

complaint

Mr B, Mr W, Mr C, Mrs W, Mrs B and Mr C complain that Amtrust Europe Limited (“Amtrust”) unfairly declined a claim made under a warranty.

To keep things simple, I’ll refer to the complainants collectively as “Mr B” throughout, unless specified. And any reference to Amtrust includes its agents or representatives.

background

The background of this claim is well known to all parties. So, I’ve summarised events.

- Mr B represents a number of properties that are across two separate buildings with courtyards – covered by an Amtrust building warranty that began in June 2011.
- The warranty includes a defect insurance period (“DIP”) which covers certain issues discovered within the first few years if the developer fails to resolve them and Amtrust intervenes. And a structural insurance period (SIP) which provides cover for certain issues **discovered** in the following years up until year ten.
- Mr B says there was an initial issue with the roof that occurred in one of the properties within the DIP period. The owner (Mr X) raised this with the developer who considered the problem and instructed the original glazing contractors to undertake remedial works. During this time another owner reported water running down the glass of an atrium. This was also raised with the glazing contractors who concluded the matter was condensation.
- Mr B says he can only assume Mr X never raised this with Amtrust as the developer had agreed to resolve the matter. He also said the policy was unclear that this was a requirement of the warranty.
- Mr B says no further problems occurred with the glazed roofing until 2017. Amtrust declined a claim for this - referring to a comment from the company secretary of the time (Mr Y) who had said the leaks occurring had “*previous problems*”. Mr B complained, saying Mr Y had clearly become confused with where the leaks occurred and was not involved in the detail of the matter.
- Mr B also said Amtrust had unfairly declined to consider unrelated damage to a separate roof as it had considered them as one common part. He said both atriums are still suffering problems related to their support structures – which he says shows the roofs were never fit for purpose. He adds the roof structures have been subjected to continuous excessive flexing which, given the elevated position of the properties must have had an effect on the glazing system. Mr B said it was possible the prior water leakages could be attributable to the recent discovery concerning the structural faults.
- Mr B also complained about Amtrust’s requirement for owners to make part-payments for other claims. This matter has since been resolved by Amtrust and is not the subject of this complaint.
- Amtrust considered the complaint and stood by its decision. It said there was no cover under the DIP as it had been notified too late, and the damage didn’t meet the required definitions for “major damage” under the SIP.
- So, Mr B brought his complaint to this service, asking Amtrust to carry out necessary roof repairs and refund the £6,000 in unsuccessful repairs already paid.

- Our investigator looked into things. She said Amtrust had failed to demonstrate that the cause of leaks addressed by the developer were the same as the issues reported during the SIP. So, she directed it to consider a claim under the SIP in line with the policy terms.
- Amtrust disagreed, saying it was for the policyholders to prove their claim, and that the evidence supported it was a continuing leak. Amtrust provided copies of claims forms from two of the property owners and a supporting statement. It said these clearly showed the repairs from within the DIP had failed and therefore the leaks resulted from the same issue. And that the policyholders had confirmed the ingress was apparent in the first two years following construction.
- Mr B responded, reiterating his concerns and stating that if Amtrust had correctly accepted the claim in 2017 as a “latent defect” further deterioration and damage would’ve been avoided. He also said that the condition precedent that Amtrust was relying on – to raise the matter with Amtrust within the DIP – was met as the developer had been informed and was responding to the defect.
- The investigator looked again, saying Mr B had proven the claim so it was now for Amtrust to investigate the matter. Amtrust still disagreed, so the complaint was passed to me for an ombudsman’s decision.

On 23 July 2021 I issued a provisional decision outlining why I wasn’t intending to uphold the complaint. I’ve included an extract of this below.

“Was there cover under the DIP?”

Under “Defects Insurance” the policy says:

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

There’s no dispute that the developer carried out works during the DIP period. And in line with the policy, any works related to any defect would need to be brought to the attention of Amtrust within six months. In this case, it’s evident this wasn’t raised with Amtrust so I’m satisfied any of the issues that occurred or were discovered within this time period would be fairly declined by Amtrust in line with the policy terms.

Was there cover under the SIP?

Under “Structural Insurance” the policy says:

*“The **Underwriter** will indemnify the **Policyholder** against all claims discovered and notified to the **Underwriter** during the **Structural Insurance Period** in respect of:*

*i) the cost of complete or partial rebuilding or rectifying work to the **Housing Unit** which has been affected by **Major Damage** provided always that the liability of the **Underwriter** does not exceed the reasonable cost of rebuilding each **Housing Unit** to its original specification;*

*ii) the cost of repairing or making good any defects in the chimneys and flues of each **Housing Unit** which was newly constructed by the **Developer** causing an imminent danger to the health and safety of occupants.”*

Unlike the DIP period which covers defects more widely, the level of cover in this claim under SIP (as it doesn't concern chimneys or flues) is limited to "Major Damage". Major damage is defined within the policy as:

"I) Destruction of or physical damage to any portion of the **Housing Unit** for which a **Certificate of Insurance** has been issued by the **Underwriter**;

II) a condition requiring immediate remedial action to prevent actual destruction of or physical damage to any portion of the **Housing Unit** for which a **Certificate of Insurance** has been issued by the **Underwriter**.

In either case caused by a defect in the design, workmanship, materials or components of:

- the **Structure**; or

- the waterproofing elements of the **Waterproof Envelope**;

which is first discovered during the **Structural Insurance Period**."

So, for the purposes of this claim and complaint, the key considerations are whether major damage has taken place, and whether this was first discovered during the SIP (as discovery during the DIP would mean the claim won't be covered).

When did the damage Mr B is now claiming for take place?

I'll begin by looking at when the damage took place. Amtrust has provided claim forms from January 2018 from Mr W and Mr B. This includes a timeline of events from the policyholders. Within this it refers to the roof glazing, saying:

"...This is not a new problem and indeed the windows have previously been attended to and some repairs have been made. The initial repairs were within two years of the original build."

This suggests to me Mr W and Mr B agree the root cause of the problems originated from when the properties were purchased. They also say:

"The present situation is that [developer] appear to be in dispute with [glazing contractors] over their responsibilities. We are therefore awaiting a reply from [developer]."

This also suggests to me that Mr B has explored, or at least considered, the responsibilities the developer and the glazing contractor may have in relation to its previous repairs. But this isn't within the scope of this service to determine.

In Mr B's submissions he's been clear that Mr X had previous issues with water ingress to the roof of the building. He's said its now apparent there are flaws with the roof support structures that indicates the roofs were never fit for purpose. This suggests to me that the problem, by its nature, always existed. And in light of the previous works carried out suggests the problem was discovered within the DIP period. While the developer and contractors carried out repairs, clearly this didn't resolve whatever issues were present. So, I think Amtrust's decision to determine the damage in question was during the DIP period -where it wasn't notified - was a fair and reasonable one.

For this reason, I'm satisfied the claim has been fairly declined, and I see no reason to go on to consider whether major damage has taken place.

I've also noted Mr B's comments about a separate condition precedent within the warranty. But this hasn't changed my mind. I say this as the term he's mentioned doesn't change any of the requirements I've outlined above within the policy."

I gave both parties until 23 August 2021 to respond and this time has now passed. Amtrust hasn't provided anything further. Mr B disagreed and provide a detailed response. I've summarised this below.

- The date of discovery of condensation issue was not certain. But the issues identified later within the second roof were distinct and separate from the condensation issues identified in the first. He reiterated Mr Y's comments being incorrect. And said the history of water leakage at the property had caused confusion within statements made. But he says these comments in question do not show that leaks have existed since build.
- Mr B reiterated he believes the terms around contacting the underwriter within six months were contradictory within the policy. And quotes a section of the policy that refers to contacting the Scheme Administrator in writing within six months of the DIP if the developer does not respond. As the developer was contacted and responded, he says this timeframe should not exist in this case.
- Mr B said the two roofs are not fit for purpose, but may suffer from latent defects which could not reasonably have been determined when new through inspection.
- Amtrust has been inconsistent with its application of its policy – referring to its actions in a separate claim.

my findings

I've reconsidered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

Having done so, I'm not upholding this complaint. I'll explain why.

- I've carefully considered all of the points Mr B has made about the date of discovery of damage, and the comments from Mr Y. And while I understand his strong feeling on this matter, I'm not persuaded these comments outweigh the available evidence I've outlined previously within my provisional decision. So these haven't changed my mind.
- Mr B has said the terms of the policy are contradictory. While I can see the distinction he has made, the condition precedent quoted says if the requirement to contact the Scheme Administrator is not met the... *"Underwriter will have no liability if all matters are not notified within these time frames."*

This doesn't suggest to me that there is any reason to ignore the terms set out within the Defects Insurance section of the policy (that I've quoted above), nor that the section he's now quoted should be read in isolation. So as I've outlined previously, any works related to any defect would need to be brought to the attention of Amtrust within six months. In this case, it's evident this wasn't raised with Amtrust so I'm satisfied any of the issues that occurred or were discovered within this time period were fairly declined by Amtrust.

- I've considered Mr B's comments regarding the possibility of identifying latent defects through inspection. But this isn't supported by any technical or expert opinion. So it doesn't change my mind.
- Mr B has referred to Amtrust's handling of other claims. But it is only this claim that I've considered when looking at this complaint.

my final decision

For the above reasons, I'm not upholding this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr B to accept or reject my decision before 16 October 2021.

Jack Baldry
ombudsman