DRN-5393516

The complaint

Mr H and Mrs G have complained about Casualty & General Insurance Company (Europe) Ltd's ('C&G's) handling of a claim they made under their Residential New Build Latent Defects Insurance Policy.

What happened

On 13 February 2025 I issued a provisional decision explaining why I was intending to uphold this complaint. This is what I said in the provisional decision:

What happened

C&G is represented in this complaint by several different parties including loss adjusters, claims handlers and other agents. When I refer to C&G in this decision, that includes reference to all parties who have acted on its behalf, or provided it with advice, in relation to this claim.

Mr H and Mrs G own a flat in a converted building comprised of 10 leasehold flats (the 'building').

In 2016, work began to convert the building, however, shortly after works commenced, the original developer declared bankruptcy. In June 2016, another developer (who I will refer to throughout as the 'developer') took the project on.

On 6 June 2019, the developer applied for a Residential New Build Latent Defects Insurance Policy (the 'warranty') to provide cover for any damage caused to the building by defects that may have occurred during its conversion. The premium was paid to C&G in October 2019.

Mr H and Mrs G purchased their flat in October 2022, which was sold with the warranty. The freehold interest in the building has remained in the ownership of the developer. The building is classified in the warranty as a conversion, and the warranty only covers new works undertaken by the developer or damage to the existing building caused by the new works.

In June and July 2023, during periods of heavy rainfall, several rooms in Mr H and Mrs G's flat were damaged by a series of substantial ingresses of water into the flat above their doorway and through many points of entry across the ceiling.

Mr H and Mrs G, together with the owners of flats 2 and 3 submitted structural warranty claim forms to C&G in August 2023, which detailed the damage to their respective flats, the building, and the common parts.

The claim form for Mr H and Mrs G's flat set out details of the damage as follows:

Mr H and Mrs G's Flat:

- *Damage to ceilings, all walls (x4) decorative moldings, floor, skirting and 6 x Door Architraves in hall. All require full replacement.*

- *Damage to the front door. New front door required.*
- *Damage to ceiling. 3 x walls, skirting, and floor in kitchen.*
- *Damage to 1 x wall in lounge and entire floor of lounge. All require replacing.*
- *Damage to ceiling, walls, skirting and floor in WC. All need replacing.*

The building: *Inadequate sealing on roof, damage to internal guttering associated with roof drainage causing internal pipes to leak, no vegetation trap installed on the roof or above the entrance to the internal guttering pipe (causing debris / leaf blockages and blockages along the internal pipes) damage to joists supporting the internal guttering, pipes installed on a negative fall and inadequate internal drainage caused by limited pipe capacity, damage to the support of the soil pipe from flat 9, mould growth on wooden joists and timbers in ceilings and under floors;*

The common parts*: Damage to communal wall and insulation between the staircase and various flats, saturated wall, damage to ceilings above front doors, damage to carpet, carpet grippers and underlay on landing and in communal areas which has become mouldy, damaged wall along the staircase, likely damaged and mouldy wooden timbers in the communal walls, floors, and floorboards due to water ingress.*

On 10 October 2023, C&G declined the claim on the basis that the roof and drainage within the original building were pre-existing features and therefore not covered by the warranty.

C&G also said, that as Mr H and Mrs G were neither the owners, nor legally responsible for, the 'retained parts', there would be no cover for those parts of the building under the warranty.

In response to a complaint from the owner of flat 2 about the claim decision (which I have also issued a provisional decision on, today) C&G appointed a loss adjuster who attended the property and provided a report on the claim.

On receipt of the loss adjuster's report dated 21 November 2023, C&G affirmed its decision to decline the claim on 2 December 2023, and included an extra reason for the decline decision. The loss adjuster reported that there was debris and vegetation within the guttering which most likely caused the damage. So, C&G said the claim was also declined on the basis that damage caused by lack of maintenance wouldn't be covered by the warranty.

Mr H and Mrs G didn't agree with C&G's claim decision. They believed that works had been carried out to the roof, guttering and pipework as part of the new works. Mr H and Mrs G also said it was not reasonable to exclude cover for the retained parts of the building, on the basis that it would effectively make the policy void. Concerns about C&G's handling of the claim were also raised at that time.

One of our investigators looked into what had happened and issued a view not upholding the complaint on 10 July 2024. She concluded the following:

- *C&G had unreasonably declined the claim on the basis that the retained parts of the building weren't covered by the warranty.*
- *There were two potential defects to consider: a defect to the roof; and a defect to the guttering and pipes.*
- *The roof was likely excluded from cover under the warranty as the evidence pointed to the roof being completed by October 2019, so wasn't part of the 'new works'.*
- *On the basis that the guttering and pipework didn't form part of the structure of the*

building, and the issues affecting them didn't amount to 'Major Damage' under the policy terms, they likely wouldn't be covered by the warranty terms; and

- *In the complex circumstances of the claim, the two months it took to reach a decision on the claim, and the decision to appoint a loss adjuster to ensure the correct outcome had been reached, was fair in the circumstances.*

Mr H and Mrs G didn't accept our investigator's view and provided detailed comments on the findings. I have referred to their further comments in the 'What I've provisionally decided – and why' section below.

Our investigator took account of Mr H and Mrs G's comments and issued a second view on 23 August 2024. She said that having asked C&G whether the guttering and pipework would be considered part of the roof covering and conversion, it responded to say the guttering potentially could be, depending on the circumstances. On that basis our investigator concluded that C&G should reconsider Mr H and Mrs G's claim about the guttering, in line with the remaining terms and conditions, disregarding the retained parts exclusion it had sought to apply.

C&G didn't accept our investigator's second view and said it wouldn't consider the claim further as the pipes, guttering and roof form part of the retained parts which are excluded under the terms of the warranty.

Mr H and Mrs G also did not accept our investigator's view as they felt it didn't go far enough in placing the liability for addressing the claim with C&G. They also continued to ask C&G for evidence to help establish when the works were likely completed and in October 2024, C&G finally provided copies of the plans and documents that the developer had submitted with its application for cover back in June 2019.

Mr H and Mrs G commissioned a Schedule of Condition Report and submitted it to the Financial Ombudsman Service on 6 February 2025. A copy of that report has also been provided to C&G.

Both parties have requested an ombudsman's decision on the complaint.

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 uphold this complaint. I've addressed each element of Mr H and Mrs G's complaint under the following headings, below: "Are the 'Retained Parts' covered?"; "Does the damage amount to 'Major Damage'?"; "Can the 'Existing Works' exclusion be fairly applied to the claim?", "Compensation for Distress and Inconvenience", and "C&G to reconsider the claim for damage to the common parts of the building and to Mr H and Mrs G's flat".

Are the 'Retained Parts' covered?

I've first considered whether C&G have fairly declined Mr H and Mrs G's claim on the basis that the warranty does not provide cover for the roof, pipework and guttering because they are located within the 'retained parts' of the building which remain within the ownership of the freeholder. C&G has based its position on the definition of 'Common Parts' which refers to:

'Those parts of a multi-ownership building (of which the Residential Property is part), for a common or general use, for which You have joint ownership or legal responsibility'.

In his letter of complaint, addressed to this service, Mr H said that a policy covering only structural aspects within the demise owned by a leaseholder covers nothing, as those aspects are reserved for the freeholder. He went on to say that if that is the correct position then the entire policy is in effect worthless.

In his correspondence with C&G, Mr H said that under the terms of the lease, the leaseholders do have legal liability to pay for the repair of the retained parts, so they are legally responsible for those parts.

In response, C&G said that the policy can only apply to the basis of ownership and the insurer can only pay for work that the policyholder is legally entitled to undertake.

In the first view, our investigator set out clear reasons for why C&G had acted unfairly in declining the claim on this basis.

First, she said that C&G was interpreting the policy in a way that effectively means the leaseholders have no cover under the policy for structural issues. Our investigator explained that the main purpose of a building warranty policy is to protect the policyholders and beneficiaries against significant repair costs due to construction issues. It therefore can't reasonably be the intention of the policy to avoid cover for structural issues on the basis that the leaseholders aren't 'responsible' for the retained parts or common parts of the building when it is the leaseholders who will ultimately pick up the repair costs for those elements of the building (through the service charge). C&G's argument that the owners of the flats aren't covered for their proportionate interest in the common parts of the building effectively relieves it of its liability for the circumstances the warranty is intended to cover.

Our investigator also concluded that the leaseholders have a legal responsibility for the retained parts and common parts, as documented in the lease, and the freeholder's responsibility to arrange for the works to be carried out, doesn't detract from the leaseholder's legal responsibility to pay for those works.

C&G didn't accept our investigator's explanation and re-affirmed its position that as the potentially defective components are in a 'retained part', under the terms of the lease, they are the responsibility of the freeholder, not the lessee. C&G remained of the view that the warranty offered no cover for the retained parts, including the roof and its components.

I've considered the arguments put forward by C&G, however, I agree with our investigator that the retained parts and common parts are covered by the warranty.

Essentially, C&G is seeking to argue that the leaseholders only have cover under the warranty for the parts of the building that they legally own.

But that is not what the warranty says. Rather, it says that C&G will pay the reasonable cost of repairing or rebuilding each 'Residential Property' that has been affected by 'Major Damage'. The definition of 'Residential Property' includes the 'Structure', which in turn includes the roof, roof coverings and all non-load bearing elements and 'Common Parts' for which the insured is responsible.

In this way, the warranty provides cover for leaseholders, for both damage to their own flat, and for their share of liability for damage to the retained parts or common parts of the building. This is common industry practice. C&G's attempt to interpret the definitions in such a way as to exclude all cover for the retained parts or common parts is unfair and

unreasonable in Mr H and Mrs G's circumstances as it effectively denies them cover for any part of the structure or building that remains in the ownership of the developer.

In any event, while Mr H and Mrs G do not own the retained parts or common parts, I'm currently of the view that they do have legal responsibility for them, under the terms of the lease.

Schedule 4 of the lease sets out the details of Mr H and Mrs G's responsibility to pay the service charge which is their proportion of the Service Costs (detailed in Part 2 of Schedule 7) which include the costs estimated by the Landlord in providing the services, such as:

a) *Cleaning, maintaining, decorating, repairing, and replacing the Retained Parts and remedying any inherent defect.*

In Schedule 6 of the lease, (Landlord's Covenants) subject to the Tenant paying the Service Charge, the Landlord covenants to provide the Services. So, the developer's agreement to maintain and repair the property is conditional on the leaseholders first paying the related costs.

In Schedule 4, (Tenant's Covenants) the Tenant is also liable to pay on demand, an amount equal to any insurance money that the insurers of the Building refuse to pay by reason of any act or omission of the Tenant or any undertenant, their workers, contractors or agents or any person at the Building with the express or implied authority of any of them.

Clearly, Mr H and Mrs G, as tenants under the lease, have legal responsibility in respect of the retained parts. They are contractually responsible to pay their proportion of the costs of maintenance repair etc of the retained parts, before the landlord will carry out any works. They are also contractually responsible to pay for the cost of rebuilding if they or their agents cause an insured event which damages or destroys the building. The landlord has the legal remedy of re-entering the property and forfeiting the lease if the tenants do not comply with their responsibilities in relation to the building, under the terms of the lease. And the lease is governed by the laws of England and Wales.

So, for these reasons, I'm satisfied that the retained parts are covered by the warranty (up to Mr H and Mrs G's Tenant's Proportion as set out in the lease). Therefore, I'm intending to conclude that their claim does concern parts of the building which are potentially covered by the warranty (subject to the remaining terms and conditions of the warranty).

Does the damage amount to 'Major Damage'?

I have next considered whether the damage claimed for is covered by the warranty.

Mr H and Mrs G's warranty is divided into different sections of cover which apply to different circumstances and different timescales within the warranty's term of cover.

Section C – 'Structural insurance after 24 months have elapsed from practical completion' – is relevant to Mr H and Mrs G's complaint as the claim was made during years three to ten of the warranty. It says that C&G will pay the reasonable cost of repairing or rebuilding in full or in part and to its original specification each residential property which has been affected by ***major damage****.*

Major damage is defined in the warranty as covering the following:

- *'Destruction of or physical damage to a load bearing element of the* ***residential property*** *caused by a defect in the design, workmanship, material, or components of the* ***structure*** *which adversely affects the* ***residential property's*** *structural stability,*

resistance to damp and/or water penetration; or

- *A condition requiring immediate remedial action to prevent damage to a load bearing element of the **residential property** which adversely affects its structural stability, leading to failure of its resistance to damp and/or water penetration; or*
- *A condition requiring immediate remedial action to prevent imminent danger to the health and safety of the occupants caused by a defect in the design, workmanship, material, components of the **structure** or failure of the **developer** to comply with **building regulations** in respect of chimney and flues; or*
- *The costs incurred in repairing, replacing, or rectifying any part of the **waterproof envelope** within each **residential property** as a result of ingress of water solely attributable to and caused by a defect in the design, workmanship, materials, or components of the waterproofing elements of the **waterproof envelope** within each **residential property**;' or*
- *Destruction of or physical damage to any load bearing element of any existing **structure** incorporated in the **residential property** which is caused as a direct result of a defect in the design, workmanship, materials or components of the new works, provided that the rebuild cost of the existing works is stated in the **certificate of insurance** which is discovered during the **period of insurance** and is notified to the **insurer** via the **scheme administrator** during the **defects insurance period** (section B of this insurance policy) or during the **structural insurance period** (section C of this insurance policy).*

***Waterproof envelope** is defined as:*

*'Means the basement and/or below ground tanking, ground floors, external walls, roofs, skylights, windows and doors of the **residential property**'.*

***Residential property** is defined as:*

*'The property described in the **certificate of insurance** comprising the **structure**, all non-load bearing elements, fixtures and fittings for which the **insured** is responsible, any **common parts** relating or boundary walls forming part of or any paths/roadway providing access for the disabled, the drainage system within the **site** for which the **insured** is responsible, any attached garage or other attached permanent out-building'.*

The certificate of insurance describes the property by reference to the apartment number and the address of the apartment.

*The definition of **Structure** includes:*

- *Foundations;*
- *Load-bearing parts of floors, staircases and associated guard rails, walls, and roofs, together with load-bearing basement or retaining walls necessary for stability;*
- *Roof covering;*
- *Any external finishing surface (including rendering) necessary for the water-tightness of the **waterproof envelope**;*
- *Floor decking and screeds.*

*Finally, **common parts** are described as:*

*'Those parts of a multi-ownership building of which the **residential property** forms part, for a common or general use, for which the **insured** has joint ownership or legal responsibility'.*

Before I go on to explain why I consider 'major damage' has occurred, it's important to note that C&G's loss adjuster accepted that the definition of 'major damage' had been met by the claim when they said, in their preliminary report dated 21 November 2023, under the heading: 'Policy Liability' that 'The claims would fall to be considered as Major Damage'. C&G's acceptance that the claim was for 'major damage' was further evidenced by its focus on seeking to exclude liability for the claim, rather than challenge whether there was a valid claim in the first instance.

Nonetheless, for clarity I have next explained why I agree with C&G that 'major damage' has occurred.

The construction of the roof, guttering and pipework in the building is unusual. To provide context for my consideration of whether 'major damage' has occurred, I have first explained the layout of the roof, guttering and pipework, referring to the reports commissioned by Mr H and Mrs G.

The inspection report Mr H and Mrs G commissioned from building consultants dated 28 February 2024 explained that their flat, which is situated to the front right-hand side of the building has suffered extensive internal water damage due to an internal drainage pipe which is situated within the ceiling void above the hallway and kitchen of their flat. The internal drainage pipe is connected to an external roof outlet gully which takes the rainwater from the valley gutter within the central, closed multi-pitched area of the slate covered main house roof, which is directly above their flat. In times of high rainfall, due to the restricted flow, the small two-inch diameter gully drain cannot cope with the volume of water which will flow down from the four roof pitches which fall into this small valley area and the rainwater will start to backup underneath the slates of the pitched roofs causing water ingress above their flat.

The cause of flooding detailed in the February 2024 inspection report had previously been recorded in a brief drainage report commissioned by Mr H and Mrs G dated 3 July 2023. This drainage report concluded that the ingress of water into their flat was caused by inadequate pipework from the roof into a pipe with an incorrect fall. This led to the pipework becoming overwhelmed under heavy rainfall with water flooding out of the top of the pipe directly above the flat then entering the flat and causing damage.

Mr H explained in more detail that the roof of the building contains a hidden valley, with four roof sections draining inwards to a gully gutter which connects via single pipe entrance to an internal drainage system that extends vertically downwards until reaching the ceiling space of their flat. At that point, the drainage then turns and progresses horizontally across the ceiling of their flat and connects to external guttering on the side of the building.

C&G have said that the internal pipework does not form part of the structure or its components under the terms of the policy. However, C&G accepted that the guttering could be considered part of the roof or roof covering.

The roof and roof coverings are included in the definitions of 'structure' and 'waterproof envelope'. Mr H and Mrs G's flat has clearly suffered extensive water damage, making it uninhabitable caused by a defect in the roof. And it seems that the damage was caused to load bearing elements of the flat. I'm therefore currently satisfied that the first bullet point in the definition of 'major damage' has been met in relation to the roof.

However, Mr H and Mrs G believe that the waterproofing and drainage components of the roof are also inherent components of the roof system which should be covered. They have referred to the Building Regulations 2010 Approved Document C (Site preparation and resistance to contaminants and moisture) which says that any part of the external envelope

of a building that is at an angle of less than 70 degrees to the horizontal wall is included in the definition of roof. Therefore, as the valley gutter is part of the external envelope of the building and on a slope less than 70 degrees it is a roof component as per building regulations and standards. The regulations also say that roofs should resist the penetration of precipitation to the inside of the building and not be damaged by and not carry precipitation to any part of the building which would be damaged by it. Mr H says if it isn't permissible for a building regulation compliant roof to direct water into the building, then a drainage system must be considered an inherent component of the roof.

I find Mr H's comments to be persuasive. In addition, the guttering and pipework which ought to direct rainfall outside of the building, are connected to the roof, but they channel the water through the centre of the building due to the design of the roof, rather than down the outside wall of the building as would more often be the case. So, in these circumstances, I consider it reasonable to conclude that the guttering and pipework are part of the 'waterproof envelope'.

In addition, I'm currently of the view that a lasting and effective repair of the damage to the 'residential property' (which includes the 'structure'), could only be achieved by carrying out repairs to the roof, pipework, and guttering. Failure to address these causes of the ingress of water would be unlikely to provide a lasting and effective repair. Therefore, if the claim is accepted, the guttering and pipework, which are inextricably linked to the roof and the building's waterproof envelope, should also be repaired.

In summary, I'm satisfied that the damage Mr H and Mrs G have claimed for, ought reasonably to be covered by the warranty (subject to the remaining terms and conditions of the warranty). However, C&G have argued that one of the exclusions in the warranty, requiring the major damage to be caused by new works, not existing works, relieves it of liability for the claim. So, I have next considered whether that exclusion can be fairly applied to Mr H and Mrs G's claim.

Can the 'Existing Works' exclusion be fairly applied to the claim?

While I'm satisfied that the roof, guttering and pipework form part of the retained parts that would likely be covered, the warranty contains a specific claim condition and a specific exclusion that C&G has sought to apply, in declining the claim.

The claim conditions applicable to section C on page 22 say: 'If either your initial certificate or your certificate of insurance refers to Property as Renovation or Conversion then this Policy will only provide cover for the structure in existence prior to the works undertaken by the developer in so far as they are damaged as a result of major damage within the works undertaken by the developer'.

The certificate of insurance describes the building as a conversion.

Then, on page 29 of the warranty terms, under the heading: 'General exceptions', paragraph 4. 'Defects in existing works' says the warranty does not cover:

Loss or damage due to or arising out of any defect in the design, workmanship, materials, or components of the ***residential property*** *that was installed or constructed prior to the refurbishment/renovation/construction works undertaken by the builder that are the subject of this insurance.'*

However, it does go on to state that cover is provided for:

*'…**major damage** to the existing works discovered after the **insurance commencement date** and notified to the scheme **administrators** during…the **structural insurance period**….which is caused as a direct result of **major damage** of the new works, provided that the rebuild cost of the existing works is stated in the **certificate of insurance**.'*

So, if the works to the roof, guttering and pipework were completed prior to the conversion of the building into flats, then the warranty would not cover any major damage to the residential property, caused by a defect in any of those parts of the building.

I've considered all the evidence provided by the parties regarding when the roof, guttering and pipework were likely completed, and I agree there is some ambiguity about whether some of the works to those parts of the building were included in the new works.

C&G has submitted that two reports completed in June 2019 and October 2019 following inspections of the building prior to the premium being paid for the warranty confirm that the roof had been completed. These reports stated that the roof structure was formed using multiple pitch arrangements and was finished in traditional slate covering. They also said the roof had already been 'covered' and discussed the need for insulation to be added underneath parts of the roof. In addition, copies of 'Google Earth' photographs have been provided by C&G which it believes show the roof was largely completed by the time the warranty was in place. As I've previously mentioned, following our investigator's second view, C&G conceded that the guttering was possibly completed as part of the new works, and could therefore possibly be covered by the warranty.

Mr H and Mrs G have submitted copies of design plans, documents, reports, and photographs in support of their view that the roof, pipework, and guttering were completed after the warranty came into effect. A large part of this evidence was provided by the developer to C&G in support of its application for cover in June 2019. C&G eventually shared this information with Mr H and Mrs G in October 2024.

This information included a structural engineer's report dated 16 June 2019 which commented that the existing roof structure had been stripped back and new finishes were partly installed. It said that copings and ridge tiles were missing in places, and there was some damp staining around the bay windows which appeared to be because of the unfinished drainage system. It concluded by saying the completion of the roof finishes would be required as one of the initial elements in order that 'as installed' finishes within the building are not damaged.

In addition, a number of plans have been provided detailing works that needed to be carried out to the roof and drainage, dated shortly before the commencement of the warranty. These include: 'Proposed Second Floor Level Demolition & Remedial Plan' dated 21 July 2019 which stated: 'All roof structures to be surveyed, numerous holes are evident which may lead to all rood (sic) timber being replaced' and '1m AOV to be created in roof structure – refer to fire strategy information'. And the 'Proposed Second Floor Remedial Plan and New Construction Plan', marked as 'for comment' (so not yet final) on 4 August 2019 which said that new trimming timbers for AOB needed to be created in the roof structure.

Mr H says the notations on these plans demonstrate that the Velux fire window was not installed in the roof structure by the end of July 2019. The requirement to include this at the head of the staircase was detailed in the site inspection report dated 10 July 2019. The design plans provided for an opening vent to be installed in the roof. Details on the Velux that was installed showed it would have been produced in the factory in June 2019. Mr H also provided copies of photographs to show the AOV wasn't installed by May 2019, but appeared in photographs by April 2020.

Noting that some of the plans were marked as 'for comment' in early August 2019, Mr H says that it is reasonable to assume that works to the roof couldn't start until the final plans were made available which at best would have been mid-August 2019. Between that time, and the date the policy went live on 10 October 2019, Mr H says the amount of work that would have been required to complete the roof and drainage system, within a 4–5-week window, could not have been done in the available time. I haven't repeated all of the necessary actions Mr H has suggested would have needed to be completed here, however, I agree that given the need for trades to be booked in, surveys to be carried out prior to the replacement, repair and modification of various elements of the roofing and drainage, it is unlikely that all of the works would have been able to be completed within that short window.

In relation to the drainage, the 'Proposed Basement Level New Construction Plan', which was updated on 31 August 2019, included drawings and instructions in relation to drainage, drainage requirements and basement waterproofing. And Mr H has provided photographs to show that the internal and external drainage were incomplete by the policy start date. He explained that the valley gutter was to be connected to internal downpipe systems which then exited the building. However, the pipes couldn't have been installed prior to the roof completion as there would have been nothing for them to connect into.

There are two further inspection reports that Mr H also highlighted, from October 2019 and September 2020, which he says provide further evidence that the roof and drainage works were not complete at the time the warranty came into effect.

The Stage 3 inspection report, dated October 2019, stated that the roof had already been covered. However, the photos provided, and the summary of the report indicated the roof was not accessed and that assessment was undertaken from the ground level. Mr H also says that although the roof may have been covered, it was not finished.

The final inspection report dated 15 September 2020, contained the following observations: Rainwater pipes are not fully installed and in some cases do not terminate to a surface water discharge, some flues have not been installed – including covers on those that have, areas of brickwork are missing to the external building envelope – these require to be adequately sealed, gaps around windows and doors have not been sealed, and the ceiling has partially collapsed to Apartment 9. A new roof has been installed – need to see this plastered and completed.

Mr H explained that flat 9 is located above their flat and the roof of flat 9 forms part of the hidden valley in question.

He has also provided satellite imagery and boiler installation documentation that evidence modification – namely the addition of flue vents – was undertaken between 2020 and 2021. This includes photographs that show that a boiler flue protruding from the roof, which serves flat 9 was not present in images that pre-dated April 2020 which Mr H said corresponds with the boiler production date of 3 February 2020. He explained that the modifications to the roof, to accommodate the flue pipes, are proximate to the areas most relevant to their claim, that is, the top section of the gully where the rainwater drainage pipe is located. Furthermore, the Velux smoke vent warranty was initiated in June 2019, which he says is the assembly date in the factory. The addition of those modifications, the window and flue, would have required cutting the roof cover membrane, which is specifically listed as a structural component.

Finally, Mr H instructed surveyors to provide a Schedule of Condition report which was dated February 2025. This report highlighted that the valley area specifically relevant to Mr H and Mrs G's claim has been extensively retiled, with roughly one-third of the slates replaced,

which Mr H believes should constitute a meaningful modification, which post-dated the commencement of the warranty.

C&G can only fairly and reasonably apply the existing works exclusion if it can be shown that the damage to the building and flat was caused by existing works. Our investigator said that it couldn't be conclusively shown that work was ongoing after the commencement date of the warranty. However, the standard of proof that I apply, is the balance of probabilities, that is, what do I think more likely was the case? I only need to be satisfied it is more likely than not, that the roof, guttering, and pipework were partially completed after the commencement of the warranty.

After considering the available evidence, which in some cases is incomplete or contradictory, I am more persuaded by the evidence Mr H has provided in support of his position that the roof, pipework, and guttering had not been completed prior to the commencement of the works covered by the warranty.

I'm therefore intending to conclude that C&G have unfairly applied this exclusion in declining Mr H and Mrs G's claim.

Compensation for distress and inconvenience caused to Mr H and Mrs G

As our investigator commented, C&G did make its decision on the claim within approximately two months. However, for the reasons I have detailed in the above sections, that decision was unfair and unreasonable. The investigations undertaken by C&G, and the extent of its consideration of the key issues affecting the claim appear to have been cursory, despite C&G having in its possession for the previous five years, all the information that Mr H submitted in support of his complaint. In addition, it wasn't until other flat owners, Mr V and Mrs D, had referred their complaint to this service in November 2023, that C&G decided to arrange for their agents to visit the property to investigate the claim.

Mr H and Mrs G have suffered significant distress, upset and inconvenience because of the way C&G has handled their claim, for which they need to be compensated.

While there will always be an element of inconvenience arising from the circumstances that led to their property being damaged by the many ingresses of water, in my view C&G's failure to engage with the claim has significantly exacerbated the stress, inconvenience and upset that Mr H and Mrs G have suffered.

C&G's stance that it was for Mr H and Mrs G to evidence which parts of the building were covered by the warranty created a significant amount of stress for them. C&G provided cover for the building from 2019, and as I have explained, was given a number of plans, reports and documents at that time which provide a picture of a development that was materially incomplete, at the time the warranty commenced. However, C&G required Mr H and Mrs G, who purchased their flat three years later, to evidence which parts of the building were or were not complete, at a point in time that was three years prior to their ownership of the flat.

The frustration this has caused Mr H and Mrs G and the impact on their health, is apparent from their evidence. In October 2024, C&G decided to provide copies of documentation to Mr H and Mrs G which they could refer to in support of their claim. It is possible that the conveyancing solicitors who acted on their purchase may have had some of that information. However, the insurer who agreed to take on the risk at the time, would clearly have that information available. The delay in providing that to Mr H and Mrs G was unfair and unreasonable in the circumstances. C&G's advisers mentioned in emails to C&G how difficult it would be for Mr H and Mrs G to provide the necessary evidence. That difficulty was

increased by C&G's apparent withholding of relevant information until more than a year after the claim was made.

Mr H has explained how Mrs G's existing medical condition has been significantly exacerbated by the stress caused by C&G's handling of the claim, to the extent that she required medical treatment.

The damage to their flat dramatically worsened while C&G declined to fairly consider their claim. After ten ingresses of water into their flat, including one which even the fire department was unable to contain, the flat became uninhabitable. For the past eighteen months, Mr H and Mrs G have had to live in hotel and other temporary accommodation.

Mr H has told us that they have claimed on their home insurance policy for alternative accommodation, however, that allowance has now run out. Mr H has said that they are now facing being homeless and potentially bankrupt.

Taking all of this into account, I'm intending to require C&G to pay Mr H and Mrs G £2,500 for the distress and inconvenience they've been caused by its decision to unfairly decline the claim and its unfair and unreasonable handling of the claim.

C&G to reconsider the claim for damage to the common parts and to Mr H and Mrs G's flat

C&G has unfairly declined Mr H and Mrs G's claim for damage to the common parts of the building and to their flat.

I understand that Mr H and Mrs G have claimed for alternative accommodation on their home insurance policy. However, it is not clear whether any urgent remedial works have needed to be carried out, or whether any such works have been funded by Mr H and Mrs G or their home insurer during the eighteen-month period since the claim was made.

I don't have sufficient evidence to direct C&G to accept the claim or to pay the claim, due to its lack of engagement with the claim.

So, to put things right I am intending to require C&G to promptly reconsider the claim, on the following basis:

- *The retained parts are covered by the warranty; and*
- *The Existing Works exclusion cannot be fairly applied to the claim about the roof, guttering and pipework in the building.*

I would also note that the brief report provided by C&G's loss adjuster in November 2023 suggested that the damage was caused by debris and vegetation within the guttering on the roof. However, in view of the other evidence provided by Mr H and Mrs G, I don't find that suggestion to be persuasive. So that also would not constitute a fair reason to decline the claim.

If C&G decides to now accept the claim, it will need to work with Mr H and Mrs G and the other affected leaseholders to establish the value of the claim and how the claim is to be settled.

Also, in the event of the claim being accepted, during the period that Mr H and Mrs G's home remains uninhabitable, C&G must include in any claim settlement, alternative accommodation costs as provided for on page 24 of the warranty terms.

While the warranty contains a general condition on page 27, in relation to contribution, given the period of delay that Mr H and Mrs G have already suffered in having their claim fairly considered and progressed, I would expect C&G to negotiate any contribution directly with Mr H and Mrs G's home insurer or other relevant third party.

As the warranty provides cover for Mr H and Mrs G's flat, and their proportion of liability for the retained parts and the common parts, any settlement of the claim would need to include their proportion (as detailed in their lease) of the cost of repair to the retained parts and common parts.

If C&G wish to avoid receiving complaints from other leaseholder owners in the building, who also have a proportionate responsibility for the cost of repair of the retained parts and the common parts, it may consider approaching the other leaseholders directly regarding the settlement of the claim in relation to their proportion of liability as detailed in their leases. If C&G chooses not to do so, then the other leaseholders may approach this Service with their own complaint about the claim.

Should Mr H and Mrs G be unhappy with C&G's decision on the claim, or, any proposal C&G might make to settle the claim, then they are free to make a further complaint about that to C&G and if they remain unhappy with the response, they can refer the complaint to this Service.

I concluded the provisional decision by explaining that I was intending to uphold the complaint and require C&G to promptly reconsider the claim without relying on the exclusions I had considered earlier in the provisional decision, and to pay Mr H and Mrs G £2,500 compensation for the distress and inconvenience they have been caused by its handling of the claim.

I asked both parties to provide me with any final evidence or arguments they wanted me to consider by 27 February 2025, before I issued my final decision on the complaint.

C&G requested an extension of time to provide their response on the basis that the provisional decision had presented complex issues that it needed to consider. I agreed to a two-week extension, to 13 March 2025.

In responding to the provisional decision, Mr H and Mrs G said that they are unsure of what I am requesting C&G do, in saying they must promptly reconsider the claim without relying on the exclusions I had considered. They would like clarification about whether I am instructing C&G to accept their claim or reassess it without reference to the previous criteria used for rejection.

Mr H and Mrs G have also provided additional comments regarding their current housing situation, the current state of their property, the difficulties they have experienced in trying to access the roof ascertain the extent of the defect and damage, and other costs. They have also highlighted two points of clarification.

In addition, Mr H and Mrs G have raised questions about whether the cost of the reports they have obtained, and their legal fees ought to be covered by C&G. And, they have asked for a direction be included in the final decision which only permits C&G to charge one excess on the claim.

C&G responded to say that it did not accept the provisional decision, and made the following points in relation to the complaint brought by Mr V and Mrs D. C&G confirmed that its comments also applied to this complaint brought by Mr H and Mrs G:

1. Mr H and Mrs G have no '*legal responsibility*' for the parts of the building implicated in their claim, and are therefore precluded from claiming in respect of them under the policy; and

2. There is good evidence that the roof valley and guttering implicated in the claim was in situ before the works commenced / the policy incepted, and any issues connected with them therefore fall foul of the '*existing works*' exclusion. The attempts to suggest otherwise by the Complainants lack credibility, where there is no positive evidence that causative works have been carried out to this section of the roof by the developer.

C&G also suggests that, following a Court of Appeal judgement, the Financial Ombudsman Service is not able to adjudicate on whether Mr H and Mrs G have legal responsibility for the retained parts, so I should dismiss this complaint.

I've taken the parties' further submissions into account when reaching my final decision on this complaint.

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.

C&G's request that the complaint be dismissed.

I have first considered C&G's submission that I have no power to consider part of the complaint, so it would be appropriate for me to dismiss the complaint in its entirety.

This submission indicates that C&G may have misunderstood what it is that I am deciding, in this decision. So, I have first addressed that key issue.

Mr H and Mrs G have not approached this Service for a legally binding finding on whether they have any legal responsibility for the retained parts or common parts under the terms of their lease. In any event, even if they had, I would not have any power to make a finding on that point of law, as is not within the scope of the regulated activities that I am empowered to consider complaints about.

What I am deciding, is whether, in concluding that the scope of cover provided by the structural warranty doesn't extend to the retained parts, C&G has acted fairly and reasonably in the circumstances of this complaint.

DISP 3.6.1R provides that: '*The Ombudsman will determine a complaint by reference to what is, in his opinion, fair and reasonable in all the circumstances of the case*'.

DISP 3.6.4R says that: '*In considering what is fair and reasonable in all the circumstances of the case, the Ombudsman will take into account:*

(1) Relevant:

(a) law and regulations;

(b) regulators' rules, guidance and standards;

(c) codes of practice; and

(2) *(where appropriate) what he considers to have been good industry practice at the relevant time.*'

If I did not refer to the lease terms which govern the relationship between Mr H and Mrs G and the freeholder, I would not be fulfilling my obligation to consider the law, as required by DISP 3.6.4R(1)(a).

I have therefore considered the provisions of the lease in arriving at my overall finding, that the scope of the warranty does extend to the retained parts, and I have concluded that C&G's restrictive interpretation of the warranty terms creates an unfair and unreasonable outcome for Mr H and Mrs G with regard to their claim.

I remain of the view that I have the necessary power to consider this complaint, and I don't consider it would be appropriate to dismiss the complaint.

I will next consider C&G's submissions in relation to scope of the cover provided by the warranty.

Are the retained parts covered?

C&G explains that it has taken legal advice on my interpretation of the warranty and lease provisions, regarding whether the retained parts are covered by the warranty. C&G considers the conclusions I have reached to be wrong, as a matter of law, and is confident that a court would reach a different conclusion on the issue.

I have addressed each point raised in relation to this issue, following the numbering detailed in C&G's submissions.

2.5.1 C&G states that the retained parts including the common parts are expressly excluded from the demise of the Property.

This is not in dispute. I have not suggested that these parts are owned by Mr H and Mrs G.

2.5.2 C&G says that the lease grants the leaseholders only limited rights over the '*common parts*' and '*retained parts*'.

Again, this is not in dispute and has no bearing on whether the leaseholders have any legal responsibility for the common parts and retained parts.

2.5.3 C&G states that the leaseholders do not have any rights to take any steps to repair, maintain, inspect, alter, or interfere in any way with the '*retained parts*' or '*common parts*'. C&G says that this means it cannot be said to be legally responsible for them.

I accept this constitutes one possible interpretation of whether the leaseholders have legal responsibility for the common parts or retained parts under the terms of the lease. However, the warranty terms do not include this restricted definition of legal responsibility. If C&G wished to apply a more limited category of '*legal responsibility*' as it has suggested, then it ought to have written the warranty terms in such a way as to say that. The warranty simply refers to '*legal responsibility*'; which I maintain covers the obligations the leaseholders have under the lease in relation to the retained parts and common parts, as detailed in the provisional decision (included above). C&G's submissions on this point have not led me to reach a different conclusion.

In addition, the fact that the warranty refers to legal ownership or legal responsibility lends support to my conclusion, as it demonstrates a clear intention to cover more than just the

legal ownership of the building.

2.5.4 C&G believes that the only obligation on the leaseholders in relation to the '*common parts*' and the '*retained parts*' is to pay for the services relating to them via the service charge.

As I have set out in the provisional decision. I do not agree with this limited interpretation of the leaseholders' obligations in the lease, regarding the common parts and the retained parts. In addition to the other obligations I have already referred to, the leaseholders are obliged to comply with the Regulations detailed in Schedule 5, which include using their property in such a way as doesn't cause damage to, or lessen the support or protection their property gives to the other parts of the building (see clauses 4, 5, 6, 8, 20, and 26 of Schedule 5 of the lease).

Also, the certificate of insurance for this flat, under the heading: '*Schedule and endorsements*' and the sub-heading: '*Section B&C – Structural insurance period*' sets a limit of cover of £10,000,000 or the rebuilding cost whichever is the lesser for any one Residential Property or Continuous Structure'. I consider that this provides an additional indication that the warranty was intended to cover the retained parts, that is, the structure. If that wasn't the case then the certificate of insurance could simply have referred to one or more Residential Properties.

2.5.5 C&G submits that the provision requiring the leaseholders to pay the service charge does not create any interest or rights in law, in relation to the common parts or retained parts. It then says that therefore the leaseholders have no '*responsibility*' for them.

I've considered C&G's arguments here, but again I don't find them to be persuasive. As with the submission made by C&G in paragraph 2.5.3, it has proposed one possible definition of '*responsibility*', that is, an interest or right in law in the retained parts.

However, the Cambridge English Dictionary provides an alternative definition of '*responsibility*' which covers: '*a duty to take care of something*'.

The Oxford English Dictionary has ten meanings listed under its entry for the noun, '*responsibility*'.

Another definition of responsibility is: '*to be legally responsible to fulfil the requirements for accountability under the law*'.

So, again, when considering the term of the warranty which lists legal ownership and legal responsibility as two separate interests, I don't accept C&G's restrictive definition of '*responsibility*' can reasonably be applied in these circumstances.

For the reasons detailed in the provisional decision, I remain of the view that Mr H and Mrs G have legal responsibility for the retained parts.

2.5.6 C&G argues that the definition of '*residential property*' in the policy is based on the physical parts of the property covered, not any liability to pay the costs of repair for those parts. If the latter was the intention, then this would be stated in the policy.

I don't agree with this point. As I have explained in the provisional decision, I consider the warranty does provide cover for both the leaseholders' flat and the leaseholders' proportionate responsibility for the repair and maintenance of the retained parts.

2.5.7 C&G submits that the items forming part of the definition of '*structure*' in the policy can only relate to the '*residential property*' in so far as it has any of them as a matter of fact.

C&G provides the example of a first-floor flat in a seven-storey block, which does not have a roof covering and so this cannot form part of the definition for that first-floor flat. C&G also repeats its assertion that the warranty doesn't cover leaseholders for both damage to their own flat and for their share of liability for damage to the '*retained parts of the building*'.

I find C&G's arguments here to be somewhat contrived and not reflective of how a multi-occupancy building functions. If the logic was applied to other parts of the flat such as the external wall immediately adjacent to the flat, C&G appears to be saying that major damage to the external wall adjacent to a ground floor flat, is irrelevant to the structural integrity of the flats above it. But the structure of a building and the structural stability of the flats within it are inextricably connected. So, damage to one part of a structural wall is likely to affect all of the flats that gain stability from that wall, whether the flat is directly adjacent to the damaged part, or not. I therefore don't find C&G's submissions on this point to be logical or persuasive.

2.6 C&G considers that in order to reach my conclusion on this issue, I have had to carry out my own interpretation of the provisions of the lease and the policy, which I do not have the power to do.

As I have already explained, the purpose of this decision is not to make a finding of law about whether Mr H and Mrs G have legal responsibility for the common parts. Rather, as required by the DISP rules referred to earlier in this decision, I have considered the law, in arriving at my decision that C&G has unfairly and unreasonably declined Mr H and Mrs G's claim. By applying an unfair and unreasonable interpretation of the warranty term which refers to '*legal responsibility*', C&G has sought to unfairly limit the scope of cover provided by the warranty to exclude cover in precisely the circumstances a structural warranty is designed to engage. C&G's proposed interpretation of the warranty term effectively renders the structural warranty, worthless.

I have no further comments to make in relation to C&G's submissions about my lack of power to make a finding in law, as expanded on in paragraphs 2.7 to 2.10 of their submissions other than to say that I don't find the submissions to be persuasive.

So, for the reasons given, I remain of the view that the 'retained parts' are covered by the warranty.

<u>Does the damage amount to 'Major Damage'?</u>

I have next considered C&G's response to my provisional findings in relation to whether there has been '*major damage*' to a covered part of the building, which the warranty ought reasonably to respond to. I have considered all of the points raised by C&G, but in this section of the final decision, I've only specifically referred to the points which relate to the key issues in dispute, and I have noted the relevant paragraph alongside.

In paragraphs 3.1 to 3.11 of C&G's submissions, it has said that it doesn't agree that '*major damage*' has occurred. C&G has asked for detailed information from Mr H and Mrs G to evidence that '*major damage*' has occurred. Before I proceed to respond to the material points raised, I would like to address the timing of these information requests, and the potential detriment C&G's delays in engaging with this claim may cause Mr H and Mrs G.

ICOBS 8.1 says: '*An insurer must:*

(1) Handle claims promptly and fairly;

(2) Provide reasonable guidance to help a policyholder make a claim and appropriate information on its progress;

(3) *Not unreasonably reject a claim….;*'

C&G's request for information it ought to have sought when considering the claim 18 months ago is further evidence of its failure to progress the claim promptly and fairly.

The appropriate time to raise these concerns, at the latest, would have been following receipt of the report from its loss adjuster that referred to '*major damage*' occurring, a short time after the claim was made.

In my view, Mr H and Mrs G's ability to prove their claim has likely been detrimentally impacted by C&G's delay in engaging with the claim, evidenced by this late raising of information requests, after a significant period of time has passed since the damage occurred.

Their ability to prove their claim, with clarity, has likely been impacted by a number of factors, including but not limited to, the need to carry out any emergency repairs to mitigate the potential damage to the property, (in the absence of any meaningful engagement with the claim by C&G), and the ability to provide reports on the damage which occurred sometime ago, for which evidence may not now be available.

I would also remind C&G that my provisional decision's proposed resolution to the complaint was to require it to reconsider the claim within specific parameters. It would therefore be more appropriate to consider some of the points it has now, in my view, prematurely raised, during that reconsideration of the claim.

In paragraph 3.3, C&G says that as a starting point, it is a well-established principle of insurance law that the onus rests with a policyholder to prove there has been an insured loss under a policy. It therefore follows that the Complainants are obliged, as a matter of law, to show there has been '*major loss*' for the purposes of the policy.

The warranty in fact does not refer to '*major loss*', rather the question is whether '*major damage*' has occurred, which ought to be covered by the warranty.

I am aware of the principle of insurance law C&G has referred to. But the standard of proof that is applied, in my consideration of this issue, is that of the balance of probabilities. And for the reasons given in my provisional decision included above I am satisfied that '*major damage*' has likely occurred which should be covered by the warranty.

In paragraph 3.4 of their response to the provisional decision, C&G says it is not clear to them that Mr H and Mrs G have overcome the evidential hurdle to establish that there has been a major loss for the purposes of the policy.

C&G says it would expect that evidence to include:

- Any repair or maintenance works carried out since practical completion.
- Details of any extreme weather conditions since practical completion.
- Any lack of maintenance, including failure to clean the central valley gutter.

C&G says without that evidence, it isn't clear on what basis I can reasonably be satisfied on the balance of probabilities that there is water ingress attributable to defects in the works carried out by the developer.

The findings included in the provisional decision were based on the information that was available at that time. I was of the view that both parties had had sufficient time (more than eleven months from the date the complaint was first referred to this Service) to provide submissions and information in support of their position on the complaint. So, I proceeded to give my provisional decision on the complaint, based on the available evidence and arguments.

It is not the role of this Service to undertake detailed investigations into a claim on behalf of an insurer. It is the insurer's role to make whatever enquiries it thinks are necessary to validate a claim before the claim decision is made.

My role, on receiving a complaint about a claim decision, is to consider all of the available evidence in light of the relevant law, regulation, and good industry practice. That is what I have done.

C&G has requested a detailed schedule of repair or maintenance works, details of any extreme weather conditions and details of all maintenance items that have not been completed across all of the years that have passed since practical completion of the building was certified (in November 2020). I accept that such information might enable me to confirm, beyond reasonable doubt, the question of whether '*major damage'* has occurred. However, that is not the burden of proof that needs to be satisfied here, as I have explained. I also note that the provision of such detailed information would potentially provide me with sufficient evidence to direct that the claim must be paid, but that is not the conclusion I reached in the provisional decision.

For the reasons set out in the provisional decision, I have explained why, on balance, I consider that '*major damage'* has likely occurred. The burden of proof then shifts to C&G to prove, on balance, that any exclusion in the warranty terms can fairly be applied.

C&G has said that it has never accepted that there has been '*major damage*', and it assumes the comment I made to that effect, in the provisional decision, was based on the report of the loss adjusters who were only indicating the relevant sections of the policy that the claim might be considered under. C&G says it wasn't an admission that '*major damage*' had occurred. I don't find this to be a persuasive argument as there do not seem to be any other relevant sections in the warranty to signpost. It is only where the '*residential property*' is affected by '*major damage*' that cover will engage under the warranty.

In addition, while the evidence provided by C&G has been brief, it has included a number of email exchanges between C&G and its various agents which support my interpretation of the loss adjuster's report as confirming '*major damage*' had occurred. The email communications which followed the report evidenced discussions about how liability for the claim could be excluded. One reason discussed for excluding liability for the claim was that the property hadn't been maintained, as evidenced by debris that had collected in the gully. In my provisional decision I explained why I wasn't satisfied that the extent of the damage within the building, to Mr H and Mrs G's flat, other flats in the building, and the retained parts, was likely caused by debris collecting in the gully. I also understand the debris referred to by the loss adjuster was removed by the leaseholders' contractor.

However, as C&G has now said it doesn't agree that '*major damage*' has occurred, I have next considered the new submissions it has now made in relation to that.

C&G says that for the definition of '*major damage*' to be met, the policyholder must show that there has been damage to a '*load bearing element of the residential property which adversely affects the residential property's structural stability, resistance to damp and/or water penetration*'.

C&G says the walls, carpets etc referred to in the provisional decision don't appear to be load bearing features, and the damage doesn't appear to have adversely impacted on the structural stability or watertightness of the '*residential property*'. So, this part of the definition of '*major damage'* hasn't apparently been satisfied.

The claim form for Mr H and Mrs G's flat refers to the following damage to their flat:

- *'Damage to ceilings, all walls (x4) decorative moldings, floor, skirting and 6 x Door Architraves in hall. All require full replacement.*
- *Damage to the front door. New front door required.*
- *Damage to ceiling. 3 x walls, skirting, and floor in kitchen.*
- *Damage to 1 x wall in lounge and entire floor of lounge. All require replacing.*
- *Damage to ceiling, walls, skirting and floor in WC. All need replacing.'*

However, it isn't just the internal walls, ceilings and so on, of the flat that are covered by the warranty. The definition of '*residential property*' also includes the '*structure*'. And as I've already explained, I don't agree with C&G's interpretation of the warranty terms to limit that definition to the part of the structure immediately adjacent to the flat.

Under the above heading: '*Are the retained parts covered?*' I have also given my reasons for why I consider the warranty provides cover for both Mr H and Mrs G's flat and their proportion of responsibility for the retained parts, which includes the '*structure*'. I therefore remain of the view that the first definition of '*major damage*' is likely met.

However, I don't need to make a finding on this because I'm persuaded that another definition of '*major damage*' is likely satisfied. I will explain why.

The second part of the definition of '*major damage*' that C&G refers to (included in the fourth bullet point of the definition in the warranty terms) says that the warranty will cover:

'*The costs incurred in repairing, replacing, or rectifying any part of the **waterproof envelope** within each **residential property** as a result of ingress of water solely attributable to and caused by a defect in the design, workmanship, materials, or components of the waterproofing elements of the **waterproof envelope** within each **residential property***'.

C&G considers that Mr H and Mrs G are unable to evidence this because their flat does not have its own roof, and the roof of the building isn't included in the definition of waterproof envelope.

I disagree. As explained, the '*residential property*' includes the '*structure*', and the '*waterproof envelope*' includes the roof. And the warranty doesn't just cover the flat, it covers the leaseholders' proportion of responsibility for the repair of the retained parts, which includes the roof.

C&G doesn't understand the explanation I have given as to why I consider the internal drainpipe to be part of the waterproof envelope when it doesn't form part of the external waterproofing barrier of the property.

I have set out the reasons for my conclusion on this point in some detail in the provisional

decision. However, I will summarise them again here. The leaseholders have explained that the roof of the building contains a hidden valley, with four roof sections draining inwards to a gully gutter which connects via a single pipe entrance to an internal drainage system that extends vertically downwards until it reaches the ceiling space of the flat owned by Mr H and Mrs G. At that point, the drainage then turns and progresses horizontally across the ceiling of that flat and connects to external guttering on the side of the building.

The design of the building therefore drains the water from the roof down the inside walls of the property and across the ceiling of one of the flats, before continuing down the external wall. So, those internal walls effectively form part of the waterproof envelope of the building because they perform the same function as the external walls would if the building was traditionally constructed to drain water down the external walls of the building.

The warranty hasn't been adapted to reflect the unique construction of this building. However, given that the design and construction of the building directs the flow of the water down from the roof, inside the property and along the ceiling of one of the flats, I consider it a fair and reasonable interpretation of waterproof envelope, to include the walls and ceiling that are located within the property between the drainpipes and the internal wall of the flats.

Photographs of the inside of the building provided by the leaseholders show other services also being installed in the same cavity space as where the water drains through the inside of the building. And the existence of this cavity is referred to in the schedule of condition report that Mr H and Mrs G commissioned, dated 12 December 2024, which was shared with C&G on 11 February 2025. The report says on page 28 that previous reports from residents indicated that the issues stemmed from inadequate pipework originating from the multi-pitched roof above Mr H and Mrs G's flat. It explains that the internally fed pipework lacked proper fall, causing rainwater to back up during heavy rainfall. The resulting escape of water has led to extensive damage in Mr H and Mrs G's flat, Mr V and Mrs D's flat and a third flat in the building and has caused minor damage to the communal staircase walls, with water travelling down the cavity between the walls and floors.

It is clear from the evidence provided by the leaseholders that the waterproof envelope has failed, as it has allowed significant amounts of water from the roof to enter the building. So, I consider it a fair and reasonable interpretation of the definition of waterproof envelope, to include the internal walls and surfaces in the middle of the building which the water drains along and across (the ceiling of Mr H and Mrs G's flat) and outside to the external drains. In addition, any time water is directed internally to a building, there are strict building requirements that need to be adhered to, to ensure that the interior parts of the building are robustly watertight. As mentioned in the provisional decision, I find Mr H and Mrs G's comments regarding the relevant building regulations, which support this interpretation, to be persuasive.

I therefore remain satisfied that '*major damage*' has likely occurred. More particularly, a defect in the design, workmanship, materials, and components of the waterproofing elements of the waterproof envelope within the residential property is likely responsible for the damage caused by the ingress of water into the residential property owned by Mr H and Mrs G and the affected retained parts of the property.

<u>Can the existing works exclusion be fairly applied to the claim?</u>

Lastly, I've addressed C&G's response to my provisional conclusions on whether the existing works exclusion can fairly be applied to the claim.

C&G has said it considers my conclusions on this issue to contradict the Financial Ombudsman Service's initial findings on this issue and has asked for clarification as to how

that conclusion has been reached. It isn't clear what initial findings C&G is referring to here. If it is referring to the investigator's view, then as C&G will be aware, if either party requests an ombudsman's decision on the complaint, the ombudsman will consider everything afresh and come to their own conclusion on the complaint. That may lead to a different answer being given on a particular issue by the ombudsman to that reached at an earlier stage of the process.

C&G has also said it struggles to understand the conclusion that I have reached as to why I consider it has unfairly applied the existing works exclusion to the claim.

I have set out my reasons for intending to conclude that the existing works exclusion has not been fairly applied to the claim, in detail in the provisional decision. I don't intend to repeat that explanation again here. Instead, I will address the challenges that C&G has made to my findings on this issue and explain why they haven't caused me to reach a different conclusion about whether the exclusion has been fairly applied.

C&G says, in considering this issue, the relevant question is whether any causative works were carried out by the developer to the parts of the roof implicated in the claim (namely the valley and the gutter) after the commencement of the policy. C&G says that it hasn't seen anything that plausibly suggests it has.

I think C&G's challenge here is based on an incorrect starting point. It isn't just the roof that the claim is made in respect of. It is the roof, guttering and internal drainage that form part of the waterproof envelope. And the evidence that I have seen shows the waterproof envelope was likely subject to some material alterations by the developer, as I've detailed in the provisional decision. This includes the attachment of components of the building to the part of the roof that appears to be a material contributor to the '*major damage*', that is, the gully.

C&G has provided further Google Earth images in support of its challenge, to say the roof had been a feature of the building since at least 2000. That is not in dispute. The warranty covered a conversion of the building, not a demolition and rebuild, so it is to be expected that parts of the existing structure, including the roof, will pre-date the conversion works covered by the warranty. However, the warranty says on page 22:

'*If either your initial certificate or your certificate of insurance refers to the Property as Renovation or Conversion then this Policy will only provide cover for the structure in existence prior to the works undertaken by the developer in so far as they are damaged as a direct result of major damage within the works undertaken by the developer*'.

Only part of the claim relates to the existing structure, and based on the information currently available I remain of the view that works undertaken by the developer likely affected the existing structure, including the roof and the waterproof envelope.

C&G has raised a number of questions about specific details included in various documents and agreements provided by Mr H and Mrs G in support of their claim. However, no substantive arguments have been made about the findings I've reached in the provisional decision regarding the application of the existing works exclusion to the claim, so I haven't been persuaded by C&G's questions to come to a different conclusion on this issue.

The exclusion refers to loss or damage to components of the '*residential property*' that was installed or constructed prior to the new works being undertaken. C&G had argued that the roof had been completed before the warranty commenced, so Mr H and Mrs G couldn't make a claim that related to the roof. In my provisional decision, I went to some lengths to explain why I wasn't persuaded that the roof (and parts of the building comprising the waterproof envelope) had been completed before the warranty commenced, so I didn't think

C&G had fairly applied that exclusion to the claim. C&G's comments have not persuaded me to reach a different view on this point.

Mr H and Mrs G's request for clarification about C&G's reconsideration of the claim.

Mr H and Mrs G have requested clarification about what my direction to C&G to promptly reconsider the claim means, in practice. They would like me to explain whether I am instructing C&G to accept their claim or reassess it without reference to the previous criteria used for rejection.

Mr H and Mrs G have explained that if C&G are only required to reassess the claim, they are concerned that it might reject the claim based on other grounds not covered in the provisional decision. They say that given they have been out of their home for approaching two years, that prospect is very concerning, particularly as they consider C&G have been clear in their intent to oppose every possible point of the claim. They believe that C&G's actions could lead to a further six months to two years of delays. So, they would prefer that I require C&G to accept the claim. In addition, they would prefer that C&G instructs suitable contractors to do the works (and they have suggested some contractors), undertakes a full inspection of the roof and property and outlines all defects and damage to be put right.

I understand Mr H and Mrs G's concern about a further period of delay being suffered because of C&G not being directed to accept the claim, and then it further delaying or obstructing a fair resolution of their claim and complaint. However, there are five reasons as to why I don't consider I am able, at this time, to require C&G to accept the claim. I have set these out below:

1. Given that a final decision, if accepted by the complainants, is legally binding, it is necessary for the award and/or directions given by the ombudsman to the respondent firm to have sufficient clarity for the firm to know what it is expected to do next.

2. This is a complex claim for C&G to consider and settle. While my conclusion is that significant damage has likely been caused by '*major damage*', to put things right, C&G would need to consider the extent of the damage and what works would need to be carried out to ensure the repair provided was lasting and effective. In addition, structural warranties don't cover everything that may go wrong with a building, for example, they wouldn't usually cover damage that was only cosmetic, or any damage that wasn't caused by something the warranty covers (for example, it wouldn't cover some of the types of damage that a buildings insurance policy would cover, such as damage caused by a storm, accidental damage and so on).

3. It is C&G's responsibility to validate the claim as the underwriter. That is not something this Service can do. However, once a claim decision has been made, we can consider whether it has been made in accordance with the terms and conditions of the policy, and whether it is fair in the circumstances.

4. Also, to decide whether a respondent firm has made a fair offer to settle a claim that it has accepted, the details of the offer need to be established, which may include compiling a scope of works, obtaining quotations on the works, carrying out further investigations to establish the cause or extent of the damage that the warranty ought reasonably to cover. And while I understand Mr H and Mrs G's preference for C&G to instruct suitable contractors to carry out repair works, that is only one of the ways that C&G could elect to settle the claim. It is up to the insurer to put forward its proposals to settle a claim and explain why it considers a full indemnity would be provided by its proposals. If Mr H and Mrs G were unhappy with any proposals put forward by C&G, they would be free to raise a further complaint about that with this Service.

5. As an independent alternative resolution scheme, the Financial Ombudsman Service is impartial and doesn't favour one party to the dispute over the other. So, my conclusions also need to be fair to C&G, and it wouldn't be fair to require it to accept a that it hadn't properly investigated and quantified.

I have referred to C&G's ICOBS obligations to promptly consider a claim, and I have explained that Mr H and Mrs G can make a further complaint about the handling of the claim, should they need to do so. However, I am unable to provide any assurances as to what may or may not occur in the future. I understand that it is frustrating for Mr H and Mrs G to have to go through the complaints process again, but as the Financial Ombudsman Service was set up to resolve complaints that cannot first be resolved by the disputing parties, I cannot become involved in considering a complaint, until the respondent firm has first had an opportunity to put things right with their customer.

To encourage a prompt decision being made on the claim, I have included in my direction, that in reconsidering the claim, C&G should not rely on the exclusions that I have already given a view on. That is because I have already considered those exclusions in this decision, on the basis of the available evidence, and I have concluded that they cannot fairly be applied to the claim. This includes C&G's arguments about the retained parts not being covered by the warranty. I also don't think it is reasonable for C&G to seek to deny liability for the claim on the basis that the building hasn't been properly maintained as demonstrated by the evidence of debris collecting in the gutter.

Mr H and Mrs G's other responses to the provisional decision.

Mr H and Mrs G have explained that they are now in financial difficulty because of the claim not progressing and may face bankruptcy if their home insurer only offers them a cash settlement for the internal damage to their home (which it is in the process of considering). They have said there are some alternative accommodation costs that their home insurer has not covered, they have incurred costs in relation to obtaining survey reports and they are in the process of incurring significant legal costs. Mr H and Mrs G have also made some additional comments in response to the provisional decision. I have addressed all of these points below.

1. Reimbursement of cost of surveyor reports

Mr H and Mrs G have asked for the surveyor reports they've obtained, to be reimbursed by C&G. They have advised that the cost of the two surveys they instructed to aid with evidencing their claim was £2,300. They have also provided an email from a company who I will refer to as 'A', who said, when acting on behalf of C&G in relation to the claim, that if the claim is considered valid by C&G, then the costs of the survey will be considered by the insurer.

That advice is in line with this Service's approach to the reimbursement of the costs of reports obtained by complainants, by insurers, following the acceptance of a valid claim. So, in this case, should C&G accept the claim, then the settlement of the claim should include reimbursement of the cost of any of the reports that we would expect C&G to rely on in accepting the claim.

2. Reimbursement of legal costs

Following C&G's declinature of the claim, Mr H and Mrs G instructed solicitors to issue legal proceedings to gain access to the roof but have to date only received a singular dismissive response leaving them with no alternative but to have their solicitor commence legal proceedings to gain access.

Mr H and Mrs G have also advised that they have paid legal fees of £5,300 to date, and their solicitor has estimated that the costs for the full proceedings could reach £40,000. They have explained that they are unable to fund those proceedings and will likely face bankruptcy before the proceedings conclude, which is an incredibly difficult situation for them to live with. Mr H and Mrs G believe the legal fees have been incurred directly because of C&G declining their claim as they wouldn't have had to pursue legal action if their claim had been properly investigated or accepted. They have highlighted a term, on page 24 of the warranty which says that C&G will pay such Architects, Surveyor's, Legal, Consulting Engineers and other fees as are necessarily and reasonably incurred by the insured.

Mr H and Mrs G believe that if C&G had properly investigated the claim it would have exercised the right of access to the building to undertake repairs, that is included on page 27 of the warranty terms, and they would have been able to avoid the costs and inconvenience incurred by trying to gain access themselves. I accept it is possible that Mr H and Mrs G may have avoided the need to struggle with the freeholder over gaining access to the roof and other affected parts of the building, had C&G properly investigated the claim and sought to visually inspect the damaged parts of the building claimed for. However, if I were to award the legal costs incurred by Mr H and Mrs G at this time, I would be placing responsibility for the freeholder's obstruction to access, on C&G, which I don't currently consider would be fair in the circumstances.

If C&G does accept the claim, then we would expect it to consider the legal costs Mr H and Mrs G have incurred in relation to the claim, when making any offer to settle the claim. However, I am not able to award those costs in this final decision. This is because the claim has not yet been accepted, and if for any reason the claim isn't validated, and that is deemed to be a fair outcome, then the legal costs wouldn't be payable by C&G.

The DISP rules provide that costs awards can be made against the respondent to the complaint (DISP 3.7.1R). And a costs award by an ombudsman may cover some or all of the costs which were reasonably incurred by the complainant in respect of the complaint (DISP 3.7.9R).

However, it follows that the power to award costs is limited to the costs associated with the complaint that is brought to this Service and does not extend to costs that a complainant might incur in taking his claim against the respondent to court. So, other than indicating that we could possibly consider any decision C&G might make regarding the exclusion of any claim related legal costs from any settlement of the claim, I am not able to provide any further assurances to Mr H and Mrs G regarding the legal costs at this time.

Mr H and Mrs G have also said that if access rights are an issue, to facilitate a prompt resolution, they would consent for C&G to instruct their legal representatives and continue proceedings they have started, as envisaged on page 6 of the warranty terms which gives C&G the right to '*Take over and conduct in your name any claim or legal proceedings at any time and negotiate any claim on your behalf*'.

3. Other alternative accommodation costs

Mr H and Mrs G said that there are some alternative accommodation costs that their home insurer is unable or unwilling to cover. Since August 2024, they have been paying their Council's 200% long-term empty council tax, including £1,800 in backdated fees and an ongoing monthly premium of £312. Mr H and Mrs G would like C&G to cover these costs, together with ongoing alternative accommodation costs. I would expect C&G to consider covering these costs if it accepts the claim.

4. Application of excess to the claim

Mr H and Mrs G have said that the provisional decision makes a number of references to '*their proportion*' in relation to the costs of works on the retained parts. They've highlighted the term, on page 13 of the warranty terms which says that: '*The excess shall apply to each and every separately identifiable cause of loss or damage for which we make payment*'. They have asked, as there is only a single identifiable cause of loss or damage (i.e. water ingress), and the warranty terms contain no reference to the apportionment of costs, they request that a single policy excess is considered sufficient for the claim.

I understand Mr H and Mrs G's concerns about the excesses that may be applied to any claim settlement and what '*their proportion*' of a claim settlement might be.

If C&G accepts the claim, we would expect it to consider how may excesses are payable in relation to the claim for '*major damage*' to the retained parts and the claim for '*major damage*' to Mr H and Mrs G's flat, applying the relevant terms and conditions of the warranty. If Mr H and Mrs G are unhappy with the excesses that are applied by C&G, then they can raise a new complaint about that. At the current time, I am not able to give any more specific answer to their concerns about the possible application of excesses to the claim, as that is currently unknown.

I have next clarified my references to their proportion of the costs of the works to the retained parts. When a claim is made on a structural warranty for damage to the retained parts and/or common parts, the insured interest that is covered by the warranty is each leaseholder's proportion of responsibility for the retained and/or common parts. This is usually set out in their lease. In Mr H and Mrs G's case, their proportion is set out in the definition section of their lease as follows: '***Tenant's Proportion****: 12.5 % or such other percentage as the Landlord may notify the Tenant from time to time*'. In the absence of any evidence to show the Landlord has notified a different percentage to Mr H and Mrs G, then I think it's reasonable to conclude that their proportion of any cash settlement amount offered in relation to the claim relating to the retained parts would be 12.5%.

There are a number of ways a retained and/or common parts claim can be settled by an insurer. It can either take the necessary steps required to carry out the repair works, or if it is accepted that a cash settlement is a fair way to settle the claim, then the insurer can pay each of the leaseholders their proportion of the cash settlement. If the insurer doesn't elect to do so, then each leaseholder may raise a complaint with this Service about their proportion of the cash settlement.

Mr H and Mrs G would of course be entitled to receive 100% of the cost to settle the claim for damage to their flat.

5. Corrections to the provisional decision

Mr H and Mrs G dispute that the loss adjuster attended the property in 2023, before providing his report to C&G. They've also clarified that their conveyancing solicitor wasn't provided with the documents that C&G eventually sent in October 2024. I have noted these corrections, however, they do not affect the conclusions I've arrived at in this final decision.

<u>Compensation for distress and inconvenience caused to Mr H and Mrs G and alternative accommodation.</u>

Mr H and Mrs G have said they are grateful for the award of £2,500 compensation for the dispute and inconvenience they have suffered. They have also explained that the impact on their mental health and Mrs G's physical health is significant and ongoing.

With regard to their housing situation, Mr H and Mrs G have explained that they have been in alternative accommodation since the initial flooding, first, in a hotel, and from January 2024 in a single bed rented flat. They have clarified that their home insurer has covered the majority of the costs associated with their alternative accommodation, and when they exceeded their limit in late 2024, their insurer allowed an additional extension to the end of June this year, to prevent Mrs G's medical treatment from being interrupted. However, that is the final extension their home insurer is willing to give so, from the end of June 2025, they will be without a home. Mr H and Mrs G are also living without their belongings which are in storage or with family. Some of their storage costs have been covered by their home insurer.

Mr H and Mrs G have also explained that the damage to their property continues to worsen as it floods intermittently in heavy rain, following considerable ingress of water into the building. It remains uninhabitable due to the ongoing water ingress and mould growth. The developer refuses to accept there is a problem with the property and declines to communicate with Mr H and Mrs G or their solicitor. No temporary repairs have been carried out to the roof as access to the roof has not been agreed by the freeholder / developer. Inspections to date have only been able to assess what is visible from their flat, or by drone. It is therefore very likely that other contributing issues may become apparent once full access to the roof is obtained.

C&G hasn't made any comment on the provisional findings regarding the award of compensation to Mr H and Mrs G for the stress, inconvenience and upset they've suffered caused by the way it has handled their claim.

The circumstances Mr H and Mrs G are having to deal with, because of the damage to their property not being addressed is significant, which is why I provisionally intended to award them £2,500 in compensation. Having considered this further, I remain of the view that C&G should pay Mr H and Mrs G for the stress, upset, inconvenience and other impact described, that they have been caused by its handling of their claim.

However, in addition, I do consider their housing situation to be concerning, particularly in light of Mrs G's health issues and her need to remain in the current location to access the ongoing medical treatment that she needs. I remain of the view that C&G's unfair handling of the claim has led to significant delays in Mr H and Mrs G being able to make their home habitable, which in turn has had and is having a substantial impact on their health and wellbeing. With that in mind, I am going to require C&G to take some additional steps here, to treat Mr H and Mrs G fairly, and to provide them with some degree of certainty in relation to their alternative accommodation.

While I am not currently able to require C&G to reconsider the claim and give its decision on the claim (together with its proposal to settle the claim, if accepted) within a specified time, in view of the housing situation Mr H and Mrs G now face, I think C&G needs to do more for them while it considers the claim.

So, if a claim decision (including proposals to settle the claim if appropriate) hasn't been made and communicated to Mr H and Mrs G by the end of June 2025, when their alternative accommodation will cease to be paid for by their home insurer, C&G needs to take over paying their alternative accommodation costs until the claim decision is communicated to Mr H and Mrs G, and thereafter in accordance with the warranty terms (in particular under the heading: '*2. Alternative accommodation costs*', on page 24 of the warranty terms). Further, if Mr H and Mrs G complain about C&G's claim decision, I would expect C&G to treat them fairly when considering covering their alternative accommodation for a further period.

This has been a complex complaint to consider because arguments have been made by both sides about a claim that has not been properly considered. For the reasons given, I conclude that, on balance, Mr H and Mrs G have shown that damage has been caused to their flat and the retained parts of the building by '*major damage*'. C&G therefore needs to promptly consider, and not unreasonably reject the claim, in accordance with its obligations in ICOBS 8.1. As I explained at the end of the provisional decision, should Mr H and Mrs G be unhappy with C&G's decision on the claim, or, any proposal C&G might make to settle the claim, then they are free to make a further complaint about that to C&G and if they remain unhappy with the response, they can refer the complaint to this Service.

C&G to reconsider the claim for damage to retained parts and to Mr H and Mrs G's flat

As I explained in the provisional decision, C&G has unfairly declined Mr H and Mrs G's claim for damage to the retained parts of the building, and to their flat.

I remain of the view that, to put things right, C&G need to promptly reconsider the claim on the following basis:

- The retained parts are covered by the warranty; and

- The existing works exclusion cannot be fairly applied to the claim about the roof and defect in the waterproof envelope (comprised of the roof, guttering and pipework).

In reconsidering the claim, C&G also needs to take account of the other considerations I detailed in the section with the same title, in the provisional decision.

In view of Mr H and Mrs G's concerns about the ongoing damage being caused to their flat, and C&G's lack of engagement with the claim to date, I would expect any decision to accept the claim, to also include details of C&G's proposals to settle the claim when it is communicated to Mr H and Mrs G.

With regard to C&G's reconsideration of the claim, and in view of the housing situation Mr H and Mrs G now face, having been unable to occupy their home for more than 18 months, I think C&G needs to do more for Mr H and Mrs G while it considers the claim. I have set out in some length the very real impact the delays have had, and further delays will likely have on their housing situation.

As I have explained in the previous section of this decision, I cannot require C&G to reconsider the claim within a specific period of time, as a number of currently unknown factors may impact on how quickly that can be done. However, if a claim decision (including proposals to settle the claim if appropriate) hasn't been made and communicated to Mr H and Mrs G by the end of June 2025, when their alternative accommodation will cease to be paid by their home insurer, C&G needs to do the following:

- Continue paying Mr H and Mrs G's alternative accommodation costs until such time as its claim decision is communicated to them, and thereafter in accordance with the warranty terms and conditions, if applicable; and

- Should Mr H and Mrs G complain about C&G's claim decision, I would expect C&G to treat them fairly when considering covering their alternative accommodation for a further period.

My final decision

For the reasons I have given in the provisional decision and this final decision, I uphold this

complaint and require Casualty & General Insurance Company (Europe) Ltd to:

- Promptly reconsider the claim without relying on the exclusions I have considered above;

- Pay Mr H and Mrs G's ongoing alternative accommodation costs, if the claim decision has not been made and communicated to them by 30 June 2025, up to the time that the claim decision is made and communicated to them; and

- Pay Mr H and Mrs G £2,500 compensation for the distress and inconvenience they have been caused by its handling of the claim.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs G and Mr H to accept or reject my decision before 18 April 2025.

Carolyn Harwood
Ombudsman