

## The complaint

Mr W has complained about Amtrust Europe Limited's decision to decline a claim he made under his Premier Guarantee New Home Warranty.

## What happened

I issued a provisional decision on this complaint in April 2022, explaining that I was intending to uphold it. Here's what I said in my provisional decision.

### ***"What happened***

*The subject of this complaint is a high-rise building comprised of several flats. Damage has been caused to the common parts of the building, which means other leaseholders have been affected, in addition to Mr W. However, this complaint has been brought by Mr W only.*

*There has been extensive background to this complaint which I don't intend to repeat in full detail here. Instead, I'll summarise the key events most relevant to the outcome of Mr W's complaint. This isn't meant as a discourtesy, rather it reflects the informal nature of our service and my role within it.*

*There have been several businesses and individuals involved in the complaint – acting as representatives or agents of either Mr W or Amtrust. But for ease of reference, I'll only refer to Mr W and Amtrust in this decision – even when referring to the actions or arguments of their representatives.*

*In March 2019, some cladding boards were blown off of Mr W's building and caused damage to a skylight below. A claim was raised with the relevant building insurer (a separate insurer to Amtrust), who accepted the claim under the storm cover and dealt with the resultant damage. But it also recommended the remaining cladding was replaced, as it said it was defective, which was excluded under that insurer's policy.*

*A claim was raised with Amtrust, the New Home Warranty provider, but it wasn't accepted. Amtrust accepted that the fixings used to secure the cladding weren't adequately spaced, in line with the manufacturer's recommendations. But it said there was no evidence that this is what caused or contributed to the damage. Amtrust said the dominant cause of the damage was the storm – which it says is supported by the fact that the building insurer accepted and settled the claim. Amtrust also said cladding boards wouldn't be covered under the policy in any event, as they weren't structural or part of the building's waterproofing envelope which was a claim requirement under the terms.*

*The original builder has since agreed to repair/replace all the cladding, on a without prejudice basis. But Mr W, and the leaseholders, are seeking reimbursement of the costs they incurred in erecting scaffolding around the building. They say this was necessary to encapsulate the building to protect it, and the general public, from further risk of damage or injury from falling cladding.*

*One of our investigators considered Mr W's complaint, but she didn't think it should be upheld. Our investigator set out that the fees Mr W was seeking to claim would only be covered in the event that the claim for the damage was covered under the policy terms. She explained that for a claim to be successful under the terms and conditions of the warranty, there needed to be a defect (as defined in the terms of the warranty) in the structure or waterproof envelope, and the defect needed to be shown to be the cause of major damage to the housing unit. She accepted that there was a defect – the incorrect spacing of the fixings used to secure the cladding boards – but she wasn't persuaded that this defect was the dominant cause of damage. She felt the damage had been caused because of the storm, rather than because of the defect. She also didn't consider that the cladding boards were part of the building's waterproofing envelope.*

*Mr W didn't accept our investigator's findings. So, because no agreement has been reached, the complaint has been passed to me to decide.*

### ***What I've provisionally decided – and why***

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

*Having done so, I'm intending to reach a different outcome to that reached by our investigator. I'll explain why below, starting with an explanation of the cover provided under the new home warranty.*

### **What the warranty covers**

*Mr W would like Amtrust to cover the costs he's incurred for erecting scaffolding following the detachment of cladding boards during a storm. He says the scaffolding was necessary to mitigate the imminent risk of further damage to the building and the risk to the health and safety to the occupants and general public. Mr W would also like to be reimbursed for the cost of the engineer's report he, and the residents, obtained.*

*Mr W's warranty document details the terms, conditions, and definitions applicable to the cover it provides. The warranty explains the circumstances where additional costs and fees would be covered:*

#### ***"Additional costs***

*Such additional costs and expenses as are necessarily incurred by the Policyholder solely in order to comply with Building Regulations or Local Authority or other Statutory Provisions, provided that the Underwriter shall not be liable for those costs that would have been payable by the Policyholder in the absence of the discovery of a valid claim under the Policy.*

## *Fees*

*Such Architects', Engineers', Legal, Consulting Engineers' and other fees as are necessarily and reasonably incurred, by the Policyholder in relation to the complete or partial rebuilding or rectifying work to the Housing Unit but shall not include costs or fees incurred by the Policyholder in investigating and/or preparing a claim."*

*Based on the above, the fees incurred for the engineer's report wouldn't be covered as they were incurred whilst investigating and preparing a claim.*

*However, the costs incurred in erecting the scaffolding could, potentially, be covered. But only in the event that a valid claim under the policy existed. So, in order for me to decide that Amtrust needs to reimburse Mr W for his share of the scaffolding costs, I'd need to be persuaded that Amtrust's decision to decline the claim for damage to the building was incorrect. I'll consider this below.*

## *The claim decision*

*Mr W's warranty is split into various sections of cover. Section 3.3 "Structural Insurance" is the relevant section to Mr W's claim and complaint. This section states:*

*"The Underwriter will indemnify the Policyholder against all claims discovered and notified to the Underwriter during the Structural Insurance Period in respect of:*

- 1) The cost of complete or partial rebuilding or rectifying work to the Housing Unit which has been affected by Major Damage provided always that the liability of the Underwriter does not exceed the reasonable cost of rebuilding each Housing Unit to its original specification...."*

*The warranty defines 'Major Damage' as:*

### *"Major Damage*

- a) Destruction of or physical damage to any portion of the Housing Unit for which a Certificate of Insurance has been issued by the Underwriter.*
- b) A condition requiring immediate remedial action to prevent actual destruction of or physical damage to any portion of the Housing Unit for which a Certificate of Insurance has been issued by the Underwriter.*

*in either case caused by a defect in the design, workmanship, materials or components of:*

- the Structure; or*
- the waterproofing elements of the Waterproof Envelope*

*which is first discovered during the Structural Insurance Period."*

*And it defines the 'Structure' and 'Waterproof Envelope' as:*

## *“Structure*

*The following elements shall comprise the Structure of a Housing Unit:*

- foundations;*
- load-bearing parts of ceilings, floors, staircases and associated guard rails, walls and roofs, together with load-bearing retaining walls necessary for stability;*
- non-load bearing partition walls;*
- chimneys and flues;*
- roof covering;*
- any external finishing surface (including rendering) necessary for the water-tightness of the external envelope;*
- floor decking and screeds, where these fail to support normal loads;*
- wet applied plaster;*
- double or triple glazed panes to external windows and doors;*
- underground drainage that the Policyholder is responsible for maintaining.*

## *Waterproof envelope*

*Waterproof Envelope shall mean the basement, ground floors, external walls, roofs, skylights, windows and doors of a Housing Unit."*

*What this means is that for this claim to be covered under the terms of the warranty, the cladding would need to be considered either structural or part of the waterproof envelope. And the defect would need to be considered the proximate cause of the damage which occurred. I'll consider these separately below.*

### *Is the cladding structural/part of the waterproofing envelope?*

*Amtrust initially refused to cover Mr W's claim on the basis that the cladding boards are not part of the structure or waterproof envelope – and so are not covered by the warranty at all. Amtrust based this on the opinions of both sets of engineers, its own and the resident's, who each stated that cladding had been installed for aesthetic purposes only.*

*Mr W doesn't dispute that the cladding may have been installed for aesthetic purposes. But he's highlighted that both sets of expert reports also state that when the cladding boards were installed, sections of the original wall were cut out so that the frame could be attached to the building. Mr W argues that these cut-out sections have then compromised the existing waterproofing envelope. Therefore, he says, the cladding boards became the new waterproofing envelope when they were installed.*

*I've thought carefully about everything both sides have said about this issue. I accept that the existing wall would have stood alone as a waterproofing envelope and that the cladding boards were only intended to be decorative, rather than an essential part of the weatherproofing. But taking into account the views and comments of the experts, I agree with Mr W that the cladding boards became part of the waterproofing envelope, by virtue of the way they were installed.*

*I say this because each of the experts have commented that once removed, the areas where the frame punches through the original wall would be vulnerable to water ingress without some form of remedial action. This means that without the cladding boards and frame in situ, the building is not watertight.*

*The definition of structure includes, “any external finishing surface (including rendering) necessary for the water-tightness of the external envelope”. And based on everything I’ve seen, I think the cladding boards meet this definition, for the reasons I’ve explained above.*

*So, I don’t think Amtrust can fairly refuse to cover the claim, based solely on the argument that the cladding boards aren’t structural or part of the waterproofing envelope.*

*I’ll now go onto consider whether the defect was the proximate cause of the damage.*

*Is the defect the primary cause of damage?*

*Mr W’s warranty provides cover for major damage caused by a defect. Having considered all the available evidence, it’s clear there was a defect in the installation of the cladding. And this isn’t disputed by either party. But the warranty doesn’t cover defects, in isolation, it covers major damage caused by a defect. So, in order for me to uphold Mr W’s complaint, I would need to be persuaded that, even without the storm, the major damage would still have occurred when it did, or that there was an imminent danger of major damage occurring, due to the defective fixings.*

*I’ve carefully considered all of the available expert evidence. Having done so, on the balance of probabilities, I think it’s most likely that the defect was the proximate cause of the damage. I’ll explain why below.*

*It’s not in dispute that the damage happened during a windstorm or that the windstorm would have contributed to the damage which occurred. But having reviewed the expert reports, the evidence I’ve seen suggests that had the cladding been appropriately fixed, in line with the manufacturer’s instructions, then it would have withstood the windstorm.*

*Mr W, and the residents’ expert report assessed the wind loading capacity of the cladding against the calculated pressure of wind it encountered. For the floor which experienced damage, they calculated that the wind pressure it experienced was 1.36 kN/m<sup>2</sup>. This is significantly lower than wind load resistance of the fixings, if secured in line with the manufacturer’s instructions – 1.85 kN/m<sup>2</sup>.*

*The report which looked at the spacing of the fixings, in the most detail, found that the majority of them were in excess of the minimum suggested spacing by at least 50mm and often by 100mm or more. Such increases in the gaps between the fixings would significantly reduce the wind loading capacity.*

*Based on the above it seems more likely than not that, but for the defect, the cladding would have withstood the storm and no major damage would have occurred.*

*In addition to the above, Amtrust’s own engineer commented on the proximate cause of the damage in this case. This report said (with my emphasis):*

*“It’s reasonably clear from the survey that the existing render cladding boards to the West (sic) face of the staircore (sic) to the tower have not been properly fixed and secured in accordance with the manufacturer’s recommendations. This is most likely the reason why the boards failed during storm weather.”*

*And:*

*“From what I could see of the render cladding board fixings – see for example Photos 010-012 – they appear in excess of the manufacturer’s recommended maximum spacing of 250mm....*

*... In most cases, the fixings spacings appear to be around 400-600mm. It is therefore reasonable to conclude the cladding boards have detached due to insufficient number of fixings holding the boards back.”*

*So, both the engineer’s reports have highlighted that the proximate cause of damage in this case was the defect, rather than the storm. Based on this, I think Mr W has a valid claim, under Section 3.3 of the warranty. This is because the building has suffered “Major Damage” as defined, as a result of a “Defect” as defined, in the “Structure” as defined.*

*That said, I’m aware that the issues with the cladding are now being resolved by the original contractors on a without prejudice basis. So, Amtrust won’t be required to cover the cost of repairing or replacing the render cladding boards. And as I understand it, the building insurer already covered the costs of damage caused by the falling boards. This means the only costs remaining to be covered are for the scaffolding.*

*Given that I’m persuaded the proximate cause of damage was the defect, and that it had been a particularly windy week, I consider that it was reasonable and sensible for Mr W and the residents to erect scaffolding to protect the building, residents and general public from the risk of further falling cladding. And based on this, I’m minded to conclude that it would be fair and reasonable for Amtrust to cover the costs incurred by Mr W for the scaffolding.*

*Amtrust should also add 8% simple interest to the amount Mr W is due for the scaffolding, from the date Mr W can evidence that he was out of pocket, to the date he is reimbursed. This is to compensate Mr W for being deprived of the use of that money for other purposes.”*

I said I was intending to direct Amtrust to reimburse Mr W, for any costs he’d incurred for the scaffolding, and to pay 8% interest on that amount from the date Mr W was out of pocket until the date of settlement.

I asked all parties to send me any further evidence or arguments they wanted me to consider before I reached my final decision.

Mr W responded to say he accepted my provisional decision in principle. But he asked that I consider additional costs he’d incurred in appointing surveyors to assess the repairs carried out by the original builder. He provided the invoices for these repairs, which I shared with Amtrust.

Amtrust didn't initially respond, other than to confirm receipt of my provisional decision. But having received the invoices, it provided further comments. In summary, it said:

- The cladding was added to a building which was already watertight, so was cosmetic.
- My finding that the way the cladding was installed prevented the original building from remaining watertight in the absence of the cladding made sense, but that is presumably why the building insurer accepted the claim without referring Mr W to Amtrust. The proximate cause of damage was the storm. Until the bad weather pulled the cladding off of the property there was no breach of the waterproofing envelope.
- The policy can only cover the costs of the scaffolding and professional fees in the event of a valid claim. The only damage which existed had already been dealt with by a separate insurer, so a valid claim cannot exist in this case.

### **What I've decided – and why**

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

I've also carefully considered the additional comments and evidence provided in response to my provisional decision.

Having done so, my conclusions around the validity of Mr W's claim remain unchanged. I say this because I had already considered the arguments put forward by Amtrust prior to issuing my provisional decision. And I set out the reasons why I didn't agree with those arguments in that provisional decision.

Ultimately, I think the cladding would have withstood the weather, but for the defect with the fixings. So, I consider that the defect, not the storm, was the proximate cause of damage.

I accept that the initial damage was dealt with by the building insurer. But the insurer refused to cover the costs of the scaffolding, once it established that there was an inherent installation defect with the cladding. So, I don't think Amtrust can fairly refuse to cover Mr W's costs on the basis of the building insurer's decision either.

The original builder has now carried out the required remedial works to the cladding on a without prejudice basis. But Mr W has provided evidence of additional costs incurred for professional fees in signing off the works and checking the fire safety of the builder's work.

Amtrust says it could only cover these costs in the event of a valid claim. But as I've explained above, and in my provisional decision, I consider that Mr W does have a valid claim under the policy. The only reason Amtrust isn't having to deal with the claim is because the buildings insurer, and the original installer, are dealing with elements Amtrust would've otherwise be responsible for which limits their obligations – but the principle remains that Mr W has a valid claim under his policy. So, it follows that I think Amtrust should reimburse Mr W for his share of these costs, plus interest from the date he can show he was out of pocket to the date of settlement.

However, I note that two of the invoices supplied by Mr W relate to the original reports and surveys carried out to identify why the cladding failed. But as I explained in my provisional decision, the warranty doesn't cover professional fees incurred in preparing a claim. So, I don't expect Amtrust to cover Mr W's share of these particular costs.

There are other leaseholders, with Amtrust warranties, affected by the issues considered in this complaint. It would be in Amtrust's interests to settle the other leaseholders' costs on the below basis, to avoid similar complaints. However, those leaseholders aren't party to this complaint, so I'm unable to make a formal direction for their costs in this decision.

### **My final decision**

For the reasons set out above, and in my provisional decision I uphold Mr W's complaint.

Amtrust Europe Limited must:

- Reimburse Mr W for the costs he incurred for the scaffolding.
- Reimburse Mr W for the costs he incurred for professional fees during the cladding replacement but excluding those incurred in preparation of the claim.
- To these amounts add 8% simple interest\* from the date(s) Mr W can evidence he was personally out of pocket to the date of settlement.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr W to accept or reject my decision before 9 June 2022.

*\*If Amtrust Europe Limited considers that it's required by HM Revenue & Customs to deduct income tax from that interest, it should tell Mr W how much it's taken off. It should also give Mr W a tax deduction certificate if he asks for one, so he can reclaim the tax from HM Revenue & Customs if appropriate.*

Adam Golding  
**Ombudsman**