DRN-4527954

The complaint

Mr L has complained about Amtrust Europe Limited's handling of a claim he made under his LABC New Home Warranty for defects and fire safety issues affecting his building.

What happened

The subject of this complaint is a building comprised of multiple flats. Defects and fire safety issues have been identified in the common parts of the building. This means other leaseholders have been affected, in addition to Mr L. However, this complaint has been brought by Mr L only, and so only focuses on what he is entitled to under his individual warranty.

That said, where other leaseholders have separate (but essentially the same) complaints with Amtrust, our service would reasonably expect Amtrust to apply what is said in this complaint to the others where appropriate – even though this decision only strictly applies to Mr L and his entitlement.

There has been extensive background to this complaint which I don't intend to repeat in full here. Instead, I'll summarise the background and then focus my findings on the key issues which form part of this specific complaint. This isn't meant as a discourtesy to either party, rather it reflects the informal nature of our service and my role within it.

Mr L's (and the leaseholder's) claim began with issues affecting balconies in 2015. In December 2019, a claim was made on behalf of the leaseholders by the property management company and various investigations have been completed since then. During these investigations, further issues with the cladding were identified and investigations into these issues were also carried out.

Amtrust has provided final response letters (FRL) to three separate complaints during the life of the claim:

- January 2021 – The FRL was issued to the first property management company (who later resigned). This FRL covered the leaseholders' complaint about delays in handling the balcony claim and the cladding claim. The complaint was upheld by Amtrust and compensation of £75 per leaseholder was offered. This was later increased to £100 per leaseholder following additional correspondence from the management company between 21 and 25 January 2021.

- April 2021 – The FRL was issued to Mr L who was the director of the replacement (and current) management company. This FRL gave Amtrust's reasons for declining the balcony claim and provided explanation about actions being taken on the cladding claim.

- March 2023 – The FRL was issued to the new director of the management company. This FRL addressed a complaint about delays and poor service since the April 2021 FRL. Amtrust upheld the complaint and made an offer of £300 per leaseholder.

Amtrust disputes that our service has the necessary jurisdiction to consider Mr L's complaint. It says no complaint has been referred to our service, by an eligible complainant, within six months of any of the FRL's it has provided.

Two of our investigators have given opinions on this complaint to date. In summary, the first investigator said:

- No complaint was referred to our service within six months of the January 2021 FRL and there were no exceptional circumstances provided to explain the late referral of the complaint to this service. So, our service doesn't have the power to consider the issues covered and addressed in the first FRL.

- The complaint was brought in time for the remaining issues.

- Amtrust's decision to decline the balcony claim was ultimately correct, even though she didn't fully agree with the reasons it provided.

- Amtrust had enough information to accept a valid claim for the cladding under section 3.5 of the policy and hadn't done enough to move the claim forward such as commencing production of a schedule of works or covering the cost of temporary emergency fire safety measures.

- Amtrust should increase the compensation on offer to Mr L (and the other leaseholders) to £500 per person, to recognise the delays and poor handling of the claim.

- Amtrust should provide Mr L (and the other leaseholders) with a detailed explanation of the next steps.

- Amtrust should carry out any remaining emergency repairs to ensure the safety of the occupants while the claim is ongoing.

And our second investigator said:

- No complaint was referred to our service within six months of the January 2021 FRL and there were no exceptional circumstances provided to explain the late referral of the complaint to this service. So, our service doesn't have the power to consider the issues covered and addressed in the first FRL.

- A referral to our service was made in August 2021, so we can consider the issues covered in the April 2021 FRL.

- Just because the first FRL was out of our jurisdiction doesn't mean subsequent complaints about further delays should be.

- Amtrust's cladding claim decision, made following the March 2023 FRL, was unfair. It should reconsider the claim without applying condition 3 of the policy, as it had sought to do in order to limit its liability.

- Amtrust should increase the compensation on offer to Mr L (and the other leaseholders) to £500 per person, to recognise the delays and poor handling of the claim.

Amtrust maintained its objection to our service having jurisdiction to consider the complaints. Nonetheless, Amtrust offered to do the following in response to our second investigator's assessment:

- Indemnify Mr L (and each of the other leaseholders/policyholders) for the external wall/cladding defects, in line with the terms of the policy, without applying any requirements under condition 3 of the warranty prior to providing indemnity. But Amtrust says each leaseholder must first supply sufficient evidence to show the extent of their liability to contribute toward the repair costs, in line with the policy terms.

- Pay the increased £500 compensation to Mr L (and the other leaseholders) recommended by the investigators.

Mr L didn't accept Amtrust's offer. He said he wanted Amtrust to cover the cost of the emergency repairs and reimburse the costs he (and the other leaseholders) had already incurred in carrying out such repairs, as well as any other expenses they'd incurred as a result of Amtrust's delays. In addition, Mr L wanted Amtrust to agree to pay the claim settlement monies directly to a nominated contractor.

Amtrust didn't agree. It said it wasn't responsible for covering the cost of emergency repairs, the freeholder was. It also said it hadn't been provided with any evidence of expenses Mr L (or the leaseholders) incurred as a result of the delays, and that it would consider any complaint about such expenses as a new complaint separate to this one. And it said that Mr L's request for any claim settlement to be paid directly to a nominated contractor was not something it would agree to, and in any event that was a new issue.

As no agreement could be reached, the complaint was passed to me to decide.

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.

I've issued a separate jurisdiction decision setting out which elements of Mr L's complaint are within our service's power to consider, and which are not.

This final decision will focus primarily on the parts of Mr L's complaint which I've decided we do have the power to consider.

For ease of reference, I'll address the complaint issues separately.

Balcony claim decision

Mr L's (and the leaseholders') claim began with issues affecting their balcony in 2015. Amtrust declined this claim in 2021 and our first investigator explained why she felt this was fair and reasonable.

It's not clear whether or not this matter remains in dispute. But for completeness I'll address it.

Mr L's warranty is split into various different sections of cover, some of which depend upon how much time has passed since completion of the building. The balcony issues were first discovered in 2015, and this means the relevant section of cover which would apply is section 3.2.

Under section 3.2, in order for cover to be provided, the issue needs to be discovered and notified to Amtrust within six months of the expiry of a certain timeframe, referred to as the defect's insurance period. Where the issues discovered affect a common part of the building, such as balconies, this timeframe commences on the earliest date specified on a certificate of insurance for a housing unit which shares responsibility for the common parts. And it ends three years from the earliest date specified on a certificate of insurance or two years from the latest date specified on a certificate of insurance sharing responsibility for the common parts – whichever is the latest.

In this case, for the balcony issues to be covered under section 3.2, they needed to be reported to Amtrust by 2018. But they weren't reported until 2019. So, I think Amtrust can fairly refuse to cover the balcony issues under section 3.2.

Amtrust can also fairly refuse to cover the balcony claim under section 3.3 of the warranty, because in order for a claim to be covered under this section, the issue needs to be discovered and notified during a different period of time, called the structural insurance period. But, as explained above, the balcony issues were discovered during the defect's insurance period, rather than the structural insurance period. So, it follows that the issues would not be covered under section 3.3.

Cladding claim decision

In my jurisdiction decision, I set out the reasons why this issue is not within my power to decide. This is because the claim decision was made after Amtrust's March 2023 FRL and because no formal complaint about it has been either made or responded to.

But I also explained that this point is essentially irrelevant now, because Amtrust has already agreed to the recommendation our second investigator made about the claim decision, despite its dispute around whether we had the necessary jurisdiction to make such a finding. Amtrust has committed to dealing with the claim in line with the terms and conditions of the policy, for Mr L and the other leaseholders, without applying condition 3 of the warranty.

Amtrust has reasonably set out the information it requires from each leaseholder in order to assess their liability for contributing toward the cost of the necessary repairs, which is what will inform Amtrust's liability to indemnify them under the policy. So, I suggest Mr L (and the other leaseholders) engage directly with Amtrust about this so that the matter can be progressed.

Should a dispute later develop over the settlement amount, a new complaint would need to be raised. And this potential future complaint could likely be referred to our service if needed, subject to our normal rules and timescales.

Request for cladding claim settlement to be paid to the contractor

As this point is linked to the claim decision, and covers a future event, it is not something that is within my power to make a finding on as part of this complaint.

However, despite not having the power to make an actual decision about this issue under this specific complaint, I think I can helpfully explain that this isn't something our service would typically recommend in circumstances where the policy provides indemnity based on each leaseholder's individual liability.

Typically, in similar circumstances, an insurer might settle each leaseholder's claim once it had established their individual liability. Or, potentially, the insurer might reach an agreement with all the leaseholders, via a shared representative (like the management company), to pay the full settlement to the management company on the understanding that it has the leaseholder's permission to collect it and that party is arranging the repairs.

The above is all hypothetical, and the right and fair thing to do in each case will likely differ based on the circumstances. So, Mr L and the leaseholders should engage with Amtrust about their preference once they've provided the evidence it requires to establish their liability, to decide between themselves the best way forward. Should an agreement not be reached, a new complaint can be made.

Claim delays

It's not in dispute that there have been periods of avoidable or unreasonable delays during this claim. Delays were a feature of each of the FRL's Amtrust issued and it has already paid, or offered to pay, compensation to Mr L and the other leaseholders for some of the earlier delays.

Amtrust paid each leaseholder £100 following the first FRL. But, as set out in my jurisdiction decision, I have no power to consider that award, or the time-period to which it relates.

Since then, Amtrust offered each leaseholder a further £300 in the April 2023 FRL as it accepted responsibility for significant further delays in the progression of the claim. And, following our investigator's assessment of the complaint, Amtrust agreed to increase this to £500 compensation per leaseholder, despite disagreeing that we had the any jurisdiction to make that increased award. And I've seen that Mr L, and the other leaseholders, were happy to accept this offer.

In my jurisdiction decision I set out that our service does have the power to consider the claim journey from the point of the January 2021 FRL onwards, so that's what I've considered here.

In my view, Amtrust had enough information to determine a valid claim existed for the fire safety issues with the rainscreen cladding from mid-2020. So, I think it ought to have started the process of obtaining evidence to establish each leaseholder's liability much sooner than it did.

Considering the period of time I have the power to look at, and what I've been told about the impact these delays have had on Mr L, I agree that £300 compensation doesn't go far enough. So, it is my decision that Amtrust must pay Mr L £500 compensation for the impact of these delays. And, while I cannot make a direction under this decision for Amtrust to pay the same to each leaseholder, I understand that it has already committed to doing so.

Costs incurred as a result of claim delays

Amtrust has disputed that this point can be considered under this complaint. It says no complaint has been raised about it and no evidence has been provided by Mr L to substantiate any alleged losses.

Whether or not Mr L's initial complaint to Amtrust specifically referenced financial losses as a result of the claim delays, it's not in dispute that the central issue to the complaint from the outset has been Amtrust's delays in progressing the claim.

Our service's inquisitorial remit allows us to look beyond the specific wording of a customer's complaint to the issues at its heart. And I consider that consequential losses which result from unreasonable delays naturally form part of a complaint about the delays, whether or not they are mentioned specifically when the complaint is raised. So, I don't agree with Amtrust's position.

Amtrust says Mr L hasn't adequately evidenced financial losses which he has suffered as a direct result of its delays. I also haven't seen evidence of specific financial losses incurred by Mr L. So, I think Mr L should share with Amtrust any evidence he can to show the losses he has suffered. And, subject to that evidence being provided, I would expect Amtrust to cover any losses which have been incurred as a direct result of its unreasonable delays.

Once this evidence is provided to Amtrust, should a further dispute arise over the amount due to Mr L , that dispute can be dealt with as a separate complaint. And should Mr L (or the other leaseholders) remain unhappy after Amtrust deals with that hypothetical new complaint, they can refer a new complaint to our service, subject to our normal rules and timescales.

Costs for temporary/emergency repairs

Mr L (and the leaseholders) say they've incurred costs, via the management company and their service charges, for carrying out temporary or emergency repairs to mitigate the fire safety risk and/or risk of falling cladding panels. Mr L wants Amtrust to reimburse these costs, and for it to carry out (or cover the cost of carrying out) more substantial temporary measures until the full repairs can be completed.

Amtrust says it's the landlord's responsibility to carry out such repairs under the relevant legislation, as the landlord is the 'Responsible Person'. And it doesn't agree with this issue forming part of this complaint either.

I think it's important to acknowledge here that this issue ultimately relates to Amtrust's claim decision – which I have no jurisdiction to consider or decide as part of this complaint. This is essentially because Amtrust's liability for the cost of repairs (whether temporary, emergency or permanent) only strictly arises, under the policy terms, once a valid claim has been accepted. So, I think the cost of emergency repairs is inextricably linked to Amtrust's overall decision on the claim.

That said, given the offer Amtrust has now made – to accept the claim and to deal with it without applying condition 3 – once it establishes each leaseholder's liability, it's clear that Amtrust accepts a valid claim exists.

Whilst I can't make a finding on this issue for the reasons I've explained, I think as in earlier sections, I can provide some helpful thoughts on how this service *may* consider these types of issues more generally.

In situations like this, where the issues which are causing a risk are covered by a building warranty policy, we wouldn't typically consider it fair for the insurer to leave the policyholders having to bear the cost of emergency safety measures. And whether the landlord is the 'Responsible Person' or not, it's most often the leaseholders ultimately '*footing the bill*' via their service charge.

It's unlikely that an insurer/warranty provider would be the 'Responsible Person' under the Fire Safety Order. However, I don't think that removes its liabilities or responsibilities under the contract of insurance, where there is a valid claim. And it's these responsibilities that would be my considerations if this issue formed part of this complaint.

Our service wouldn't typically consider it reasonable for an insurer to artificially separate the interim safety measures from the overall work that's required to put right the breached building regulations which have resulted in the risk to the residents. This is because we don't usually find them to be distinctly separate things.

Building warranty polices typically include a section of cover for issues causing an imminent danger to the health or safety of the residents which arise from a breach of building regulations. In other words, building warranties generally assert that, where there's a valid claim, the policy will protect the policyholder in those circumstances. And in the context of the cover being provided, we'd usually interpret that to mean the warranty provider will protect the policyholder against all the risks and costs associated with the breach, including any immediate risks and costs. Although of course, any determination on this issue would include consideration of the particular warranty terms which applied, and the individual circumstances of that complaint.

As explained, I can't make any direction for Amtrust to cover these costs here, because the claim decision isn't within my power to decide as part of this complaint. But if, at the point of a settlement offer being made, Mr L (and the leaseholders) feel Amtrust's settlement is unfair as a result of these costs not being included, they can raise this as a new complaint at that time.

In the interim, if further temporary or emergency repairs are required, Amtrust may wish to consider whether it ought reasonably to support its policyholders with these, given it has essentially accepted responsibility for covering the claim (subject to evidence of each leaseholder's liability for the costs). But, as I say, I cannot decide whether Amtrust needs to do so, or make any direction for Amtrust to do this as part of this decision.

My final decision

For the reasons I've explained above, I uphold this complaint in part.

My final decision is that Amtrust Europe Limited must:

- When considering the claim settlement sum due to Mr L, consider reimbursement of the costs he's incurred as a direct result of its claim delays, subject to Mr L providing evidence of those costs.

- Pay Mr L a total of £500 compensation for the distress and inconvenience it has caused him.

If Mr L accepts my final decision and direction Amtrust will be bound to do this.

Alongside this, and separately to my direction above, Amtrust has said it will also:

- Subject to receipt of evidence to show his liability for contributing toward the cost of the repairs, settle Mr L's claim for the cladding issues without first requiring him to take action, against any third parties, by reason of condition 3 of the warranty.

I can't formally include that within my direction, or bind Amtrust to doing it, because the claim decision isn't in my jurisdiction to decide under this complaint. But I think it helpful to include reference to that here as Amtrust has offered to do this in any event.

I also make the following *recommendation*, which I referred to in the '*What happened*' section of this decision:

As the defects and fire safety issues have been identified in the common parts of the building, the other leaseholders in the building have been affected. So, while this decision only addresses the complaint brought by Mr L and makes awards based on what he is entitled to under his individual warranty, where other leaseholders have separate (but essentially the same) complaints with Amtrust, our service would reasonably expect Amtrust to apply what is said in this complaint to the others where appropriate.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr L to accept or reject my decision before 29 February 2024.

Adam Golding
Ombudsman