

## The complaint

Mr and Mrs B complain that Amtrust Europe Limited unfairly declined their claim on their building warranty.

## What happened

In 2016 Mr and Mrs B bought a new home that came with a ten-year building warranty. In 2019 they made a claim under section 3.3 for a defect with the water drainage system on the perimeter of the property and a gabion wall that was unsafely leaning towards the main house. This section of the warranty is the structural insurance period, that provides cover for the defined terms of Major Damage caused by a defect to the Housing Unit.

Amtrust sent an expert to inspect the drain. They identified a problem with the drainage system relating to the pump at Mr and Mrs B's property, as it was draining both surface and sewage water which was causing reduced flow and some standing water.

However at the start of 2020 Amtrust informed Mr and Mrs B that it was declining their claims. It said that in order for there to be a valid claim, there would need to be both a defect and Major Damage, and the problem with the drainage wasn't causing Major Damage. While it had identified a defect with the gabion wall, as the gabion wall wasn't causing damage to the Housing Unit and as it wasn't part of the Housing Unit itself, it was specifically excluded under the building warranty, and the cover for a present or imminent danger wouldn't apply.

Over the months that followed, various investigations took place. And both Mr and Mrs B and Amtrust instructed experts to report on the problem with the drains. Mr and Mrs B appealed the decision and subsequently made a complaint, but Amtrust didn't change its position. It also said that a problem with the drainage pump had been apparent in 2016 but wasn't raised as a claim during the relevant section of the policy covering the first two years, so it couldn't now be raised under section 3.3, which states that *'The Underwriter will indemnify the Policyholder against all claims discovered and notified to the Underwriter during the Structural Insurance Period.'*

In January 2021 there was a storm in the area of Mr and Mrs B's property. And the property suffered a significant flood to the ground floor. Mr B got back in touch with Amtrust to inform it and said that due to the defective drainage system, the water hadn't drained away. Amtrust responded to say that its stance on his drainage claim still stood, and damage due to storms was specifically excluded from the warranty, so a new claim wouldn't be accepted. Mr and Mrs B didn't think this was fair and brought their complaint to this service.

Our investigator considered everything and on 10 December 2021 issued an outcome recommending the complaint be upheld. She thought that Mr and Mrs B had done enough to show that both a defect and major damage had occurred so thought it reasonable that Amtrust cover the fault with the drainage system.

Further she said that while she accepted the gabion wall didn't form part of the housing unit, so wasn't strictly covered under the warranty terms, it was causing an imminent danger to the Housing Unit due to a defect. And therefore, thought it fair and reasonable that Amtrust

provide cover under the warranty for putting this right.

Mr and Mrs B accepted our investigator's view, however Amtrust didn't and asked for the case to be reviewed by an ombudsman.

### **My first provisional decision**

When the case came to me, I wrote to both sides with my initial provisional findings. In these I said I intended to require Amtrust to:

- Accept Mr and Mrs B's claim for the drainage system and settle it in line with the remaining warranty terms and conditions.
- Accept Mr and Mrs B's claim for the gabion wall and settle it in line with the remaining warranty terms and conditions.
- Pay Mr and Mrs B £1,000 compensation to make up for the distress and inconvenience caused.

Mr and Mrs B responded to say they accepted my provisional findings. However they also wanted their consequential losses to be included in the claim.

Amtrust didn't accept my findings. In regards to the gabion wall, it said that I hadn't considered the full extent of the policy wording. It said that cover wasn't provided under section 3.3 as the wall isn't part of the Housing Unit and it said under section 3.5 that relates to an imminent danger, this needs to be because of a defect with the Housing Unit as well. It also said that it wasn't fair for me to ask to pay for expensive repairs that I agreed weren't covered under the warranty.

In regards to the drainage it said that it thought the report produced by its expert wasn't worded well, but thinks the drainage in question is outside of the property perimeter. And it says the other reports provided expect the system to be able to cope with far above what it should.

It also said it didn't agree a defect had been shown and therefore said it wasn't clear what work should be done to fix it.

### **My second provisional decision**

I considered both sides' submissions following my first provisional decision and issued a revised provisional decision which read as follows:

*'I'll start by laying out the relevant parts of the warranty wording. Section 3.3 of the warranty 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'*  
*Major damage is defined in the policy as:*

#### ***'19. 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.'*

*The policy covers defects in the Structure or waterproofing elements of the waterproof envelope of the Housing Unit. The key definitions are defined as follows;*

#### ***'15. HOUSING UNIT***

*The property described in the Certificate of Insurance comprising:*

- *the Structure;*
- *all non-load bearing elements and fixtures and fittings for which the Policyholder is responsible;*
- *any Common Parts retaining or boundary walls forming part of or providing support to the Structure;*
- *any path or roadway within the perimeter of such property;*
- *the drainage system within the perimeter of such property for which the Policyholder is responsible;*
- *any garage or other permanent out-building.*

*Housing Unit does not include any swimming pool, temporary structure, free-standing household appliance, fence, retaining or boundary wall not forming part of or providing support to the Structure.'*

#### ***'25. STRUCTURE***

- *foundations;*
- *load-bearing parts of ceilings, floors, staircases and associated guard rails, walls and roofs, together with loadbearing 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.'*

#### ***'29. WATERPROOF ENVELOPE***

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

*I will address each of the claims in turn, making reference to the above terms and definitions where relevant.*

### ***Drainage system***

*Amtrust has declined this part of the claim as the damage was caused by a flood which is specifically excluded under the warranty. It also says that a defect hasn't been identified, so it can't yet confirm that cover would apply.*

### ***Defect***

*I've first considered whether there is a defect.*

As part of this complaint, both Amtrust and Mr B have provided a number of reports from both before and after the flooding occurred. I've considered all the reports and I'm satisfied that they are all in agreement that the drainage system at the property wasn't functioning correctly in the years before the incident in 2021. I've included extracts from the reports below.

- Amtrust's surveyor's report from August 2020 states:  
'The concerns are raised as a number of drainage runs retain water with evidence of staining and discolouration of the sides of the pipe. This is indicative that water is retained longer than expected in the pipework as the rain and foul combined water takes longer to flow to the main sewer or the flow rate is reduced by a lack of fall in the underground pipework. We cannot ignore the water retention...  
The point for the claims handler to consider is if the risk of blockages due to the discoloration of the pipework caused by a potential poor fall in the underground drainage system is Major Damage.'
- Mr B's expert report from September 2019:  
'The property has been constructed with a combined drainage system which means that the rainwater and the foul waste is directed to the same ultimate outfall pipe, because of the location of the property this has resulted in a pumping arrangement having been installed to direct sewage and rainwater to the main sewer.  
The installation is contrary to the requirements of [local water board] and also in contravention of the building regulations...  
The drainage system installed is not fit for purpose.'
- Mr B's drainage consultant report dated May 2020:

'In this case the local ditch system is available and [local water board] have confirmed in these circumstances their foul sewer should not have been used for draining surface water from the property. The permission for this connection is for the foul water only.

Groundwater can however be discharged using the same surface water system but the overall capacity of the wet well (storage area) and surface water pumps must deal with the flow specified in section 2.5 of document H which cross references the British Standard EN 752.

Failure to provide such storage or pumps on the separated drainage system (with only the foul drains discharging to the [local water board] sewer) means that flooding with a mixture of foul and surface water is inevitable (as the scheme is at the present).'

Based on these reports I'm, satisfied that there is enough evidence to show that there is a defect with the drainage system. The reports all conclude that it hasn't been built correctly and comment on both the fall of the pipework and the pump system. And that this is ultimately resulting in both foul and surface water being drained and discharged together and causing problems with the flow of the drainage water.

Amtrust's report of 2020 is particularly of note, as in the extract above it appears to accept there is a defect as it concludes there is only the matter of whether major damage has been caused to determine in order to agree warranty cover. When the report was compiled, the only damage was due to the pipe itself which is why the claim was turned down at this stage. The report concluded:

*'Whilst there may be a minor issue in regards to the falls of the pipework, this is not contributing towards Major Damage of the Housing Unit as there has only been one documented instance of flooding to the Housing Unit as a result of pump failure which was in 2016 and no documented failures since.'*

*So it seems Amtrust accepted at this point that there was a defect, just no major damage. It is worth noting that while there appears to have been a minor failure of the pump in 2016 that caused a small leak onto the patio, this didn't form part of a claim at the time. And the defect later identified in 2019, was registered by Amtrust as a new claim under section 3.3. In response to my first provisional decision, Amtrust commented that it thought the report from its own expert was 'naïve' and 'misleading'. But it's provided no counter evidence or report to support that the report was inaccurate in its findings. So I'm not persuaded that the findings of the report should be disregarded.*

*Amtrust also commented that there may be issues with the required work falling outside of the perimeter of Mr and Mrs B's home. While I accept that the problem of the foul and surface water being discharged together falls outside of the perimeter of the property, as this takes place in a neighbouring field, from the reports above the issue that is causing that problem comes from an issue with the pump and separation system. And Mr B has provided photos and plans of the building that show this is located at Mr B's property. The definition of the Housing Unit, which I quoted earlier in this decision, includes 'the drainage system within the perimeter of such property for which the Policyholder is responsible. So I'm satisfied that the defect itself is within the perimeter of Mr B's property and therefore forms part of the Housing Unit as defined in the policy.*

*Based on all the evidence, I'm satisfied that Mr and Mrs B have done enough to show there is a defect with the drainage system as defined in the warranty.*

### *Major Damage*

*As I'm satisfied there's a defect, I need to consider whether the defect has caused Major Damage as defined in the policy at paragraph 19 a) and b). As set out above, this needs to be '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 And/or 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'*

*I've looked at photos of the damage caused to Mr and Mrs B's Property since the flood and listened to their accounts. The damage to the property has been severe. It has caused destruction across the ground floor of the home that has left Mr and Mrs B unable to live at their property since the event. Based on this, I'm satisfied there has been major damage caused to the property.*

*In response to my provisional findings, Amtrust has said that damage due to a storm is excluded under the warranty, and as the flood was a direct result of a storm it wouldn't be covered.*

*I've considered this, however from looking at the photos of the extent of the damage to the building, I am persuaded that this far exceeds what I'd reasonably expect following a storm. The water contained on the patio, covers the entirety of the ground floor up to the ceiling. And while Mr and Mrs B's property is an unusual construction – built into a hill – this far exceeds the damage I'd expect following a one of storm event. Further the construction of the house means an effective drainage system is even more important. So based on the*

*evidence, I'm persuaded that the proximate cause of the damage was a defective drainage system, and the storm has merely highlighted this.*

### **Conclusion**

*Based on all the evidence, I'm persuaded there is both a defect with the drainage system and that it has caused Major Damage to the Housing Unit, as defined in the warranty terms. And therefore warranty cover under section 3.3 would reasonably apply. I am therefore minded to direct Amtrust to accept the claim and arrange appropriate remedial work in order to rectify the defect.*

*I note Amtrust has said that further investigative work will be required in order to determine the exact defect and repairs that are required. And I accept further investigation may be necessary in order to scope a repair. However it isn't for me to direct the exact work that happens next. I'm persuaded that there's enough evidence to show a valid claim under the warranty, it's now for Amtrust to do the required work to put this right.*

### **Gabion wall**

*In my initial Provisional Decision dated 26 January 2022 I said that while I accepted the defect with the gabion wall didn't fall under warranty cover, I thought it fair and reasonable that Amtrust provide cover as it was likely to cause damage to the housing unit. As stated in the quoted warranty terms earlier in this decision, section 3.3 provides cover for:*

*'The cost of complete or partial rebuilding or rectifying work to the Housing Unit which has been affected by Major Damage'*

*In the warranty, the Housing Unit is defined, and part of this definition states:*

*'Housing Unit does not include any swimming pool, temporary structure, freestanding household appliance, fence, retaining or boundary wall not forming part of or providing support to the Structure.'*

*The gabion wall is a retaining wall on the perimeter of the property not forming or providing support to the Structure itself, which is defined as:*

- foundations;*
- load-bearing parts of ceilings, floors, staircases and associated guard rails, walls and roofs, together with loadbearing retaining walls necessary for stability;*
- non-load bearing partition walls;*
- chimneys and flues;*
- roof covering;*

*Having carefully reviewed the representations made by Amtrust about the Definition in the emails dated 11 and 22 March 2022, I agree it is excluded from warranty cover.*

*Initially, I concluded that in the circumstances it was fair and reasonable for Amtrust to provide cover for the wall as I felt there was enough evidence to show there was a defect and that the defect was likely to cause imminent damage to the Housing Unit, even though the gabion wall did not arguably form part of the Housing Unit or the Structure. Mr and Mrs B's expert report from 2020 highlighted the following issues:*

- 'The onsite Gabion structure has been installed with a 10° backward lean the uppermost baskets to the left-hand elevation have a 15° backwards lean.'*

- *'The manufacturer's design manual advises the fill material should be a minimum of the mesh size which in this case is 75mm the actual fill material used appears to be ,<20mm gravel. The recommended fill material is an important feature to prevent movement the larger stone interlocks and prevents slip smaller stones do not "grip" each other and can lead to movement of fill material.'*
- *'The design relies upon factual soil investigation in this case I could find no reference to any factual soil investigation having taken place prior to the installation of the Gabion wall.'*
- *'The inclusion of a 225mm thick wall founded on top of the gabion wall has further increased the loading and is exerting forces that the Gabion wall is not designed to have applied.'*
- *'The wall exhibits evidence of movement and it is my opinion that catastrophic collapse of this structure is a strong possibility if hydrostatic water pressure continues to affect the performance and stability of the wall the fact that wall structures are constructed on top of the Gabion walling means the structure is not built in compliance with the design loading and stability parameters.'*

*So I said that while there was no defect with the housing unit as defined in the warranty, as the defect to the wall was likely to result in a 'catastrophic collapse' which would cause serious damage to the housing unit, then it was fair for Amtrust to provide warranty cover in this instance.*

*Amtrust disagreed with my provisional findings. It said as I agreed the wall wasn't covered under the warranty it wasn't fair to ask it to still provide cover in spite of this. It also pointed out that the cost to rebuild the gabion wall was in excess of £200,000 and therefore argued that this wasn't a proportionate resolution for something that the warranty doesn't provide for. I would therefore need to be able to justify any departure from the clear wording of the warranty or I wouldn't be able to make that finding.*

*Based on these comments I've re-considered my provisional findings to consider whether it is possible to justify a departure from the exclusions in the warranty cover and the definition of the "Housing Unit" and "Structure". While I am satisfied that there is a defect with the gabion wall and that this may lead to serious damage to Mr and Mrs B's property, I have to consider what is fair and reasonable to both parties and this means taking regard of the warranty definitions and exclusions.*

*As stated previously in this decision, the definition of Housing Unit is clearly defined in the warranty. And the most relevant part states:*

*'Housing Unit does not include any swimming pool, temporary structure, freestanding household appliance, fence, retaining or boundary wall not forming part of or providing support to the Structure.'*

*In this case, the gabion wall does not provide support to the structure as it is a retaining wall, which is completely separate from the Housing Unit itself. And in order for the gabion wall to form part of the Housing Unit as defined, it must be necessary for the stability of the structure. As the gabion wall does not provide any support to the structure, it is not. So I can't fairly say that it would form part of the Housing Unit as defined in the warranty.*

*As I've said previously, in order for the warranty to provide cover under section 3.3 there needs to be a defect to the Housing Unit and Structure which has caused Major Damage to the housing unit. As the gabion wall does not form part of the Housing Unit as defined in the policy a defect to the wall isn't covered. And while Mr B's report says that damage to the Housing Unit is likely, this hasn't yet happened. So the potential claim fails to meet both*

requirements under the section – there is neither a defect nor damage to the Housing Unit. So having re-considered everything carefully. On balance I don't think it's proportionate or fair and reasonable to require Amtrust to cover the cost of a significant repair that doesn't meet either of the two requirements for cover under the warranty.

I've also considered whether cover elsewhere in the warranty would fairly apply, due to the potential imminent safety risk the wall poses.

Section 3.5 provides cover as follows:

*'The Underwriter will Indemnify the Policyholder during the Structural Insurance Period against the cost of repairing, replacing or rectifying the Housing Unit where such repair, replacement or rectification cost is the result of a present or Imminent danger to the physical health and safety of the occupants of the Housing Unit because the Housing Unit does not comply with Building Regulations...'*

So there is cover where there's a safety risk to the Housing Unit. However this section is also dependent on the defect itself being to the Housing Unit. And as the gabion wall doesn't meet this definition, I can't fairly say that cover should be provided under this section either.

So while I greatly sympathise with Mr and Mrs B's position and the problem the gabion wall poses, I have to consider what is fair to both sides. While warranties are in place to put right defects found in the first ten years, they don't cover everything. So after considering all the evidence available again, on this occasion I find that the warranty doesn't provide cover. I therefore don't think it would be fair to ask Amtrust to cover the claim for the gabion wall, so I intend not to require it to take any action on this point.

### **Compensation**

In my initial provisional findings I said that I thought Amtrust should pay Mr and Mrs B £1,000 compensation to make up for the distress and inconvenience it has caused.

I highlighted that due to the severe damage to their home, Mr and Mrs B have explained that they've not been able to live at the property for some time. And due to the delays with accepting the claim, they haven't begun repairs to the property which has caused significant distress and inconvenience.

In response to my initial findings, Mr and Mrs B accepted my suggested compensation award. Amtrust didn't accept but provided no other comment other than to agree 'some' compensation is due.

Based on this, I see no reason to depart from my initial provisional findings. And intend to require Amtrust to pay £1,000 compensation.

### **Consequential losses**

Mr B and Mrs B have also said that Amtrust should cover the cost of the rent paid while living out of their home, as well as other consequential losses they have incurred due to the flood. I can see the warranty includes costs for alternative accommodation as part of the cover provided, so I'd expect Amtrust to consider this as part of the claim for the drainage, on receipt of proof of the cost from Mr B and that it hasn't been covered under any other insurance policies.

However I note they've incurred costs in the arrangement of a number of professional reports they've provided in order to assist them in proving their claim. And I think it's



*reasonable that Amtrust pays for those that have led to a change in the outcome of the claim. So I intend to require Amtrust to pay for Mr and Mrs B's professional reports that commented on the drainage system, plus 8% simple interest to make up for the time they've been without the funds.*

### **My provisional decision**

*For the reasons I've given, I intend to uphold Mr and Mrs B's complaint in part. I'm minded to require Amtrust Europe Limited to:*

- *Accept Mr and Mrs B's claim for the drainage system and settle it in line with the warranty terms and conditions.*
- *Pay Mr and Mrs B £1,000 compensation.*
- *Reimburse Mr and Mrs B for the expert reports they instructed in relation to the drainage system, on receipt of proof of these costs.*
- *Pay 8% simple interest on the cost of the reports from the date they were paid for until the date of settlement.*
- *Consider Mr and Mrs B's additional claim related costs and losses in line with the warranty terms and conditions.'*

### **Responses to my second provisional decision**

Mr B responded to my decision to confirm he accepted it.

Amtrust responded to confirm it had no further comments.

### **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.

As both parties have provided no further comment, I see no reason to depart from the position outlined in my second provisional decision copied above.

### **My final decision**

For the reasons I've given, I uphold Mr and Mrs B's complaint in part. I direct Amtrust Europe Limited to:

- Accept Mr and Mrs B's claim for the drainage system and settle it in line with the warranty terms and conditions.
- Pay Mr and Mrs B £1,000 compensation.
- Reimburse Mr and Mrs B for the expert reports they instructed in relation to the drainage system, on receipt of proof of these costs.
- Pay 8% simple interest on the cost of the reports from the date they were paid for until the date of settlement.
- Consider Mr and Mrs B's additional claim related costs and losses in line with the warranty terms and conditions.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr B and Mrs B to accept or reject my decision before 2 September 2022.

Sophie Goodyear  
**Ombudsman**