

The complaint

Mr R and Mrs C are unhappy a claim made under their Amtrust Europe Limited (Amtrust) building warranty has been declined.

What happened

Mr R and Mrs C purchased two flats in a converted building which came with a ten-year building warranty underwritten by Amtrust. There are eight flats in the converted building.

Damage has been caused to the cornice on the parapet on the outside of the building, which is deemed a retained area and not the sole responsibility of Mr R and Mrs C. Mr R and Mrs C pay a service charge as part of their lease agreement, and it appears that in exchange for paying the service charge, the landlord/freeholder is responsible for, amongst other things, the retained parts.

As the area in question isn't just the responsibility of Mr R and Mrs C, it is likely the damage and cost to repair will impact the other leaseholders and landlord. But Mr R and Mrs C logged their own individual claim and complaint with Amtrust. And Amtrust considered their claim and complaint individually and gave them their own complaint final response. So, under this case, I'm also only considering Mr R and Mrs C claim and complaint and Amtrust's decision to decline their claim.

Mr R and Mrs C made a claim to Amtrust for severe rotting of the wooden cornice externally, covering where the walls joined the roof of the building on the parapet.

Amtrust ultimately declined the claim. They said the rot was historic and had been happening over a considerable number of years, pre-dating the conversion of the building, and as it wasn't installed as part of the conversion, they said it isn't covered by the building warranty. Amtrust also said the area in question didn't form part of the structure, or waterproof envelope as defined in the policy, so they said there was no cover under the policy on this basis either.

Mr R and Mrs C didn't agree and approached this service.

Our investigator looked into things, but she didn't uphold the complaint. She first considered whether there had been a defect as defined in relation to the cornice. But she didn't think there was.

The investigator said even if there was a defect as defined - which she didn't think there was – it would also need to be part of the *structure* or *waterproof envelope* for a claim to be made. However, the investigator didn't think the cornice formed part of this either. So, she said Amtrust hadn't acted unreasonably by declining the claim.

Mr R and Mrs C didn't agree and asked for a final decision from an ombudsman.

What I've decided – and why

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

Having done so, and whilst I appreciate it'll come as a disappointment to Mr R and Mrs C, I'm not upholding their complaint.

Firstly, Mr R and Mrs C have asked for the view of this service more generally on this type of policy, the cover it provides, along with the builder carrying out construction, processes for signing off the property and the policy being issued. But to clarify, that is not the role of this service. We don't provide guidance on suitability of policies either individually or in comparison to others, or the cover available across the market, or what general processes are or should be undertaken in order for the property to be constructed or signed off. Instead, our role is to consider individual complaints. So here, I'm considering Amtrust's decision and reasons to decline Mr R and Mrs C's claim alongside the warranty policy terms and conditions, and what is fair and reasonable.

I'll also explain that I don't intend on commenting on every argument that has been presented by both parties. I don't mean this as a discourtesy, instead this reflects the informal nature of this service and my role within it. Instead, I'll focus on what I consider is key in reaching a decision which is fair and reasonable in all the circumstances. To expand on this point, our investigator considered whether there was a defect, which she didn't think there was. She then went on to say, even if there was, the claim still wouldn't be covered as she didn't think it fell within the policy cover of *major damage* in any event.

I don't intend to comment on both points as I don't need to in order to reach a final decision on whether the claim has been fairly declined by Amtrust. Instead, I'm going to focus on whether the claim falls within *major damage*, because regardless of whether there is a defect or not, if it's not *Major damage*, then the claim isn't covered even if it is considered a defect as defined. But I'd like to reassure both parties that I've considered all the information and arguments they've provided when reaching my final decision.

Mr R and Mrs C have made various arguments about why they consider the cornice has a defect, this includes how the policy terms are laid out and where the definitions are found. This also includes where words are included in bold, and where they aren't. They say these arguments support their position that there is a defect.

But regardless of the various arguments made about whether there is a defect, I don't think that's important in determining whether Amtrust should deal with the claim. I say this because I don't think the claim succeeds on the basis of the other requirements in the terms in any event. I'll explain why.

The claim was made in years three to ten of the policy so the cover that applies is section 3.3. The policy terms outline (I've included the relevant part):

"SECTION 3.3

STRUCTURAL INSURANCE

*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;"*

So, this outlines that for claims under section 3.3, there needs to be *Major Damage*.

Major Damage is defined as:

"MAJOR DAMAGE

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

which is first discovered during the Structural Insurance Period.

*For the purposes of this Policy the definition of **Major Damage** is deemed to include any physical loss, destruction or damage to the **Housing Unit** caused by contamination or pollution as a direct consequence of a defect in the design, workmanship, materials or components of the **Structure** of the **Housing Unit**."*

So, this outlines that there needs to be a defect in the design, workmanship, materials or components. And this needs to be either to the *structure* or waterproof elements of the *waterproof envelope*. Both parts are required i.e. point *i)* and *ii)* need to be caused by a defect in the design, workmanship, materials or components of either of the bullet points (as defined). Points *i)* and *ii)* aren't independent of the rest of the requirements outlined.

Structure is defined as:

“STRUCTURE

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

- *foundations*
- *load-bearing parts of ceilings, floors, staircases and associated guard rails, walls and roofs, together with load-bearing retaining walls necessary for stability;*
- *non-load bearing partition walls;*
- *chimneys and flues;*
- *roof covering;*
- *any external finishing surface (including rendering) necessary for the water tightness of the external envelope;*
- *floor decking and screeds, where these fail to support normal loads;*
- *wet applied plaster;*
- *double or triple glazed panes to external windows and doors;*
- *underground drainage that the Policyholder is responsible for maintaining.”*

However, I don't think the cornice falls within the listed items above. This is because it is an aesthetic feature to hide where the walls join the roof on the parapet, rather than being the roof or wall itself, it doesn't perform a function and is decorative. And the roof covering would be things like tiles, slates or waterproof membrane etc, which again the cornice isn't, it's decorative and doesn't have any other function.

There also isn't anything to show that it is necessary for the water tightness of the external envelope, as it is cosmetic to hide the join between the walls and the roof, rather than to prevent water ingress.

Therefore, I don't think the cornice falls under bullet point one of the requirements, the *Structure*, under *Major damage*, regardless of whether it has a defect (as defined) or not. So, the claim wouldn't succeed under this point.

Bullet point two also says a requirement is that there needs to be a defect in the design, workmanship, material or components of the waterproof elements of the *Waterproof Envelope*.

Waterproof envelope is defined as:

“WATERPOOF ENVELOPE

Waterproof Envelope shall mean the basement, ground floors, external walls, roofs skylights, windows and doors of a Housing Unit.”

I don't think the cornice is part of the roof as outlined above. Instead, it is a cosmetic/aesthetic feature fixed to the outer face of the wall to hide the join between the wall and the roof. And whilst the membrane, which is the weatherproofing, is lapped over the cornice/parapet for ease of application, based on the evidence provided, the cornice itself isn't necessary for the water tightness of the *waterproof envelope*.

Therefore, whilst I note Mr S and Mrs C's arguments, I'm satisfied there hasn't been *Major damage*, as defined by the policy. Therefore, I haven't gone on to consider whether there is a defect because that alone, in the absence of *Major damage*, isn't enough for a claim to succeed. With this in mind, I don't think Amtrust has acted unfairly by declining Mr R and Mrs C's claim.

My final decision

It's my final decision that I don't uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr R and Mrs C to accept or reject my decision before 7 September 2023.

Callum Milne
Ombudsman