DRN-5400200

The complaint

Mr and Mrs G have complained about their building warranty provider, Society of Lloyd's. They believe it handled their claim poorly and unfairly declined it.

What happened

Mr and Mrs G bought a property in 2020. It was sold and marketed as a new-build property – but as a building it had existed since early 2000, just used for a purpose other than residential dwelling.

The property benefitted from a ten-year defects and damage warranty. The warranty, in the first two years, offers certain cover for defects. Within the first two years after completion Mr and Mrs G noticed issues with their property, and they instructed a company to produce a snagging list. They approached the developer for resolution and SOL for its assistance under the warranty.

The warranty, in that first two-years, placed liability on the developer for resolving matters. Liability would only transfer to SOL if the developer stopped cooperating or became insolvent. In spring 2023, whilst Mr and Mrs G were trying to get the developer to take action, it advised them it had gone into liquidation. On 31 March 2023, Mr and Mrs G turned to SOL for assistance under the warranty.

SOL provided an answer about its liability under the warranty in May and then June 2023. In short it didn't accept there were any defects, so said it could not assist. Subsequently, having raised a number of issues with SOL, such as about checks undertaken whilst the property was being built, and not being happy with SOL's reply, Mr and Mrs G brought their complaint to the Financial Ombudsman Service.

In a separate decision I considered what parts of Mr and Mrs G's complaint I could and could not consider. I explained that I would only be able to look at how SOL had handled matters after Mr and Mrs G had turned to it for assistance on 31 March 2023, and whether it had fairly and reasonably decided there were no defects, meaning it thought it had no lability under the warranty for resolving the issues claimed for.

I allowed Mr and Mrs G more time to present any other evidence they wished to. And I asked SOL to provide detail regarding its determination that the issues claimed for did not amount to defects as defined by the policy. Further information was received from both parties and I assessed it. I issued a provisional decision to explain to both parties my views on the merits of Mr and Mrs G's complaint. My provisional findings were:

"Are there defects?

There is a list of issues that have been identified with Mr and Mrs G's property and which are subject of the 'defect' dispute. Mr and Mrs G think the issues are reasonably covered by the policy. However, SOL, with one exception, says they aren't 'defects' as defined in the policy.

The one exception is: "Large gap in party wall firebreak". SOL does not dispute that this is a defect. So I won't mention this one item any further.

I've set out the remaining items below. I've numbered them for ease of reference.
1) *Loose mortar bedded ridge tiles.*
2) *Inappropriate mortar joint between door canopy and wall.*
3) *Damaged roof truss.*
4) *Incomplete longitudinal bracing to roof trusses.*
5) *Incorrectly fitted gable wall strap.*
6) *Insufficient cavity wall insulation.*
7) *Incomplete fire barrier.*
8) *Improperly fixed kitchen worktops.*
9) *Insufficient security measures on front door.*
10) *Stair floorboards dipping under load.*

The policy says a defect is:
"A fault, due to a breach of either The Q technical Requirements or the Building Regulations".

So a problem with a property, for example if something is not performing as was expected, or maybe if something is fitted in a way that doesn't look quite right, does not necessarily equate to a 'defect'. Even if a professional, such as a surveyor, thinks something should have been done differently – only if the way it was done breached either the Q technical requirements (QTR) or the building regulations, would the problem, under the warranty, be classed as a defect.

A surveyor, with knowledge of the QTR and building regulations would be able to offer a professional view in that respect. I can see that, here, SOL did seek that kind of professional advice. His comments carry the weight of an expert – but I have also reviewed what he has said against the QTR and building regulations in order so that I am satisfied his view is fair and reasonable. In the main, I think his view, that most of the items are not defects, is fair and reasonable. So, for items 1) and 3) to 9), I won't be requiring SOL to take any action. But I don't agree with the surveyor's view, and therefore SOL's position, in respect of items 2) and 10).

<u>Items 1) and 3) to 9)</u>

1), the surveyor says this is simply an issue of wear. I think that is fair.

3), 4) and 5), the surveyor has explained that the QTR don't deal specifically with these issues. I can confirm that is correct. Rather the QTR say the building regulations must be complied with. The building regulations set out certain requirements for structural elements like this. However, converted buildings are covered by a more restrictive section of the building regulations. I'm satisfied that the building regulations, as apply to converted properties, do not set out any requirements for these items.

6) and 7), as above regarding the QTR, meaning it is only the building regulations that would apply to these items. The surveyor has explained that these items weren't changed during the renovation and that building control signed off these items as part of the build. SOL hasn't provided the sign-off details. However, having also reviewed the building regulations I can't see that cavity wall insulation (6) is covered. There are requirements relating to fire spread (7), even for converted properties. But, in this respect, I've noted the surveyor's expert assessment regarding item 7). He says that no fire break is required as there is no cavity within which fire can spread. The building regulations are complex. In relation to their technical application regarding what they might require in respect of fire protection, I'm satisfied it's fair to rely on the surveyor's expert opinion.

8), the surveyor says this is a snagging issue. I can see that it is not an issue dealt with by the QTR. It is also what I would think of as a finishing element of the home, as opposed to a part of a property's structure. So I'm satisfied it isn't something covered by the building regulations.

9), the surveyor points out that the building regulations that apply for converted properties don't reference a need for front door security features. He says the QTR do offer some direction regarding front doors – but not in respect of security features like these. I'm satisfied by what the surveyor has said.

Items 2) and 10)

2), the surveyor said that inappropriate mortar is not covered by the QTR. I'm not in agreement with that. The QTR say that "Methods of…jointing…of elements should be adequate….". I've seen no argument from SOL that the mortar jointing at this juncture is appropriate, or adequate. I bear in mind that this is a sloped canopy roof adjoining the brick facade of the home. In my experience a canopy like this would usually feature lead flashing or similar to provide adequate water run-off away from the brickwork. I'm satisfied, from everything I've seen, this reasonably amounts to a breach of the QTR and, therefore, must fairly be viewed as a defect.

10), the surveyor notes this is covered by the QTR – but argues it has not been shown that they've been breached. The requirements say floors should provide adequate resistance to impact. The surveyor says it has not been shown the floor cannot bear the loading which is applied to it by foot traffic. However, I think that where the floor is flexing, that strongly indicates the floor cannot take the load. I bear in mind it is the end of a floorboard which is said to be dipping because it's not been placed on a joist. I think it's fair to say a floorboard flexing on impact of mere footfall, isn't adequately resisting the impact placed upon it.

So, regarding 2) and 10), I am going to require SOL to view them as defects and consider a claim for them. There are other terms and conditions of the warranty for SOL to consider, so I can't reasonably require it to just accept the claim and settle it. But I think it was wrong when it declined the claim for these items on the basis they were not defects.

Claim handling

It was 31 March 2023 when Mr and Mrs G advised SOL of the developer's insolvency. It was only following them chasing a reply that they received any contact from SOL, that was three weeks later. It was 11 May 2023 once SOL had reviewed the claim and set out its initial answer to Mr and Mrs G – that the listed items were not defects and so not covered by it under the warranty. I've explained above why I think SOL's answer on the claim, in the main, was fair and reasonable. And, apart from the short delay in the beginning on April, I think SOL handled matters reasonably between 31 March 2023 and 11 May 2023.

Once the claim decline was put forward by SOL, the parties started to debate the decision. I think the correspondence was handled reasonably and answered in a reasonably timely manner. This culminated with SOL's agent issuing a final response letter in November and Mr and Mrs G forwarding their complaint to this Service. I'm not persuaded SOL dealt with Mr and Mr G unfairly or unreasonably at this time. Clearly the parties disagreed with one another, but that type of disagreement is part and a parcel of a contract of insurance, which is reasonably dealt with by the complaint process.

Clearly Mr and Mrs G are disappointed by the position they've been left in. They brought a new home and have found issues with it within the first two years. They turned to their warranty and their developer for resolution in that respect, only to find the developer went out of business. They then found that SOL wasn't minded to accept liability as the insurer under the warranty. Meaning they were left with things that needed fixing and no recourse for achieving that. I accept that they suffered distress and inconvenience as a result. But I'm satisfied that the majority of that upset was not caused by any failure of SOL.

In my view SOL's failures were limited to a slight delay in April 2023 and it unfairly discounting items 2) and 10) as defects. I'm satisfied that £150 compensation is due for the upset caused by these relatively limited failures. I accept that will seem insignificant to Mr and Mrs G, that they will feel that does not reflect what they've been through. But I can only add again that this compensation is not meant to reflect that, and cannot be made in respect of all that frustration and disrupted time. Having considered everything, I am satisfied that £150 is fair and reasoble in the relevant circumstances here."

Mr and Mrs G were unhappy with my findings. SOL was dissatisfied with the parts of the complaint I'd upheld.

Mr and Mrs G said they want further clarification on what can and cannot be ruled upon by this Service. They'd like to know why certain things can't be considered. With transparency, they said, being crucial to help them understand the full scope of their rights and potential further avenues of resolution. They listed the following points they'd like comment on:

- SOL's failure in due diligence.
- The building certificate should never have been issued.
- They've not received data, from a third-party, under a subject access request, which would raise further concerns about the certification process.
- The provisional decision focusses on structural defects – but section 2 of the warranty covers more than that. Seemingly their dispute about the validity of section 2 has been overlooked in favour of a focus solely on defects and the QTR.
- They'd like to know why SOL did not support them, its warrantyholders, when they told it of the developer's insolvency.
- SOL failed to adhere to its own wording regarding insolvency, why is that critical aspect disregarded (they'd explained previously why they felt defects were accepted before the developer became insolvent, so once there was insolvency, SOL should have acted).

Mr and Mrs G also raised the following points (which I view as being related to the provisional decision I made, copied above, and which the parties were asked for comment on):

- There's a clear conflict of interest because SOL was the developer's insurer too.
- They'd like to know how they were granted a "new home" certificate and a Help to Buy Equity Loan, if it is a conversion.
- The warranty does not say there will be exclusions or limitations in regard to converted properties.
- They want a clear explanation of how the classification that their home was a conversion was determined.

- They note I said “certain cover for defects” and they’d like that phrase clarifying more specifically.
- They’d like to know more about SOL’s surveyor and why his view outweighs that given during the review completed by the ADR service for the new homes sector.
- How can loose mortar, 1), after only two years, be reasonably classed as wear and tear, it could equally be an inherent construction defect.
- Rectifying the kitchen worktops, 8), should be covered under the warranty.

SOL said it felt its surveyor was best placed, rather than the Ombudsman, to make a correct decision about what constituted a defect. It said it’s seen no evidence which contradicts its surveyor’s opinion. There’s no reason why it should not have relied on the surveyor’s expert opinion to fully decline the claim. In short, SOL said, the onus is on the warrantyholder to prove they have a defect covered by the warranty – and they have not done that. In light of all of that, it doesn’t think compensation is warranted.

Specifically about 2), SOL said it can see nothing in the QTR that covers external canopies. SOL said even if the quote I included applies – part of that is missing. The part which is missing, requires an expert assessment to determine if there was a breach. And, says SOL, there is no evidence that anything missing from the construction, such as lead flashing, is a breach of the building regulations.

Turning to 10), SOL said there is a difference between a floorboard flexing and it being unable to take the load of traffic. Flexing might be annoying but if the floor functions for its designed purpose, then that is not a defect.

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.

That said, we are an informal service and, in line with that, I won’t reference or cover off every single point made or piece of evidence presented. My focus will be on the main issues at the heart of the complaint and central to my reasoning. I can assure both parties though that I have read and understood everything said and provided.

Mr and Mrs G will notice I’ve summarised their reply above, spitting it into two sets of bullet points. The first set of bullets I can add no further comment on. They are all related to parts of their complaint I’ve already said I can’t consider. I issued a provision decision in that respect initially and then, having considered their response, a concluding decision. The matter then moved on to my consideration of the parts of their complaint I am considering. It’s not appropriate for me to revisit that earlier, concluded part of our complaint process.

It isn’t uncommon for an insurer to cover the interests of more than one party. That won’t necessarily, of itself, cause a conflict of interest. When considering a complaint, if I felt an insurer had acted unfairly for some reason, perhaps because of a conflict, then I could make a finding in that respect. When considering what SOL did here – after 31 March 2023 – I’ve not seen any issue or failure by it caused by a conflict of interest.

I appreciate that Mr and Mrs G think the Equity Loan wouldn’t have been given, and the “new home” certificate shouldn’t have been issued, if they had not bought a new property. But I don’t think there is any debate that they bought a “new home” and had cover for that under the warranty with SOL.

The warranty is called “Structural Defects Insurance – Residential Policy”. Its opening detail explains that the policy “provides you with protection against structural defects arising from the design or construction of a new home”. Mr and Mrs G did buy a “new home”. But the building itself wasn’t newly built. It existed, being used for a non-residential purpose, before the developer changed its use and Mr and Mrs G bought it as their “new home”. The warranty explains the cover for new homes, including what cover is given regarding defects, with a definition for defects also given.

As I said provisionally the definition for defects ties to the QTR and the building regulations. With the building regulations themselves containing different requirements for properties which are newly built, from the ground up so to speak, to those which apply when the building worked on already existed but was being converted for a different use. In the circumstances, I don’t think SOL did anything wrong by relying on the building regulations which relate to converted properties when determining if there was a defect covered by the warranty. I also don’t think SOL did anything wrong by not including the building regulations, which set out the differences for different property build types, within its policy wording. It wouldn’t be reasonable, in my view, to expect SOL to include such a wealth of technical detail within its policy wording. Not least because building regulations change and are often updated. But also because such detail would make the policy unwieldy.

I note Mr and Mrs G would like me to be more specific about the policy rather than saying “certain cover for defects”. That they want specific detail to be given so they can better understand “their coverage rights”. That phrase is taken from my summary background detail. It was used as an introduction to the issues at the heart of the complaint. It is not for me to set out the policy in detail listing everything it covers. And nor is it for me to set out detail which might aid a better understanding of the cover generally afforded by the warranty as a whole.

The ADR scheme was involved prior to 31 March 2023. They were involved because this was a “new home”. They considered what the developer was meant to do because this was a “new home”, in respect of snagging issues identified and the requirements of the Consumer Code for New Homes. They weren’t considering SOL’s liability under the warranty, along with the warranty’s particular and specific terms. The warranty does not offer cover for “snagging” only for defects. With the warranty, as I mentioned provisionally, containing a specific meaning for the word “defect”. So what was found by the ADR scheme, including any of its experts, can’t fairly inform on the reasonableness of what SOL and its expert surveyor found in relation to the warranty.

SOL says its expert is best placed to make decisions about the warranty – even better placed than me. I’d remind SOL though that whilst its expert surveyor can offer comment on technical matters like the building regulations and his opinion as to how that relates to the warranty, it is my job to assess whether those views are fair and reasonable.

I’d also remind SOL that a policyholder only has to show, on the face of it, that they have something which might be covered by the policy. That’s particularly important here because to decide whether or not a problem at a property most likely amounts to a defect covered by the warranty, could amount to a technically complex finding, where some consideration of SOL’s own requirements is required. I remain of the view that here, on the face of it, Mr and Mrs G appeared to have problems which might have amounted to defects under the warranty and it was then for SOL to show, if it wanted to, that there were no defects.

1) - Mr and Mrs G said this might not be wear and tear given their home was completed not long before the issue was found. I think they mean that mortar would be expected to last longer than two years. Mortar might last longer than two years – but it could also wear in that time and I’m mindful that Mr and Mrs G have been told the roof was existing, so not subject

of the works undertaken to convert the property. I haven't seen anything which makes me think SOL's surveyor's opinion in this respect is unreasonable. There isn't a counter opinion from Mr and Mrs G from a similarly qualified expert in this respect. I'm not persuaded to change my view on this point.

2) - SOL said the QTR doesn't cover external canopies like this. I accept that the QTR does not have a specific section on external canopies. But the QTR does, more broadly, look at how parts of the building are jointed together – with the external canopy here being jointed to the main house. So I think it would be a very unfair outcome if I said the QTR didn't apply because this bit about joining did not specifically refer to 'jointing of external canopies'.

I appreciate I did not quote the full QTR term provisionally. That is because SOL had argued that this issue, about the jointing of the canopy, was not covered by the QTR, whilst my quote showed that it reasonably is. The missing part says the joint has to be adequate "due account being taken of the location and anticipated life of the element". I explained provisionally, that, on the face of it, the mortar joint didn't seem adequate because many installations like this would usually include some kind of barrier to aid water run-off. SOL hasn't provided any expert view in reply which satisfies me a mortar joint alone was adequate "due account being taken of the location and anticipated life of the element". The definition for defect requires a breach in the QTR or the building regulations – given what I've found regarding the QTR, I don't need to consider what the building regulations say in this respect. I remain of the view that 2) is reasonably a defect under the warranty.

8) - Mr and Mrs G said the problem with the kitchen worktops is a significant defect which affects the usability and value of the property – so the cost of resolving this should be covered by the warranty. I'm sorry to disappoint Mr and Mrs G in this respect – but their warranty simply does not extend to that type of consideration. SOL, under the warranty, will cover the cost of rectifying "defects" – and I've explained what the warranty defines a defect as and why the kitchen worktops don't reasonably fit within that definition. My view on this point has not changed.

10) – SOL contended that the flexing floorboard is not a defect. SOL in response to a request by me earlier in this complaint process, referenced the QTR regarding resistance to impact – but argued it had not been shown the floor is unable to bear normal loads. I think 'adequate resistance to impact' and 'unable to bear the load' are two different things. The latter not being referenced in the QTR. SOL also said, and has said again in reply to my provisional findings, that if the floor fulfils its design purpose, there is no defect under the warranty. I've seen nothing, in the warranty that links a defect to a failure to fulfil a design purpose. Having considered this aspect again, nothing SOL has said makes me think it would be unfair and unreasonable for me to require it to accept 10) as a defect under the warranty. I remain of the view this is what it should do.

I note SOL disagrees with my compensation award. It said that was based on its view that my position on points 2) and 10) should be changed. I've considered what SOL said about 2) and 10), explained above, and my view on these points hasn't changed. I've also considered the points raised by Mr and Mrs G. And I haven't been minded to change my view based on what they've said. As such my view on fair and reasonable compensation hasn't changed either. I remain of the view that £150 compensation should be paid.

Putting things right

I require SOL to:

- Accept items 2) and 10) above as defects and consider a claim for them, in line with the remaining terms and conditions of the warranty.

- Pay Mr and Mrs G £150 compensation.

My final decision

I uphold this complaint in part. I require Society of Lloyd's to provide the redress set out above at "Putting things right".

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr G to accept or reject my decision before 15 April 2025.

Fiona Robinson
Ombudsman