

The complaint

Mr and Mrs G have complained about Amtrust Europe Limited's decision to decline a claim they made under their Premier Guarantee New Home Warranty.

What happened

The subject of this complaint is a building comprised of multiple flats. Damage has been caused to the common parts of the building, which means other leaseholders have been affected, in addition to Mr and Mrs G. However, this complaint has been brought by Mr and Mrs G only.

There has been extensive background to this complaint which I don't intend to repeat in full here. Instead, I'll summarise the key issues in dispute which I need to decide. This isn't meant as a discourtesy to either party, 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 and Mrs G or Amtrust. But for ease of reference, I'll only refer to Mr and Mrs G and Amtrust in this decision – even when referring to the actions or arguments of their representatives.

The complaint concerns Amtrust's decision to decline Mr and Mrs G's claim for damage to the render of their building caused by defects with the coping stones. Amtrust has declined the claim on the basis that it wasn't reported within the timescales required under the terms of the warranty.

Mr and Mrs G have raised several concerns with this position. They've argued that the issues only crystallised in 2022, so they couldn't have reported the claim any sooner than that. They say the final claim they made differs from the issues that were evident prior to that point. They say the damage is ultimately the result of construction issues covered under the warranty, and so they feel Amtrust should accept and settle the claim.

One of our investigators considered Mr and Mrs G's complaint but he didn't think it should be upheld. He said Mr and Mrs G were aware of issues with the render and coping stones within the first two years of the warranty as they had reported them to the developer. He explained that the terms of the warranty required Amtrust to be notified of any issues by no later than two years and six months from commencement of the cover – but in this case it wasn't notified until around four years after the commencement date. Our investigator explained that had Amtrust been notified of the issues earlier, it could have carried out investigations and identified the defect at the heart of the issues sooner. So, taking all of this into account, our investigator felt Amtrust's decision to decline the claim was in line with the policy terms and was fair and reasonable.

Mr and Mrs G didn't agree. So, because no agreement had been reached, the complaint was passed to me to decide. I was minded to agree with the outcome reached by our investigator, but for slightly different reasons. So, I issued a provisional decision to give the parties the opportunity to respond before I reached a final decision. Here's what I said:

“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 outcome reached by our investigator and for broadly the same reasons. I’ll explain in more detail below.

Mr G is the chairman/director of his building’s resident’s association, but this position doesn’t afford him the right to bring a claim or complaint as there is no policy issued to the resident’s association. However, Mr and Mrs G are also leaseholders and policyholders of a warranty for their own flat. So, they are entitled to bring a complaint about Amtrust’s decision to decline the claim in their capacity as leaseholders.

That is what I am considering under this complaint – what Mr and Mrs G are entitled to under their specific warranty. So, while it follows that what I say here would most likely apply to the separate (but essentially the same) complaints of the other leaseholders, my decision here only technically applies to the specific complaint brought by Mr and Mrs G under their own warranty.

The claim at the heart of this complaint relates to damage and defects in the common parts of Mr and Mrs G’s building. Mr and Mrs G’s warranty document sets out the cover and limitations with respect to claims of this nature:

“COMMON PARTS

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 towards the cost of repairs, rectification or rebuilding works. Claims are subject to the financial limits for the individual sections detailed above and the Excess as detailed in the Initial and Certificate of Insurance.”

This means Mr and Mrs G are entitled to bring a complaint about the portion of the common parts they are responsible for under their lease.

Mr and Mrs G’s warranty is split into several sections of cover. These sections, and a claim being made under them, depend on when the issues first materialised, relative to when the warranty commenced. Amtrust has declined Mr and Mrs G’s claim on the basis that the issues were reported too late to be covered under section 3.2.

The dates for the various sections of cover for Mr and Mrs G’s warranty are set out on their certificate of insurance as:

- *Section 3.2 from 25/09/2015 to 25/09/2017*
- *Section 3.3 from 25/09/2017 to 25/09/2025*
- *Section 3.4 from 25/09/2017 to 25/09/2025*
- *Section 3.5 from 25/09/2017 to 25/09/2025*

For claims under section 3.2 to be covered, the policyholder is required to report the issues to the developer within the dates for section 3.2, and to report them to Amtrust within six months of the expiry of section 3.2. Amtrust has confirmed these dates are the same on the certificates of insurance for each of the leaseholders in the building – which means they also apply to this common parts claim.

Section 3.2 is also known as the Developer's Insurance Period or DIP. Under this section, responsibility for remedying issues discovered during the relevant period rests with the developer, rather than Amtrust, in the first instance. But if the developer doesn't carry out repairs, then Amtrust is required to take over the claim in certain circumstances. This is explained within the warranty document (with my added emphasis on the key part relevant to Amtrust's claim decision in this case):

"The Developer's Responsibility during the Defects Insurance Period

The Developer is responsible for Defects that arise during the Defects Insurance Period. The Policyholder should notify their concerns to the Developer in writing as soon as possible after discovering the problem. The Policyholder should keep a copy of all correspondence for their records.

It is a condition precedent to payment of claims under this section of the Policy that concerns must be notified to the Developer in writing before the expiry of the Defects Insurance Period and if the Developer does not respond the Defects must be notified to the Scheme Administrator in writing within 6 months of the expiry of the Defects Insurance Period. The Underwriter will have no liability if all matters are not notified within these time frames."

The warranty document goes on to explain the circumstances under which issues discovered during section 3.2 can become the responsibility of Amtrust (again with my added emphasis):

"The underwriter will indemnify the Policyholder during the Defects Insurance Period against the cost of repairing, replacing or rectifying any Defect in the Housing Unit for which the Developer is responsible and which is discovered and notified to the Developer during the Defects Insurance Period and which is notified to the Underwriter within 6 months of the expiry of the Defects Insurance Period..."

The evidence I've seen suggests that Mr and Mrs G were aware of issues with the rendering and coping stones in 2016 – during the DIP. I say this because Mr G himself has said that staining and discolouration of the render and issues with the mortar between coping stones first materialised in 2016. So, based on this, I'm satisfied that section 3.2 is the relevant section of cover for Mr and Mrs G's claim for those issues.

I've also considered what the relevant regulations have to say. The Financial Conduct Authority's (FCA) Insurance Code of Business Sourcebook (ICOBS) states that an insurer should not reject a claim for breach of a condition or warranty unless the circumstances of the claim are connected to the breach. What this means is that unless the breach is material to the loss, Amtrust shouldn't rely on it to decline Mr and Mrs G's claim.

However, in this case, the condition required Mr and Mrs G to have notified Amtrust about the issues (which were present in 2016) by no later than 25 March 2018. The issues weren't notified until September 2019 and, during this time, the damage to the property was getting worse as the staining developed into cracking and later to falling render/mortar. This means the potential cost to Amtrust of rectifying the issues was increasing with time, effectively prejudicing its position. Based on this, I consider that the late notification is material to the loss, and therefore Amtrust's decision to decline the claim, under section 3.2, is in line with the relevant regulations, and the terms of the policy, and so is fair and reasonable in all the circumstances.

Mr and Mrs G have also argued that that the defect with the size/type of coping stone used wasn't fully established until 2022 and is separate to the issue of the mortar between the stones, which was twice rectified by the developer and so not part of the claim they made to Amtrust. So, they say that the claim for the defective coping stones, and resultant damage, should be covered under section 3.3.

I've considered whether there would be cover under section 3.3 – the Structural Insurance Period or SIP. Unlike section 3.2, section 3.3 doesn't provide cover for a defect in isolation. Rather, section 3.3 covers major damage which has been caused by a defect. This is explained in the policy document:

“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 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 definition of “Structure” in the policy document includes rendering.

So, in this case, the major damage is the damage to the render. But the render issues were first discovered during the DIP (3.2) not the SIP (3.3). It also doesn't appear to be in dispute that the render issues are the result of the defect with the coping stones. So, the issues are inextricably linked.

I think it's reasonable to conclude that had Amtrust been made aware of the render issues during the DIP, in line with the terms of the warranty, it would most likely have identified and remedied both issues as part of the same claim. I say this because the only way to deliver a lasting and effective repair to the render issues, which is what Amtrust would have been required to do under a successful claim, would have been to remedy the defect with the coping stones. But the render issues weren't notified to Amtrust until much later than required.

In the circumstances of this complaint, I don't consider there is cover for the coping stone defect under section 3.3 because this section covers major damage caused by the defect, rather than the defect itself in isolation. The major damage (to the render) was present before section 3.3 commenced so it wasn't first discovered during the relevant period for section 3.3 to apply.

To summarise, section 3.2 covers defects. Section 3.3 covers major damage caused by a defect. Here there wasn't a defect reported in the period applicable for 3.2 to apply, so the defect with the coping stones isn't covered under section 3.2. And when a defect was reported, this was under section 3.3. But the damage caused by that defect, which is what section 3.3 covers, was already present before that section of cover came into place, so it wasn't first discovered during the SIP – which is a requirement for cover under section 3.3.

So, taking all of this into account, I don't think it would be fair or reasonable to direct Amtrust to deal with the claim under either section 3.2 or 3.3.”

In response to my provisional decision, Mr and Mrs G provided additional context to the sequence of events which took place. They explained that in 2016 there was defective mortar between the coping stones and that there was discolouration to the upper part of the render and to the side walls of the balconies – not to the main external walls which have discoloured and cracked more recently. They said the early discolouration was attributed to the defective mortar, and that these issues were all rectified by the developer to their satisfaction at the time. So, Mr and Mrs G say they can't reasonably have been expected to make a claim to Amtrust during the defect insurance period (the first two years of cover) as there was no longer an issue for them to claim for.

When new issues with the render materialised in 2019, Mr and Mrs G say they contacted the render provider only to learn that the developer never requested the separate render guarantee from them, and so it wasn't in place. But through their communications with the render provider, they discovered that the coping stones did not have sufficient overhang or drip facility to protect the render from water run-off.

Based on the above, Mr and Mrs G have argued that they can only reasonably have been expected to respond to what was knowable at the time. And during the defects insurance period (DIP) the walls or coping stones were not forecast to have any further issues. So, they disagree that their claim should fail on the basis that the issues weren't reported to Amtrust during the DIP, because the issues they are seeking to claim for now hadn't yet become apparent during that period.

I shared Mr and Mrs G's response with Amtrust and asked for its comments. Amtrust maintained that the issues are connected and so Mr and Mrs G should have reported them to Amtrust at the time.

Based on Mr and Mrs G's response to my provisional decision, I was persuaded to change my mind and to uphold their complaint. So, I issued a second provisional decision to give the parties the opportunity to respond to my new provisional outcome, and reasoning. Here's what I said in my second provisional decision:

“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 responses to my first provisional decision. Having done so, I'm now intending to uphold Mr and Mrs G's complaint. I'll explain why in more detail below.

At the time of drafting my initial provisional decision, I wasn't aware that the earlier issues with the render and coping stones had been resolved by the developer. Rather, I was under the impression that Mr and Mrs G reported the issues to the developer, but that they were never satisfactorily dealt with. It was on this basis that I said it wouldn't be fair to expect Amtrust to deal with the claim under either section 3.2 (DIP) or section 3.3 (structural insurance period or SIP). This was because the policy clearly requires any issues not satisfactorily dealt with by the developer to be reported to Amtrust within six months of the expiry of the DIP.

However, given the additional information provided by Mr and Mrs G, I no longer think it would be reasonable for me to conclude that they ought to have reported issues they believed to have been fully resolved by the developer, to Amtrust, at the time.

I agree that Mr and Mrs G can only be expected to act on what is knowable. So, as the developer had, to all appearances, resolved the issues which they were aware of at the time, I see no reason for them to have contacted Amtrust. And I note there is no condition within the warranty which requires the policyholders to notify Amtrust of any and all issues which materialise, only those not dealt with, or responded to, by the developer. After all, the developer is responsible for defects which arise during the DIP – so if they address the issues to the policyholder's satisfaction, there is no need for the policyholder to involve Amtrust:

“The Developer's Responsibility during the Defects Insurance Period

The Developer is responsible for Defects that arise during the Defects Insurance Period. The Policyholder should notify their concerns to the Developer in writing as soon as possible after discovering the problem. The Policyholder should keep a copy of all correspondence for their records.

It is a condition precedent to payment of claims under this section of the Policy that concerns must be notified to the Developer in writing before the expiry of the Defects Insurance Period and if the Developer does not respond the Defects must be notified to the Scheme Administrator in writing within 6 months of the expiry of the Defects Insurance Period. The Underwriter will have no liability if all matters are not notified within these time frames.”

Amtrust says the issues which Mr and Mrs G were aware of during the DIP are clearly linked to the later issues. It says the developer may have dragged out the issues until the end of the DIP, but Mr and Mrs G were still required to notify Amtrust within the stated timescales.

I agree that there were issues present in 2016 which have resulted in the damage which materialised during the SIP (years three to then of the warranty coverage). For example, the lack of suitable overhang or drip facility on the coping stones. But again, I can't see that Mr and Mrs G can reasonably have been expected to know this at the time. While one episode of damage occurred during the DIP, and was dealt with by developer, a separate one seems to have occurred during the SIP. And Mr and Mrs G's warranty provides cover for damage, caused by a defect, which is discovered and notified during the SIP.

As explained above, Mr and Mrs G knew there were issues with the mortar and render which they reported to the developer as required. The developer dealt with the issues and Mr and Mrs G had no reason to suspect that they had not done so adequately until much later, when further damage occurred. So, while I agree that the more recent damage is linked to the defects which were present during the DIP, I don't agree that this means Mr and Mrs G ought to have known to report those issues to Amtrust at the time.

Therefore, taking all of the above into account, I think Amtrust should reconsider Mr and Mrs G's claim under section 3.3. I say this because the damage (which is what section 3.3 covers) that led to the discovery of the pre-existing defect first materialised during the SIP and Mr and Mrs G reported it to Amtrust in line with the reporting requirements of that section. I don't think Amtrust's decision to exclude the damage for cover, on the basis that a separate episode of damage was reported to the developer, and remedied by the developer, in the DIP period, is fair and reasonable in the circumstances."

Both sides responded to confirm they accepted my amended provisional conclusions.

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 responses to my second provisional decision.

Both sides accepted my amended provisional conclusions and so haven't offered any further evidence or arguments for me to consider. Therefore, in the absence of any new evidence or arguments, I've reached the same conclusions outlined in my second provisional decision – and for the same reasons.

My final decision

For the reasons set out above, and in my provisional decisions, I uphold Mr and Mrs G's complaint.

It is my final decision that Amtrust Europe Limited must reconsider Mr and Mrs G's claim under section 3.3.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr and Mrs G to accept or reject my decision before 12 July 2023.

Adam Golding
Ombudsman