

The complaint

Miss D and Mr R have complained that Society of Lloyd's (SOL) unfairly declined a claim they made under their Premier Guarantee New Home Warranty.

What happened

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

The subject of this complaint is a high-rise building comprised of several flats. Water damage has been caused to Miss D and Mr R's flat due to a potential defect or defects with their lounge window.

Miss D and Mr R first raised their claim in 2014. At this stage, it was agreed their complaint would be placed on hold while issues involving common parts of their development were considered by SOL, and later the court.

In 2020, a court judgement was issued, deciding that two common parts claims were statute barred under the Limitations Act 1980. Following this, Miss D and Mr R sought to get their claim for damage to their flat considered by SOL.

SOL declined Miss D and Mr R's claim for two reasons. Firstly, it said that the court had decided the claim was statute barred. And secondly, it said that even if the judgement didn't apply to their claim for damage to their flat, there were four possible causes of damage and so four minimum claim values (MCV's) would apply. SOL said it was unlikely the cost of repairs to their flat would exceed this minimum claim value and so it wouldn't be responsible for covering the claim.

One of our investigators considered Miss D and Mr R's complaint and thought SOL's decision was unfair. She said she was persuaded that the cause of water ingress was most likely Miss D and Mr R's window rather than the roof or atrium issues which were the subject of the court judgement. So, she didn't agree that the issue central to this complaint had been statute barred by the courts.

Our investigator said the cause of water ingress hadn't yet been established as SOL hadn't carried out any investigations. She acknowledged that Miss D and Mr R's surveyor had highlighted four possible issues with the window and/or frame. But she said it wouldn't be fair to consider each individual defective component of the window as a separately identifiable cause. She said a fairer interpretation would be to consider the defective window as the cause of loss, and so to apply one MCV not four.

Our investigator recommended SOL should carry out investigations to establish the cause of water ingress, and that any MCV should be applied in line with her view. She also recommended SOL should pay £350 compensation for the distress and inconvenience it had caused Miss D and Mr R in not investigating and identifying the cause of water ingress sooner.

SOL didn't agree with our investigator. It said the defect in this case was in a common part and the judge had deemed that the common parts claim was statute barred. So, SOL argued that the same logic would apply to their claim. SOL went on to say that even if it accepted that this claim was separate to the judgement, a new common parts claim would need to be brought by all the leaseholders of the building and that an MCV would apply for each leaseholder. SOL also said that 'separately identifiable causes' is based on advice from consultant engineers and that it couldn't agree with our investigators opinion that it would be fair to consider the issue here to be a defective window when the separate causes within the window are identifiable.

Our investigator responded to SOL to address its points. She said it wouldn't be a fair interpretation of the policy terms to suggest that any claim must be considered a common parts claim and subject to a common parts MCV. She said the policy covers damage, not the defect and so a claim for damage to one flat should only attract one MCV.

SOL 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 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 agree with the conclusions reached by our investigator. I'll explain why in more detail below, addressing each issue separately and starting with an explanation of the cover provided under the new home warranty.

What the warranty covers

Miss D and Mr R's warranty is split into various sections of cover. Section 3.3 "Structural Insurance" is the relevant section to Miss D and Mr R'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....*
- 2.*
- 3. The reasonable costs incurred in repairing, replacing or rectifying any part of the Waterproof Envelope within each Housing Unit which was newly constructed by the Developer as a result of ingress of water caused by a defect in the design, workmanship, materials or components of the waterproofing elements of the Waterproof Envelope of each Housing Unit...*
- 4. ..."*

The warranty defines 'Housing Unit' and 'Major Damage' as:

"Housing Unit

The property described in the Final Certificate 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 or providing support to the Structure....*

Major Damage

- a) *Destruction of or physical damage to any portion of the Housing Unit for which a Certificate of Approval has been received 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 Approval has been received by the Underwriter.*

In either case caused by a defect in the design, workmanship, materials or components of the Structure which is first discovered during the Structural Insurance Period."

The warranty defines Common Parts as:

"Those parts of a multi-ownership building (of which each Housing Unit is part), for a common or general use, for which the Policyholder has joint ownership and/or legal responsibility.

And the financial limits for claims involving common parts are further explained:

"The maximum the Underwriter will pay for any claim relating to Common Parts will be the amount that the Policyholder has a legal liability to contribute toward the cost of repairs, rectification or rebuilding works. Claims are subject to financial limits for the individual sections detailed above and the Minimum Claim Value and/or Excess as detailed in the Initial and Final Certificates.

'Structure' and 'Waterproof Envelope' are defined as:

"Structure

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

- *foundations;*
- *load-bearing parts of floors, staircases and associated guard rails, walls and roofs, together with load-bearing retaining walls necessary for stability;*
- *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;*

Waterproof envelope

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

And finally, 'Minimum Claim Value' is defined as:

"Minimum Claim Value

The amount relating to each and every loss in respect of each Housing Unit below which the Underwriter has no liability under this Policy. If the loss is greater than the Minimum Claim Value the underwriter will be responsible for the full amount of the Policyholder's claim covered by this policy.

A separate Minimum Claim Value shall apply to each separately identifiable cause of loss or damage for which a claim is made under the Policy."

What all of the above means in practice is that Miss D and Mr R's warranty covers them for damage to their home, or their proportion of any common parts they're responsible for, caused by a defect in the structure of the building or the waterproof envelope. Cover is subject to the cost of repairs exceeding the minimum claim value (MCV). And a separate MCV can be applied for each separate cause of loss or damage, and/or for each leaseholder/policyholder who shares responsibility for the common parts – in the event of a common parts claim.

It's important to note that the warranty does not define what is meant by separately identifiable cause of loss or damage. It's also important to note that, to date, no definitive cause(s) of the water ingress to Miss D and Mr R's flat has been identified. I'll come to this again in a later subsection.

What I need to decide, in this case, is whether or not Miss D and Mr R's claim can reasonably be considered a common parts claim, and how the MCV can reasonably be applied in regard to the cause(s) of loss. But first, as SOL has raised concerns that Miss D and Mr R's claim is, or ought to be considered, statute barred, I'll start with that point.

Is the claim statute barred?

SOL has pointed to a court judgement from 2020 which decided that two claims for damage to the common parts of Miss D and Mr R's building were time barred under Section 5 of the Limitations Act 1980. SOL has argued that Miss D and Mr R's claim is an extension of the time barred claims and so should also be considered statute barred.

I've carefully considered the content of the court judgement alongside the available technical evidence in this case. Having done so, I don't agree with SOL's position here. I'll explain why.

The judgement clearly explains the defects the judge considered and determined were time-barred. The judge referred to these defects as *"the atrium defect"* and *"the roof parapet and external wall defect"*.

Miss D and Mr R have explained that their development is made up of several buildings. Their particular building doesn't have an atrium, so clearly the atrium defect is nothing to do with the water ingress to their flat. They've explained that the roof parapet and external wall defect did affect their building. However, they've highlighted that their flat is four floors below the roof and none of the flats between them and the roof are showing any signs of water ingress.

Further to the above, Miss D and Mr R have supplied a report from a surveyor who inspected their property and concluded:

"Whilst there has been some minor damp staining near to the head of the window, there is no staining evident within the ceiling, or reveal, to suggest that damp is emanating from above. Indeed, at this lower level of the building, I would not expect any damp to manifest itself from above and even less so, where substantial roof work has been undertaken previously."

As you will appreciate, determining the cause of damp can be particularly difficult and is often a trial and error scenario but, it is my best assessment at this time that the damp penetration is occurring, either through the window, or the surround. We have previously found on the other brick block that the sill detailing to the windows is poor and there has been some deterioration in mastic sealant to the surround of windows. Both of these aspects could be a contributing factor to the damp. There is a possibility that the window itself has poor drainage, or design deficiencies, which could be contributing to the damp but this appears less likely based upon previous assessments and the extent of damp. A need to ultimately replace the window cannot be completely ruled out but, in the first instance, repair to the sill detail and mastic surround would seem most appropriate, followed by a period of monitoring. Of course, if the cost of replacement is not too dissimilar to that of repair, particularly with access being a large part of the cost, then replacement might in fact be considered a sensible option."

Taking all of the above into account, I consider that the damage to Miss D and Mr R's flat is most likely unrelated to the roof parapet and external wall defect. It therefore follows that I disagree their claim for water damage to their flat has been statute barred by the courts.

I've also seen that Miss D and Mr R's claim was made within the 'Structural Insurance Period' and so it hasn't been raised outside of the applicable timescales within the warranty terms.

Is this a common parts claim?

This wasn't initially one of the reasons SOL sought to rely on to decline Miss D and Mr R's claim. But in response to our investigator's assessment, SOL said that because the defect(s) likely causing damage are in a common part (the window) that an MCV would apply for each policyholder/leaseholder who shares a legal liability or responsibility for sharing the cost of repair.

SOL explained its view that in circumstances where a policyholder's lease describes their demise as internal plasterwork etc, that there will be no such thing as a standalone demised claim because the proximate cause will always emanate from a defect in the common parts.

I've thought about SOL's points here, but I don't agree with its interpretation of the cover provided by the warranty. I say this because the section of the warranty which applies covers "*... physical damage ... caused by a defect in the design, workmanship, materials or components of the Structure.*" The policy is covering the damage caused by the defect, not the defect itself. Therefore, it's the location of the damage that determines the type of claim being made, not the location of the defect.

The damage reported as part of Miss D and Mr R's claim is damp and water ingress into their individual flat. No damage, as a result of issues with Miss D and Mr R's window, has been reported to any of the common parts. Therefore, as the damage is in Miss D and Mr R's flat (demise) I consider that their claim is a demised claim and not a common parts claim – regardless of the fact the defect is, most likely, in a common part.

It follows that I don't think SOL can reasonably consider Miss D and Mr R's claim to be a common parts claim and so it cannot apply one MCV per leaseholder.

SOL has further argued that as lessees, Miss D and Mr R share responsibility for repairs to the external structure of the building. It says unless it would only be providing indemnity for their demise in isolation, which it wouldn't be if we expected it to remedy the defect as well as repair the damage, then this claim would be twofold – a demised claim for the water damage and a common parts claim for the defect.

Again, I've thought carefully about SOL's argument here. But again, I disagree with its interpretation of cover under the warranty – and for the same reasons.

The warranty covers the damage caused by the defect – not the defect itself. So, if Miss D and Mr R's flat has suffered major damage – as defined – then they are covered for the cost of repairing said damage. However, it's widely accepted good industry practice (and a well-defined approach of this service) that any repairs carried out (or funded) under a contract of insurance should be lasting and effective.

In this case, repairing the damage, in isolation, would not deliver a lasting and effective repair as the water ingress would simply reoccur. In order to deliver a lasting and effective repair, SOL will need to remedy the defect (or cover the cost of doing so). But it need only do this, in order to deliver the cover provided by Miss D and Mr R's individual warranty, which is to provide a repair of the damage, to their demise, which is lasting and effective.

So, as the warranty covers the damage, not the defect, I remain of the view that Miss D and Mr R's claim is a demised claim and therefore SOL cannot fairly apply a common parts MCV.

How should the MCV be applied?

SOL has argued that because Miss D and Mr R's surveyor's report identified four separate causes of loss, that four MCV's would apply. This is based on the term quoted above which states, "*...A separate Minimum Claim Value shall apply to each separately identifiable cause of loss or damage for which a claim is made under the Policy.*" SOL says the cost of repairs to Miss D and Mr R's flat are unlikely to exceed the four MCV's.

Firstly, I should make it clear that Miss D and Mr R's surveyor didn't make any concrete findings regarding the cause of damage. Only that the damage was more likely as a result of issues with the window than with the roof. So, I consider it wholly unreasonable for SOL to apply four MCV's based on potential causes of loss rather than actually identified causes of loss.

Secondly, the hypothetical causes of water ingress put forward by the surveyor all relate to the window and/or window frame/surround. And, as mentioned previously, the warranty doesn't provide a specific definition for 'cause of loss'. So, I would consider it an unfair and unreasonable application of the warranty terms for SOL to apply four separate MCV's in circumstances where there appears to be a single type of loss or damage (water ingress) as a result of a defect in a single portion of the home (the window).

The main purpose of the policy is to protect the policyholder against significant repair costs due to construction issues. As such, it can't reasonably be the intention of the policy to avoid cover (by applying multiple MCV's) simply because there are several construction issues in a single portion of the building (the window) which are causing a single type of damage (water ingress). To consider the individual materials or components making up a recognised portion of the building to be separately identifiable items or causes of damage would deliver an unfair outcome, because to do so nullifies the value of the policy at a time when its most needed by the policyholders, and at a time when they ought reasonably to be able to rely on it.

Instead, where there are multiple defective components to one recognised portion of the building, such as the window, I think it would be reasonable for SOL to consider the window as one separately identifiable cause of loss, and therefore to apply one MCV.

What SOL must do

I think Miss D and Mr R have provided sufficient evidence to demonstrate that they have a valid claim under section 3.3 of their warranty. They've also demonstrated, on balance, that the damage to their flat has been caused by a defect or defects with the window. So, in order to fairly resolve their claim and complaint, I think SOL now needs to investigate the water ingress to establish an actual cause, or causes, of damage before deciding how to settle the claim in line with the warranty terms.

However, as explained above, SOL cannot reasonably consider individual defective components of a single portion of the building to be a separate cause of loss or damage. So, if its investigations establish that, for example, the four potential causes of water ingress in the surveyors' report all exist and are causing the damage – it can only apply one MCV for the defective window. However, if SOL establishes that there are separate defects, present in separate portions of the building and causing the damage to the flat, such as the window and, for example, external cladding – then it would likely be reasonable for it to apply two MCV's. But, at this stage, the first step is to establish the cause(s) of loss.

In addition to the above, I think it's clear that SOL's incorrect repudiation of the claim has resulted in Miss D and Mr R suffering from distress and inconvenience over and above that which would be reasonably expected as a result of a claim of this nature. So, in order to fairly compensate them for the impact of SOL's errors, I think SOL should pay Miss D and Mr R £350.

My final decision

For the reasons set out above, I uphold Miss D and Mr R's complaint.

Society of Lloyd's must:

- Investigate and establish the cause(s) of loss at Miss D and Mr R's flat.
- Consider the claim in line with the remaining terms and conditions of the warranty, applying what I've said in this final decision about the application of the MCV in respect of demised or common parts claims, and the number of "causes".
- Pay Miss D and Mr R £350 compensation for the distress and inconvenience it has caused them.

Under the rules of the Financial Ombudsman Service, I'm required to ask Miss D and Mr R to accept or reject my decision before 21 December 2022.

Adam Golding
Ombudsman