

The complaint

Mr D and Ms R complain that Amtrust International Underwriters DAC unfairly declined their claim on their Structural Warranty Policy.

What happened

Mr D and Ms R bought a property which had been converted into separate dwellings. The property came with a 10-year insurance policy provided by Amtrust which covers it for defects in workmanship to the structure of the building in certain circumstances.

The ground floor of Mr D and Ms R's property flooded and so they claimed on their policy. It was determined that the cause of the flood was due to the ground floor not being "tanked" correctly. Amtrust reviewed the claim and turned it down by relying on an exclusion which says it won't be liable for defects in the design or workmanship to the property before it was converted.

Mr D and Ms R didn't think this was fair. They said part of the conversion involved lowering the ground floor by around 500-600mm. Because of this they didn't think it was fair to rely on an exclusion which said it hadn't been properly constructed previously as the ground floor was now lower than originally designed.

I issued a provisional decision on this complaint on 7 November 2022 where I said:

"The terms and conditions of Mr D and Ms R's policy says in Section 4 that Amtrust will indemnify Mr D and Ms R against all claims discovered and notified to them in respect of:

*"The necessary and reasonable costs incurred in repairing, replacing or rectifying any part of the **Waterproof Envelope** within the **Housing Unit** as a result of ingress of water caused by a defect in the design, workmanship, materials or components or the waterproofing elements of the Housing Unit."*

The definition of "Housing Unit" refers to Mr D and Ms R's property as listed on the certificate of insurance and "Waterproof Envelope" is defined as:

"Waterproof envelope shall mean the ground floors, external walls, roofs, skylights, windows, doors, of a Housing Unit but excluding those parts below ground floor slab level"

Amtrust had an assessment done on Mr D and Ms R's property which says:

"We did remove another section of board to expose what in our opinion appears to be the visqueen type of floor membrane which has been lapped up the wall to act as a barrier. We believe this is not sufficient to stop damp penetration from the walls or external elements. The current system in place is a metal framing and standard plasterboard finish. We could find no evidence that the walls had had any form of tanking membrane system installed."

The report goes on to recommend the following work to rectify the issue:

“We would recommend that the current plasterboard walls are removed from the property along with the metal framing to allow a full tanking membrane to be installed to the external walls. Works to be finished with the metal frame, insulation, and plasterboard finish”.

I’ve also noted another report on a trace and access and provides a quote to repair the works says:

“We would consider this to be at best a grade 1 or A type of DPC works. which is the lowest method of abating water ingress. We would recommend that this should be of a grade 3 design to give a full Tanking System to ensure integrity of building.”

From reading the reports it seems clear that the conversion has not been built to the required standard to prevent water getting in. I’m therefore satisfied there was a defect in the design, workmanship, materials or components of the waterproofing elements of the property when the conversion was completed.

The exclusion Amtrust has relied upon to turn down the claim says it will not be liable for:

“Loss or damage due to or arising out of any defect in the design, workmanship, materials or components of the Housing Unit that was installed or constructed prior to the conversion, refurbishment or renovation works that are the subject of this insurance.”

I’ve therefore considered whether Amtrust has applied this exclusion in a fair and reasonable way, and I’m not persuaded it has. I say this because it’s clear Amtrust doesn’t want to be responsible for previous design or workmanship defects. However, as the ground floor was lowered by 500-600mm during the conversion I’m not persuaded this issue is caused by a previous design or workmanship defect. This is because when the property was originally built the ground floor was higher, and therefore less likely to flood. It therefore follows that this issue is most likely caused by the floor being lowered and the property not having a sufficient tanking membrane installed during the conversion.

As the property doesn’t appear to have needed a tanking membrane before it was converted, and the floor lowered in the conversion, I’m satisfied this is a claim which is covered by the policy. I say this because there is a defect to the waterproofing elements of the property, and this doesn’t appear to be the result of defect or design to the building before it was converted.

I’m not satisfied Amtrust has shown it’s fair and reasonable to turn down this claim and therefore to put things right Amtrust needs to pay this claim subject to any policy limits. I’ve also noticed that due to the flooding Mr D and Ms R have had to live in a property which has suffered flood damage. From the photos I can see there are parts of the floor missing and holes have needed to be cut into the walls to inspect it and identify the issue. While it’s reasonable to expect some distress and inconvenience when a claim arises. Amtrust has caused additional unnecessary distress and inconvenience by declining the claim which meant Mr D and Ms R have needed to live with this damage for longer along with their daughter. They’ve also explained they have wanted to move to help with their daughter’s education and been unable to do so because of this issue. Therefore, Amtrust should pay them £1,500 to compensate them for this unnecessary distress and inconvenience.”

Amtrust responded and didn't accept my provisional decision. It repeated the exclusion I've quoted above and said that Mr D and Ms R hadn't identified a defect to the new works completed. Because of this it said it wasn't fair to be penalised for damp issues to the existing works.

Mr D and Ms R responded and accepted my provisional decision. They questioned about how prescriptive my decision would be regarding the works needed to their property to ensure it was returned to the condition it was before the floods, they also asked about their neighbour's property, as that was built at the same time. Mr D and Ms R also said they'd incurred costs of around £500 when they had to dry the property out following the second flood and that their home insurance policies were now higher due to the floods they'd had.

I asked our investigator to write to Amtrust and let them know that I was still inclined to uphold that complaint and that I would also be telling them to pay Mr D and Ms R £463.92 to cover what they'd spent drying out their property. I said Amtrust would also need to add 8% simple interest per year to this amount to compensate Mr D and Ms R for not having the money. I asked for any further comments by 9 December 2022, Amtrust didn't respond by the required date.

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 reviewed Amtrust's comments, but they haven't persuaded me to change my decision. I say this because I'm satisfied it's most likely there is a defect to the conversion for the reasons stated above and in my provisional decision. I'm also not satisfied that Amtrust has shown it's most likely there was a pre-existing fault with the property which has caused the flooding. Therefore, I'm not persuaded Amtrust is acting fairly and reasonably by declining this claim.

In response to Mr D and Ms R's comments, I've reviewed them and while I asked our Investigator to let Amtrust know I thought it was fair and reasonable to cover the drying out cost, upon reflection I'm not going to make a finding on that in this decision. I say that because the claim for the costs incurred for drying out the property would need to be considered as part of the claim. In this decision I'm only considering whether Amtrust have acted fairly and reasonably in declining the claim. As I'm now telling Amtrust to pay the claim, in line with the remaining terms and conditions, Amtrust would need to assess the drying out costs as part of the claim rather than being part of this complaint.

For the other points Mr D and Ms R raised I also won't be telling Amtrust to do any more in this decision than I set out in my provisional decision. This is because regarding their neighbour's property, I can only consider Mr D and Ms R's complaint about Amtrust's actions in relation to their claim and not anything it might have done in relation to their neighbour's property. I would also like to clarify that in this complaint I've only looked at whether Amtrust has acted fairly and reasonably in declining the claim. As I'm not satisfied, that it has I'm directing it to pay the claim in line with the remaining policy terms and conditions. Once this has been done, if Mr D and Ms R aren't happy with how much Amtrust pays, or the work completed, that would need to be raised separately. This is the same for the increase in home insurance premiums Mr D and Ms R said they have had to pay due to the floods. While I do empathise with them having to pay increased home insurance costs, I can't see that it is something the policy covers. However once Amtrust has paid the claim, if it's something Mr D and Ms R think should be covered, they would need to raise that with Amtrust first.

My final decision

For the reasons explained above and in my provisional decision, my final decision is that I uphold this complaint. I require Amtrust International Underwriters DAC to:

1. pay Mr D and Ms R's claim in line with the remaining terms and conditions, subject to any policy limits
2. pay them £1,500 for the distress and inconvenience caused

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr D and Ms R to accept or reject my decision before 20 January 2023.

Alex Newman
Ombudsman