applied too.***

*8…- the question of whether an incorrect EWS1 submitted to insurers could invalidate the coverage is again a subjective one. The EWS form was intended to show that an independent expert has completed a fire risk appraisal on the external wall system. If an incorrect form was replaced by a corrected form then the issue is whether the incorrect form contained information that the insurer relied upon in assessing the risk. An insurer who wishes to avoid a claim for reasons of non-disclosure must meet a 2 step legal test. First the insurer must show that the fact was material to its assessment or risk, i.e. it could influence whether they accepted the risk and/or at what premium/terms. Next the insurer must how that the material fact induced it to accept the risk or disclosure of the fact would have meant different terms were offered.*

*The form was also completed by an independent expert so if the errors were theirs it seems unlikely the insurer would have punished the Insured if a loss had happened in the interim period.* ***Given the insurer already knew that the external wall system comprised almost entirely of Knauf polystyrene panels, and the insurer was happy to continue when they received a correct EWS1, the experts consider that it seems unlikely there would be grounds for avoidance but in reality the only party who can answer this question is the insurer.***

*9 … - if serious issues had been revealed during a fire risk assessment and these had not been dealt with, could this invalidate the policy? For a risk of this nature, fire risk assessments are a key tool relating to fire safety. These assessments will be undertaken regularly by consultants appointed by the Insured as well as occasionally by other parties, such as the fire brigade. The Saville's assessment in May 2021 suggests that they do annual assessments and there is a constant list of recommendations, some of which are done quickly but others are not. The timescales for completion range from 1 day to 18 months or longer. The assessor does not seem to be raising red flags and the risk assessment shows as 'moderate'. In Mr Dowlen's opinion, this reflects the situation on the ground.*

*The LFB enforcement notice was issued on 22nd February 2019 with a deadline for compliance with the specified measures of 14th June 2019. The experts are not aware of whether the required steps were undertaken by Citicorp or whether subsequent dialogue with LFB took place. We are also assuming there was no further enforcement action by LFB in the aftermath of this notice. Mr Coates considers that serious issues emanating from fire risk assessments undertaken by third parties or the fire brigade could be a material circumstances that should be disclosed to insurers, but only where there is non-compliance with the specified measures and further action (such as prohibition notices) has been notified. Mr Dowlen believes that matters of detail such as these would not reasonably be taken up by insurers or turned into strict insurance policy requirements or conditions.*

*10 …- is the obligation on the applicant to comply with conditions precedent and inform the insurers of such, or the obligation on the insurer to check up on its completion? The experts note that these issues seem to relate to conditions applied to the insurance policy/slip after a survey was completed*

*by AGB (on behalf of the insurer) on 28th July 2021. The insurer added a condition stipulating that certain work had to be done to the fire alarm, confirmation relating to types of insulation used in the extension and a review of the fire risk assessment was 'encouraged. It was warranted on the endorsement that this had to be completed by 4th September 2021. A strict interpretation of a warranty is that non-compliance invalidates a policy.*

*The experts are not aware whether the conditions were complied with but the renewal policy we have seen dated 30 November 2021 does not contain these conditions* ***suggesting that they had been complied with****. The insurers also continued to renew the policy* ***which suggests they have the information they require.***

*11 … - the experts are asked to opine on 5 issues also to whether they are material facts that should have been disclosed to insurers. (Mr Dowlen does not think that these questions are relevant to the subject matter of the Tribunal hearing. Mr Coates thinks we have been asked these questions by the Tribunal so we should use our best endeavours to respond);*

i. *A previous conviction of a company director for health and safety offences – the experts agreed this would be material and should be disclosed to insurers but also note from the 2017 and 2019 broker presentation that the H & S offences relating to K Singh Sandhu and other material matters were disclosed to potential insurers.*

ii. *The existence of a LFB enforcement notice – Mr Coates thinks this could be material if LFB took subsequent action or pursued the matter further. He does not think a standard enforcement notice is itself material. Mr Dowlen has not in his experience seen such matters put before insurers.*

iii. *The existence of a council improvement notice in relation to removal of external wall system – it is well known by insurers that around 2019 to 2021, local authorities were issuing improvement notices such as these in the aftermath of the Grenfell Tower fire. Many insurers chose to exit the market for risks with the most flammable type of panels (EPS) and those that still participated did so under strict conditions.* ***These insurers were well aware that councils were encouraging building owners to remove panels but understood there were significant barriers to implementation, such as cost, complexity, alternative accommodation, planning etc****. The experts do not consider that a council improvement notice with no subsequent action or enforcement would be something that needed to be disclosed provided the insurers had been told what type of external wall system was in place and had agreed to continue or revised their terms. In this case insurers were receiving a premium that was more than 6 times the previous figure and had also imposed a very high excess or contribution to any claim(s), primarily due to the very hazardous construction that was the driver of councils encouraging alternative methods of construction.*

iv. *Failure to advise of the removal of part of the external wall system to facilitate an extension. Although many insurance policies incorporate*

*specific conditions around risk management where combustible panels are disclosed, this policy does not. Insurers usually consider it material where combustible panels are being worked upon especially if insulation material is exposed. Mr Coates considers this matter should have been disclosed to the insurers although he is not aware of the specific nature of the work or timeframe. The AGB survey in 2021 may have noted the work in which case the insurers would be aware. As it seems to only be a small extension it may be that insurers are not unduly concerned but I would consider it material. Mr Dowlen again thinks that minor works to a building would not, if professionally supervised and managed, be of interest of disclosable to insurers who would in any case expect their insureds to exercise and observe the general duty of care."*

32. The Tribunal accepts, on the balance of probabilities, and has placed considerable weight upon this evidence from the two experts in the field of insurance, insofar as it comprises agreed evidence. Due to the potential availability of government grants, the Tribunal does not accept Mr Dowlen's conclusion that it is clear that the cost of remedial action would ultimately fall on the leaseholders of Bellevue Court. Where the experts differ, the Tribunal otherwise prefers the evidence of Mr Dowlen to that of Mr Coates. Unlike the evidence of Mr Coates, the evidence of Mr Dowlen was tested through cross-examination and the Tribunal found Mr Dowlen to be a measured and credible witness. As noted at the hearing, no other witnesses had permission to give expert evidence.

**The Tribunal's determination**

33. The first question to be determined is where, as a matter of law, the line has to be drawn between issues which the Tribunal is able to take into account under section 19 of the 1985 Act when considering the reasonableness of service charges and issues which that Tribunal is unable to take into account under section 19, which must instead form part of a separate damages claim or a set off.

34. At [11] of *Continental Property Ventures v White*, HHJ Rich QC held that (emphasis supplied):

*… the "relevant costs" which by s.19(1)(a) are limited to what is "reasonably incurred" are defined by s.18(2) as the "costs . . . incurred . . . by the landlord. . . in connection with the matters for which the service charge is payable". Those matters include "reasonably maintenance etc". The question of what the costs of repairs is does not depend upon whether the repairs ought to have been allowed to accrue. The reasonableness of incurring* ***costs for their remedy*** *cannot, as a matter of natural meaning depend upon* ***how the need for remedy arose****.*

35. At [28] of *Radcliffe Investment Properties Ltd v Meeson*, Martin Rodger KC, Deputy Chamber President, held:

*The paradoxical proposition that the reason why a cost has been incurred is irrelevant to the reasonableness of incurring that cost may be an appropriate analysis in some cases, but it is not a rule of general application. In considering questions of reasonableness, it is rarely appropriate to begin with an inflexible rule.*

36. At [29] of *Radcliffe Investment Properties Ltd v Meeson*, the Deputy Chamber President summarised *Continental Property Ventures Ltd v White* and went on to state (emphasis supplied):

*31. In this case, the landlord was in breach of its duty under article 9 of the Fire Safety Order to commission a suitable and sufficient fire risk assessment by January 2019. That duty was a continuing one and it remained unfulfilled in May 2019 when the waking watch was imposed. The FTT found that, had it done so, the defects would have been discovered. It expressed its conclusion succinctly in paragraph 50(12) of the decision when it said that the waking watch costs were 'attributable to the acts and omissions of the landlord or its agents in relation to fire risk assessment. In the circumstances those acts and omissions render the costs of the waking watch unreasonable.'*

*…*

*34. In my judgment the FTT was entitled to conclude that the costs of the waking watch were not payable by the leaseholders. This was* ***not a case in which many years elapsed between the omission or breach of duty and the incurring of the cost made necessary by it.*** *The waking watch was* ***one part of the cost of making the building safe****. The cost of the necessary remedial work to put right the fire safety defects was increased by the cost of the waking watch, but that increase was wholly avoidable. If the landlord had been aware of the need to put right the defects in compartmentation and the inadequate fire protection for the lift, as it would have been if it had commissioned an up-to-date fire risk assessment when it should have done, the cost of the necessary works would not have been increased by the cost of the waking watch. The FTT considered that the cost was "unreasonable". That was an assessment which it was open to the FTT to make. As a result, the disputed cost was not payable under the Lease and the section 19(1) cap did not take effect.*

37. Both decisions are binding on this Tribunal. It is our understanding from these authorities that the distinction between issues which the Tribunal is able to take into account under section 19 of the 1985 Act, when considering the reasonableness of service charges, and the issues which must instead form part of a separate damages claim or a set off turns on the proximity in time between any omission relied upon and the cost made necessary by it and on proximity in character, including whether the increased costs are *part of* the remedy to which the disputed service charges relate (as in *Radcliffe Investment Properties Ltd v Meeson* where the cost of the waking watch was part of the service charge cost of making the building safe).

38. In the present case, an omission on the part of the Respondent is not being relied upon as having increased the cost of removing the cladding or as otherwise having increased the cost of making the Property safe. Instead, a failure to remove cladding is relied upon as having increased the cost of building insurance. Accordingly, any increased costs are not part of a remedy to which the service charge item relates.

39. The same reasoning would apply to the other alleged acts and omissions of the Respondent that have been complained of in these proceedings, had they been adequately pleaded. Any increased costs arising out of any such acts or omissions are not part of a remedy to which the service charge item which is under consideration relates. We do not accept that, as a matter of law, it is potentially open to the Applicants to secure a reduction to the building insurance charges by making wide ranging complaints of matters which are said to be unreasonable which are unrelated to any remedy to which the disputed service charge item relates.

40. The Applicants contend that the cladding should have been removed from the Property by mid-2020. However, they have not provided any expert evidence concerning the date on which the Respondent would have had to start taking action in order for remedial work necessary to reduce the insurance premiums to have been completed by mid-2020. Accordingly, there is no expert evidence before the Tribunal that there is, on the balance of probabilities, proximity in time between the omission relied upon by the Applicants and the costs made necessary by it.

41. The experts state *"These insurers were well aware that councils were encouraging building owners to remove panels but understood there were significant barriers to implementation"*. Accordingly, it is also the case there is likely, on the balance of probabilities, to be a significant gap in time between the omission relied upon by the Applicants and the costs made necessary by it.

42. The circumstances of this case are therefore akin to *Continental Property Ventures v White* rather than to *Radcliffe Investment Properties Ltd v Meeson* and the question of whether the insurance costs are reasonably incurred and reasonable in amount therefore does not depend upon how the need for the insurance arose. Reasonableness is to be determined by reference to the Property as it was when the insurance was placed and the relevant charges incurred (in all respects, including as regards the Property's physical condition and claims history).

43. The experts state *"in our opinion the terms are what should be expected until remedial action is taken"*. Accordingly, on the basis of the agreed expert evidence, the Tribunal finds, on the balance of probabilities, that the insurance premiums were reasonable for the Property as it was when the insurance was taken out.

44. The Applicants alleged at the hearing that, in 2020/21, the insurance policy covered both the Property and some neighbouring land. The Tribunal was not referred to any part of the pleading putting the Respondent on notice that this point would be raised. In any event, had this matter been before the Tribunal,

the statement of risk common to all insurance presentations only refers to the Property and so the reference to other land is likely to be a typographical error. Further, there is no expert evidence before the Tribunal that if some additional land had been included this would have increased the premium and, if so, by how much.

45. We also note that we have not been provided with any comparable quotations for building insurance to potentially demonstrate that the premiums fall outside the reasonable range for insuring the Property as it was at the time when the costs were incurred. Further, we have seen and accept on the balance of probabilities evidence that market testing was carried out and that only one insurer was willing to insure the Property during the relevant period.

46. In *Waaler v Hounslow LBC* [2017] EWCA Civ 45, the Court of Appeal held that whether costs were reasonably incurred is to be determined by reference to an objective standard of reasonableness, not by the lower standard of rationality; the fact that the cost of the relevant works is to be borne by the lessees was part of the context for deciding whether they had been so reasonably incurred; and that the focus of the inquiry was not simply a question of the landlord's decision-making process but was also one of outcome.

47. In *COS Services v Nicholson* [2017] UKUT 382 (LC), the Upper Tribunal considered the proper approach of the First-tier Tribunal in the event of a challenge to the reasonableness of charges for insurance. The Upper Tribunal concluded that the Tribunal is entitled to consider both the rationality of the landlord's decision-making process and whether the sum being charged is, in all the circumstances, a reasonable charge. It was also stated at [38] that context is, as always, everything, and every decision will be based upon its own facts.

48. For the reasons set out above, the relevant decision in this context is the decision to take out the insurance rather than any decision concerning the cladding. The Respondent was obliged to insure the Property and it cannot be said to be unreasonable to insure on terms which both insurance experts say should be expected for the Property as it was when the insurance was taken out. There is no evidence before the Tribunal that any cheaper insurance was available for the Property at the material time and the outcome in the present case appears to be the only available option for insuring the Property with all the attributes it had when the insurance policies were entered into.

49. The allegations that the conduct of the Respondent (including alleged fraudulent conduct) rendered the insurance policies voidable have not been adequately pleaded. Further, there is no factual evidence before the Tribunal that the insurance companies have sought to avoid the insurance policies and there is no expert evidence before the Tribunal that it is likely, on the balance of probabilities, that the insurance companies will in the future seek to avoid the insurance policies.

50. The allegations that the Respondent made fraudulent insurance claims have also not been pleaded and so are not before the Tribunal. It is particularly

important that allegations of fraud are fully pleaded and particularised. If these allegations had been before the Tribunal, the Tribunal would have accepted Mr Dowlen's oral expert evidence that, due to the high financial value of the insurance claims which were made concerning the Property, it is likely that a loss adjuster would have been instructed to investigate and verify the claims before the relevant sums were paid out. We find as a fact, on the basis of Mr Dowlen's expert evidence, that it is therefore likely that the insurance claims were investigated and found to be valid and justified.

51. If it had formed part of the Applicants' pleaded case that sums were billed to lessees which should have been covered by insurance, we would not have been satisfied on the balance of probabilities that this was correct because this has not been confirmed by either insurance expert. Further, even if correct, this would be a separate matter from the issue of whether the insurance premiums are within the reasonable range for the Property as it was at the time when the costs were incurred.

52. The Tribunal therefore determines that the service charges relating to insurance which form the subject matter of these applications (which are subject to any discounts which were agreed as part of the settlement agreement which was reached at the October 2023 hearing) are payable by the Applicants.

53. The Tribunal has sympathy for the Applicants' frustration that the settlement agreement does not appear to have been complied with and concerns regarding aspects of Mr Sandhu's evidence (see below). However, this is not a case which turns upon the general credibility of the Respondent and its witness of fact.

**Further observations**

54. Having heard evidence and argument concerning the position should the Respondent's primary case not succeed, the Tribunal makes the further observations set out below which do not form any part of the Tribunal's substantive decision.

55. The Respondent submits that the burden of proof in a section 27A application is on the Applicants to at least establish a "prima facie" case that the charges in question are unreasonable: *Schilling v Canary Riverside Development PTD Limited* LRX/26/2005, per Michael Rich QC at [13].

56. If the relevant issue is whether the insurance premiums are reasonable sums for insuring the Property with all the attributes which it had at the time when the insurance was taken out, the Tribunal accepts (and this does not appear to be in dispute) that the extreme rise in the level of the insurance premiums is sufficient to raise a "prima facie" or apparent case which the Respondent must answer. This question has been addressed by the Respondent's expert.

57. However, if it were open to the Applicants to argue that the insurance premiums should be reduced due to the Respondents' alleged unreasonable failure to remove cladding from the Property, the position would be different. The Tribunal accepts that, in these circumstances, in order to establish a

"prima facie" or apparent case that the Respondent acted unreasonably *in not removing/replacing the cladding*, the onus would be on the Applicants to adduce evidence showing that there was a realistic alternative which would be likely to have resulted in lower insurance premiums in the relevant service charge years.

58. Both insurance experts agree that the question of whether it would be cost-effective to remove the panels is a complicated question which depends on a number of variable factors. They also agree that they cannot adequately address the question as they are neither qualified nor have the relevant facts and figures on this subject. They state that they do not know how much the wall replacement project would cost or its complexity and timeframe.

59. The Tribunal is aware that there is currently a shortage of the fire safety experts needed to undertake such a project. We do not accept the Respondent's submission that this general knowledge is sufficiently detailed to enable the Tribunal to assess the extent and likely impact of the shortage of fire safety experts.

60. However, without appropriate expert evidence identifying the nature and scope of any proposed scheme to remove the cladding and specifying the likely timeframe for completing the work (which would include a consideration of the likely timescale for obtaining the necessary input from fire safety experts), we are not satisfied on the balance of probabilities that a "prima facie" case has been raised by the Applicants that there is a realistic alternative which would be likely to have resulted in lower insurance premiums during the relevant service charge years. There is no expert evidence that, even if funding were available at a sufficiently early date (which the Respondent disputes), it is likely that the project would have been completed so as to reduce the insurance premiums by any particular date.

61. If the Applicants do not need to establish a prima facie or apparent case that there is a realistic alternative which would have resulted in lower insurance premiums in the relevant service charge years, the Tribunal would have found that they had not made out their case on the balance of probabilities for the reasons set out at paragraphs 57 to 60 above.

62. Mr Sandhu's evidence of fact has not been determinative of any of the issues in these proceedings. However, we note that we did not find Mr Sandhu to be a credible witness. It was of particular concern that Mr Sandhu gave evidence that he had, on behalf of the Respondent, charged different lessees different sums ranging from £400 to £4,000 in order to receive a copy of an EWS 1 document which the Respondent had itself obtained entirely free of charge.

63. Mr Sandhu also stated that when lessees failed to pay or queried these charges, he had referred them to a debt collector who working at a health club owned by his father. Mr Sandhu gave evidence that he had described the debt collector as a solicitor when he was not in fact a solicitor "to add a bit of punchiness".

64. Mr Sandhu stated that this had been a mistake, he accepted that there was no fair basis for the charges, and he has stated that the Respondent is willing to

refund the charges to any affected lessees (a matter which the Tribunal confirmed would be recorded in this decision).

65. There are other aspects of the factual evidence which are not agreed about which the parties may feel strongly. However, they are not relevant to this decision because, for the reasons set out above, the expert evidence has proved determinative.

**Name:** Judge N Hawkes **Date:** 22 April 2025

## 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).