DRN-4389524

The complaint

Mr J has complained about the way Amtrust Europe Limited ('Amtrust') has handled a claim he made under a Premier Guarantee New Home Warranty (the 'warranty') for damage to his apartment.

What happened

Mr J is an owner of an apartment in a building that is covered by a 10-year warranty which commenced on 8 November 2016.

The apartment became vacant on 31 March 2022, when Mr J's tenant of four years ceased to rent the property. Mr J said that it was while he was clearing some items in the bedroom cupboard that he became aware of a water stain on the floor and on the corner of the rear wall of the cupboard. On investing the leak, Mr J realised that there was a vertical crack along the length of one of the external façade panels from the floor to the ceiling.

Mr J notified his building insurer of the damage, but, on 16 February 2023, the claim was declined for two reasons. First, it was declined on the basis that the issue with the cladding would be considered a building defect which would be the responsibility of the developer. The second reason for declining the claim was that the internal water damage repair costs would not reach the £350 policy excess.

Following receipt of the claim decision, Mr J then notified Amtrust of his claim, under the warranty terms, for the cracked façade through its portal on 3 March 2023.

Amtrust instructed its loss adjusters who I will refer to as 'M' to handle the claim. On 11 April 2023, M asked Mr J to provide a report (to be obtained at his own cost) which confirmed the cause of water ingress and included a quotation for the works. M also informed Mr J that as the claim was in relation to a 'common part' of the building, it would need to be brought by the building's management company and would be subject to a common parts index-linked excess of £10,000, which would be applicable to each identifiable cause of loss.

Mr J wasn't happy with M's response to his claim. He believed that the landlord or developer should be responsible for the cost of the report and excess. Mr J also disputed that the area that had been damaged was included in the 'common parts' of the building, as the façade wasn't load-bearing.

In response to his complaint about the handling of the claim, Amtrust sent Mr J its final response letter not upholding the complaint on 25 August 2023.

Unhappy with Amtrust's response to his complaint, Mr J referred his complaint to this service. One of our investigators looked into what had happened and, in October 2023, issued a view not upholding the complaint. In summary, he concluded that Mr J's claim had stalled due to his dispute with Amtrust over its request for a report which confirmed the cause of loss and included a quote for the required repairs, and a disagreement about whether the common parts excess should be applied to the claim. In the view, our

investigator explained that the warranty terms didn't place the responsibility for the cost of investigating a potential claim on Amtrust. Rather, they said that the policyholder was responsible for submitting full details of the claim to Amtrust, including reports, as soon as possible.

Our investigator concluded that Amtrust wasn't responsible for the cost of investigating whether an event had arisen that might be covered by the warranty. With regard to the issue of the common part excess, our investigator explained that an answer couldn't be given on that element of the complaint, until such time as a claim had been made and accepted.

Unhappy with our investigator's view, Mr J requested an ombudsman's decision on his 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.

Mr J has provided detailed submissions which address the actions of Amtrust, M, the developer, the landlord and the management company. He has also provided information about the actions he has taken in relation to his concerns, via the First Tier Tribunal and the Property Ombudsman. While this decision focuses solely on the actions of Amtrust and its representatives, including M, I would like to assure Mr J that I have read all of the information that he has provided in relation to his complaint.

In making my decision on this complaint, I've considered the arguments and evidence of the parties under the following six headings: 'Is the building covered by the warranty?'**;** 'Has Amtrust fairly categorised the claim as a 'common parts' claim?'; 'Is Amtrust's requirement for a report on the damage and a quote for the repair works reasonable?'; **'**Is Amtrust's intention to apply a common parts excess to a successful claim fair?'; 'Does the claim need to be brought by the management company?'; and 'Does the warranty potentially provide cover for all of the elements of Mr J's claim?'

Is the building covered by the warranty?

Given the absence of any substantive action following the submission of his claim to Amtrust, Mr J has asked whether there is, in fact, a structural guarantee in existence, for the development. So, I've first addressed this concern before considering the other elements of Mr J's complaint.

The '*Certificate of Insurance New Homes Warranty*' that I've been provided shows that a Premier Guarantee warranty was issued on 8 November 2016, which was signed for and on behalf of the underwriter, Amtrust Europe Limited. The certificate of insurance contains details of the address of the property, the developer, the sum insured, the period of insurance and the excesses, among other things.

I'm therefore satisfied that the building does benefit from cover provided by the Premier Guarantee New Homes Warranty (the 'warranty'), underwritten by Amtrust.

Mr M has also asked whether M ever actually presented his claim to Amtrust. In the final response letter dated 25 August 2023, Amtrust's complaint handler said that she was aware of the claim submitted by Mr J on 1 March 2023, and she provided a detailed response to Mr J's complaint.

So, I'm also satisfied that Amtrust was made aware of the Mr J's claim.

Has Amtrust fairly categorised the claim as a 'common parts' claim?

The first issue in dispute between Mr J and M is whether or not the damaged part of the building has been correctly categorised as part of the '*common parts*' of the building. After reviewing the lease, M said that based on the information contained within Schedule 1, the cracked façade is considered a '*common parts*' issue as it doesn't fall under the individual demise of Mr J's property. M said that as a result, the management company, who I will refer to as 'P', would need to make the claim on Mr J's behalf. In response to email correspondence from Mr J, M repeated that as the cladding was an external loadbearing element, as per the terms of the lease, it didn't form part of the demised property

However, Mr J says the damaged slab of the façade is across his apartment, and the design of the building is such that each apartment is fitted with panels which are contiguous with the apartment. So, Mr J considers the damage to the panel is specific to his apartment (and does not affect any adjacent apartments). In addition, Mr J explained that the façade is attached onto concrete columns and is therefore not load bearing, so Amtrust is incorrect when it says the façade is part of a common parts structural component. In his view, the cladding is part of the watertight envelope and provides a decorative and protective finish to the exterior wall, which does not support the load of the building.

In deciding whether or not the damage that Mr J is claiming for, is included within the '*common parts*' of the building, I've first considered the warranty terms and conditions.

Mr J'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 3.3 '*Structural Insurance*', is relevant to Mr J's complaint as the claim was made during years three to ten of the warranty. It says that Amtrust will indemnify Mr J, the policyholder, against all claims discovered and notified to Amtrust during the Structural Insurance Period in respect of '*the cost of complete or partial rebuilding or rectifying work to the Housing Unit which has been affected by Major Damage*….'.

It goes on to say that in the event of a claim under this section, Amtrust has the option either of paying the cost of repairing, replacing or rectifying any damage referred to in section 3.3 (1) and (2), or itself arranging to have the damage corrected.

The warranty defines '*Major Damage*' as:
'a) Destruction of or physical damage to any portion of the Housing Unit …
b) A condition requiring immediate remedial action to prevent actual destruction of or physical damage to any portion of the Housing Unit …

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…'

The '*Waterproof Envelope*' is defined as: 'the basement, ground floors, external walls, roofs, skylights, windows and doors of a Housing Unit'.

The '*Housing Unit*' is defined at clause 15 on page 4 as: 'The property described in the Certificate of Insurance comprising:

- the Structure;
- all non-load bearing elements and fixtures and fittings for which the Policyholder is

responsible;

- any Common Parts retaining or boundary walls forming part of or providing support to the Structure.'

The definition of '*common parts*' is detailed at clause 7 on page 4 of the terms and conditions and includes: 'Those parts of a multi-ownership building (of which each Housing Unit is part), for a common or general use, for which the Policyholder has joint ownership and/or legal responsibility'.

The '*Structure*' is described at clause 25 on page 5 as including:

- 'load-bearing parts of ceilings, floors, staircases and associated guard rails, walls and roofs, together with load-bearing retaining walls necessary for stability

- any external finishing surface (including rendering) necessary for the water-tightness of the external envelope'

The warranty defines 'Excess' in the following way:

'As noted on the Initial Certificate and Certificate of Insurance the Underwriter shall not be liable for the first part of any payment made in respect of a valid claim under the Policy for a Housing Unit.

A separate Excess shall apply to each separately identifiable cause of loos or damage for which a payment is made under the Policy….'

Lastly, the financial limits for claims involving common parts are set out in section 7 of the warranty, which says:

'The maximum the Underwriter will pay for any claim relating to Common Parts will be the amount that the Policyholder has a legal liability to contribute towards the cost of repairs, rectification or rebuilding works. Claims are subject to the financial limits for the individual sections detailed above and the Excess as detailed in the Initial and Certificate of Insurance'.

So, in summary, Mr J's warranty covers him for damage to his apartment and his proportion of the cost of repair of damage to any common parts he's responsible for, if caused by a defect in the structure of the building or the waterproof envelope. Cover is subject to the cost of repairs exceeding the Excess.

The damage that is the subject of this claim, according to Mr J, is likely caused by a defect in the waterproof envelope of the building. According to M, it also likely caused by a defect in the structure. Both of these areas form part of the common parts of the building as detailed in the definition above. So, I'm satisfied that the Mr J's claim has been correctly categorised as a common parts claim.

This is further confirmed by the terms of the lease between the landlord, Mr J, the management company and the estate management company (the 'lease'). Schedule 1 of the lease defines '*The Property*' as including, among other things, the walls, floors and ceilings inside the property and excludes the load bearing and structural elements of the building. Schedule 4 of the lease sets out the details of Mr J's responsibility to pay the service charge which covers his contribution to the cost of maintaining, repairing, renewing, rebuilding the Retained Parts, which includes the main structure of the building and the elements excluded from the definition of the Property detailed in Schedule 1. This meets the part of the warranty's definition of 'Common Parts' which refers to the policyholder having legal

responsibility for the part of the building.

So, for the reasons detailed above, I've concluded that based on the defect being located within the common parts of the building, Mr J's claim has been fairly categorised as a common parts claim.

Is Amtrust's requirement for a report on the damage and a quote for the repair works reasonable?

The crux of Mr J's complaint is that he feels that the landlord, management company and Amtrust have made a collective attempt to frustrate the process of settling the claim for the structural damage by suggesting that he should bear all of the initial costs of making a claim for damage to the external wall / waterproof envelope of the building. Mr J considers this would include covering the costs of hiring a crane to review and undertake the repair work, some 21 stories above in a heavily pedestrianised area.

Mr J doesn't agree that leaseholders should be responsible for paying an index linked excess fee on a risks event which was clearly documented in the lease as falling under the landlord's demise.

However, M has said that it requires evidence to show that the claim is something the warranty will cover. Therefore, to proceed, Mr J needs to obtain quotations for the repair to the panel, which will determine whether the repair costs exceed the common parts minimum claim value.

M also explained that as this is a warranty policy, the onus of proof is on the insured party to prove their loss. M also quoted section 8.3 of the warranty, paragraph 3, which says the insured must "*submit in writing full details of the claim and supply all correspondence, reports, plans, certificates, specifications, quantities, information and assistance as may be required*". M said that without that information Mr J's claim cannot proceed

When considering this issue, our investigator said he agreed that Amtrust wasn't responsible for the cost of investigating whether an event has arisen which gives rise to a claim under the warranty and he was of the view that there was nothing within the warranty terms that implied Amtrust would cover that cost. Our investigator also agreed with M, that it is a general principle of insurance that the onus is on the insured to prove their claim.

In deciding whether Amtrust have acted fairly in imposing this requirement on Mr J, I've considered the legal requirements for making a valid claim and I've referred to the warranty terms. Having done so, I've concluded that Amtrust have acted in line with the warranty terms, and fairly in Mr J's circumstances, in requiring proof of the claim before agreeing to cover the claim. I will explain why.

The starting point when considering if a valid claim has been made, is that the onus of proof rests on the insured to prove that their claim is valid. They do this by proving that an insured peril arose, and by proving the amount of the loss. The first part of this requirement is satisfied where the insured can prove they have suffered a loss directly caused by a peril that is insured by the policy. Where a policy is one of indemnity, as this warranty is, the insured must also prove that they have suffered a financial loss and identify the amount of the financial loss suffered. It isn't unusual for some insurance contracts to require the evidence of loss to be provided in a particular way and from a particular source.

Paragraph iii) of section 8.3 says that on discovery of an occurrence that is likely to give rise to a claim, the Policyholder shall: '*submit in writing full details of the claim and supply all*

correspondence, reports, plans, certificates, specifications, quantities, information and assistance as may be required.'

Taking everything into account, I think Amtrust's requirement for Mr J to provide a report on the defect and damage, in support of his claim, is fair and reasonable in the circumstances.

As an aside I note that Mr J has provided me with a copy of a homebuyer's report addressed to a prospective purchaser of his property, which outlines some concerns in relation to the property. While I have considered the contents of this report, as it wasn't addressed to Mr J, it can't be relied on as evidence in relation to his claim against Amtrust. It also would be unlikely to satisfy the requirements to obtain a report, which I've detailed above, as, being a homebuyer's report, understandably, it doesn't contain the level of detail that I would expect to see in a structural engineer's report.

Is Amtrust's intention to apply a common parts excess to a successful claim fair?

M has said that after indexation had been applied to the excess, under the warranty terms, the excess applicable to the claim for would be £13,934.84. M explained that until they had sufficient evidence they were unable to comment on whether or not the repair would fall outside of the excess that is applicable. Due to the location of the property, and the heights involved, M said there may be a requirement for specialist machinery to be used to allow access to the area.

However, as mentioned above, Mr J believes that if the loss is deemed to be a common part, which is owned by the landlord, then the costs of the excess must be covered by the landlord.

When considering this point, our investigator said that the issue of whether a common parts excess would apply to the claim couldn't be decided until it had been decisively shown that the issue affecting Mr J's apartment has been caused by a '*defect*' which meets the definition of '*major damage*', and if so, which part or parts of the building the defect resides within. For that reason, our investigator didn't make a finding on whether the common parts excess would fairly apply to the claim.

Section 7 of the warranty terms says that claims are subject to the financial limits for the individual sections detailed the excess detailed in the Certificate of Insurance.

The Certificate of Insurance details the excess for the common parts as £10,000 and paragraph 5 of section 6 of the warranty terms, under the heading: 'Conditions', says that the excess will be increased '*in line with the RICS House Re-Building Index of 10% per annum compound, whichever is the lesser, on each anniversary of the commencement of the period of insurance for Section 3.3*'. The amount of the excess payable will be as at the time of discovery by the Policyholder of such claim.

Having considered the warranty terms and terms of the lease, together with the submissions of the parties, I'm of the view that if the defect did meet the definition of major damage and the evidence confirmed that it resided within with the common parts of the building, then it is likely that a common parts excess would apply to the claim. However, I agree with our investigator that it isn't currently possible to determine whether a common parts excess could fairly be applied to the claim.

Does the claim need to be brought by the management company?

M informed Mr J that the claim would need to be brought by the management company. However, Mr J has asked why should P be warranted to present a claim that directly affects

him and for which he had received no response from them in over a year?

Mr J has also highlighted that the management company said the resolution of the damage was delayed because Mr J had taken the action to register the claim with Amtrust.

I've next considered whether the warranty terms and lease conditions prohibit Mr J from making the claim, and instead require the claim to be notified by the management company as M and P have suggested.

Clause 6.3 of the lease details the management company's obligation to insure the building, and clause 6.5 details the obligation to provide the services which, could include, (as set out in Schedule 4, paragraph (3)(a) (ii)) preparing, submitting and settling any Insurance claims relating to the Building. However, clause 3.10 of the lease which sets out restrictions on the actions Mr J can take in relation to insurance, does not prohibit him from making a claim under the warranty.

The warranty terms define '*Policyholder*', with regard to section 3.3 of the warranty, as 'The owner acquiring a freehold or leasehold interest in the Housing Unit, or their successors in title….'. Section 3.3 states that Amtrust will indemnify the '*Policyholder*'. And section 8.3 which sets out the claims procedure (which relates to a claim under section 3.3 of the policy) says that: '*On discovery of any occurrence or circumstance that is likely to give rise to a claim under this section of the Policy, the Policyholder shall as soon as reasonably possible: i) give written notice to the Scheme Administrator*'.

So, neither the warranty terms, nor the lease prevent Mr J from notifying Amtrust of a claim under the warranty. However, as Mr J has referenced in his submissions, the costs associated with obtaining an appropriate technical report to support his claim are likely to be significant given the height of the building and location of the defect / damage.

As our investigator explained, this is one of the reasons as to why it is common practice in the industry for the management company to notify the insurer of the claim.

Schedule 4 of the lease provides the basis for the costs in relation to the claim to be included in the service charge, for which each leaseholder would be responsible for paying their 'Fair Proportion'. In addition to the sharing of the associated costs amongst all of the leaseholders, there are other practical reasons as to why the management company would usually notify and manage the claim, which would include matters such as providing access to relevant parts of the building and liaising with other leaseholders.

In addition, section 7 of the warranty terms says the maximum amount Amtrust will pay for any claim relating to common parts, will be the amount that the policyholder has a legal liability to contribute towards the cost of repairs, rectification or rebuilding works. In practice, this usually equates to the liability each leaseholder has to pay a 'Fair Proportion' of the service charge costs. So, for a claim to be fully met, the equivalent of each leaseholder's contribution would need to be paid, thus necessitating their involvement in the claim, which would usually be facilitated by the management company.

So, under the terms of the warranty and the lease, Mr J is entitled to make the claim under warranty in relation to his share of repairs, rectification or rebuilding works. So, Mr J is entitled to make a claim on the warranty with regard to that.

However, for the reasons I've given, in the circumstances of Mr J's claim, it is likely to be more appropriate for the management company to make the claim on behalf of all of the leaseholders, including Mr J.

Does the warranty potentially provide cover for all of the elements of Mr J's claim?

In his communications with M, in the event that the cracked façade cannot be repaired, Mr J explained that he was seeking compensation under the warranty terms for the following (which he'd already shared relevant figures with the parties of):

(i) The insured value of the apartment;

(ii) The loss of rents suffered; and

(iii) The loss of the opportunity costs of his funds.

He also explained that he would be seeking compensation for the adverse effect on his health the delays and obstacles provided and encountered in trying to resolve the issue as a patient who is suffering from a significant health condition.

However, in response M said that it did not work for nor take any responsibility for the actions of Mr J's developer, management company, landlord or any other parties involved with the claim. M explained that any disputes Mr J may have with those parties wasn't something it could assist with.

In addition, M said that consequential losses such as loss of rent, downturn in market value, loss of sale etc., are not something that will be recoverable under the terms of the warranty. This included any costs incurred for fees of any kind that do not relate to the rebuilding or repair costs. With regard to Mr J's claim for loss of rent, M said those concerns needed to be raised with the landlord.

The first point of reference in deciding what Mr J could claim for under the warranty, are the warranty terms and the certificate of insurance which record the details of the insured perils that Amtrust has agreed to provide cover for.

Sections 3.1 to 3.5 of the warranty set out the cover that may be provided under the warranty, in different circumstances. As explained earlier in this decision, section 3.3 of the warranty sets out the cover that may be provided for a claim notified to Amtrust within years three to ten of the warranty period.

Section 4 of the warranty terms includes the other costs that Amtrust will pay in the event of a valid claim being made on the warranty. These include additional costs and expenses the policyholder has incurred in complying with Building Regulations, Local Authority or other Statutory Provisions, reasonable alternative accommodation costs where the housing unit is uninhabitable, certain fees that the policyholder incurs in relation to rebuilding or rectifying the housing unit and costs and expenses incurred by the policyholder in removing debris from the housing unit.

However, the costs of fees incurred by the policyholder in investigating and/or preparing a claim are not covered by the warranty. In addition, section 5, paragraph 3 excludes cover for: '*Consequential loss of any description except as expressly provided for in this Policy*'.

Having considered the terms of the warranty, I'm satisfied that none the losses Mr J has claimed in relation to loss of market value of the apartment, loss of rent and loss of use of money, are covered by the warranty.

Next steps

For the reasons given in this decision, I conclude that Amtrust has acted in accordance with

the terms of the warranty, and reasonably in the way it has handled Mr J's claim to date.

To progress his claim, there are two clear options available to Mr J. He is free to make the claim in his own right, which would require him to take the necessary steps to provide the evidence required by the warranty terms, in support of his claim. Alternatively, Mr J can engage with the management company with a view to the management company taking the claim forward on behalf of the leaseholders and himself, which would require it to obtain the supporting evidence to present to Amtrust with the claim (with the associated costs likely being shared by all of the leaseholders under the terms of the lease).

I would finally note that Mr J has told us that he has taken his case against P (regarding various service charges), to the First-tier Tribunal (Property Chamber) Residential Property. As that is not a matter that Amtrust is responsible for, I have not considered that any further in this decision. However, it does show that Mr J is aware of the other avenues available to him, to obtain a resolution of his complaints, so I won't repeat those here.

My final decision

For the reasons set out above, my final decision is that I don't uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr J to accept or reject my decision before 17 April 2024.

Carolyn Harwood
Ombudsman