

## The complaint

Mr S1 and Mr S2's complaint is about Allianz Global Corporate & Speciality SE's handling of, and subsequent offer to settle, a subsidence claim made under a housing warranty insurance policy.

All references to Allianz include its appointed agents.

## What happened

I will set out the key events below which are relevant to my decision. However, I want to reassure both parties that I have read, and carefully considered, everything that's been provided.

Around January 2011, Mr S1 and Mr S2 bought a property which was covered by a ten-year housing warranty insurance policy. The warranty had been arranged by the developer of the property and assigned to Mr S1 and Mr S2 when they bought it. The start and end dates of the warranty fell between 2010 and 2020.

In essence, the warranty covered Mr S1 and Mr S2 for defects in the property that led to physical damage, subject to the policy terms. And the policy defined a 'defect' as:

*"Any defect in the structural works notified to the insurers during the Period of Insurance which is attributable to a defect in design or workmanship or materials which was not manifest at the Date of Inception."*

In September 2014, Mr S1 and Mr S2 contacted Allianz to report some cracking to the property and told it of their intention to make a claim. In December 2014, they provided Allianz with a latent defect claim form and a report from a surveyor (T).

T's report was based on a visual inspection, and stated the issues were as a result of "serious structural movement". It further stated that *"Further investigation of this must be made and structural calculations considered as to whether whatever structural support is provided at this point is indeed adequate"*.

Allianz appointed a loss adjuster who visited the property and carried out a further visual inspection. The loss adjuster then obtained information as to the specification of the property's foundations. They concluded that the foundations had been built in line with the relevant building regulations and weren't defective. So they recommended Allianz turn down the claim, which it did in February 2015. Allianz relied on a policy exclusion which stated:

*"this Policy does not cover any destruction, physical damage or threat of imminent destruction or physical damage caused by, arising from, or consequent upon:*

*...*

*(ix) subsidence, heave or landslip unless due to a Defect."*

Mr S1 and Mr S2 didn't agree with Allianz's decision. In July 2016, they complained to Allianz and said that the additional surveys and site investigations they'd arranged suggested that the foundations were defective, so the policy should cover the claim.

Mr S1 and Mr S2 provided further expert reports to support their claim – including one from 'R' dated May 2016. R's report concluded that the damage was being caused by nearby tree-related ground movement. But it also stated that the foundation design had not properly accounted for the nearby trees, and had it done so, the resulting foundations would have been piled. So it concluded the damage was due to defective foundation design.

In August 2016, Allianz responded to Mr S1 and Mr S2's complaint. It said that whilst there was evidence of subsidence causing damage to the property, the policy only covered subsidence if linked to a latent defect. In other words, in order for the claim to be accepted, it needed to be shown that the foundations were defective either by design or construction. And that the subsidence wasn't *solely* due to an intervening cause, such as the presence of tree roots in the soil.

Allianz said that M's report stated the recommended foundation depth had been complied with, and having reviewed everything, it wasn't satisfied that it had been shown a defect was present in line with the policy wording. So it maintained its decision to turn down the claim. But Allianz did say that it would look to appoint an independent expert to review the claim should Mr S1 and Mr S2 wish. This was subsequently agreed by all parties.

In January 2017, Allianz instructed G as an independent expert. G's report concluded that the cause of damage was (my emphasis in bold) "*tree related movement **combined with inadequate foundation design***". And in September 2017, G's final report concluded the design process of the foundation was defective, as tree roots were evident at greater soil depths than had been accounted for.

In October 2017, Allianz told Mr S1 and Mr S2 that it was now considering covering the claim for subsidence due to the defective foundations. Allianz appointed a loss adjuster to assess the claim, and they further engaged a chartered quantity surveyor (C) to assess the cost of repairing the defect.

C's report considered three remedies of repair; to mitigate the vegetation followed by level monitoring, with repairs to proceed once the site had stabilised (which could take up to 8-10 years); mitigate the vegetation and underpin the foundations; or the demolish and rebuild of the property using suitable foundations. C concluded that underpinning the foundations would be the most reasonable option in the circumstances.

In April 2018, C calculated the cost of underpinning the property to be around £625,000, including the alternative accommodation (AA) costs for Mr S1 and Mr S2. But around May 2018, Allianz found that the property had been significantly underinsured by the developer upon inception of the policy. So in light of this, C was required to undertake further investigations and reconsider the repair costs.

During this period Mr S1 and Mr S2 raised two complaints to Allianz about the time taken to deal with the claim. Allianz responded and said it was finalising its position on the claim.

In February 2019, Allianz provided its final response to Mr S1 and Mr S2. Allianz explained that it had applied a remedy of 'Average' to the claim and made an offer of around £435,000 to settle the claim. Allianz said that it had chosen this option because the issue of underinsurance stemmed from the developer's misrepresentation, and not that of Mr S1 and Mr S2. So in the interest of fairness, instead of avoiding the policy, it was settling the claim using the provision of 'Average', which took into account the proportion of underinsurance.

Mr S1 and Mr S2 were unhappy with Allianz's offer of settlement and in March 2019 they raised further complaint points. In summary they said:

- This was the first they'd been made aware there was a valid claim.
- That because the claim was initially turned down they'd had to spend time, money, and engage professional help to show the foundations were defective. So they wanted Allianz to refund these costs.
- They felt the claim could've been settled sooner and were unhappy with how long it had taken Allianz to reach an offer of settlement.
- They weren't happy with Allianz's overall handling of the claim or its lack of communication.
- That the delays have led to a worsening of the damage and therefore increased the repair costs.
- They didn't understand why the settlement had been 'Averaged'. And they asked why the underwriter of the policy hadn't visited the site to see the value of what it was providing cover for.
- That they wanted copies of all the reports which had influenced the cost and scope of the repairs.

In May 2019, Allianz responded to Mr S1 and Mr S2's concerns. In summary it said:

- That it had notified Mr S1 and Mr S2 there was a valid claim in October 2017.
- That the policy didn't provide cover for legal, professional, or consulting fees incurred for the purpose of preparing a claim. But it did offer a goodwill gesture to reimburse any surveyors' fees incurred by Mr S1 and Mr S2 prior to them appointing solicitors, using the 'Average' provision.
- The claim had been complex and required a number of investigations and expert reports to get to this stage, so it didn't agree that the delays were unnecessary.
- That the settlement included a built-in buffer of around £121,000 for preliminary fees and contingency costs which may not become payable as part of the cost of the works. It said it hadn't removed these costs which in turn led to an increased 'Average' offer.
- It had added a further payment for storage costs which wasn't included in its original offer. This meant the settlement offer was now adjusted to around £440,000.
- It said it wasn't required to undertake analysis of the sum insured, as this had been provided by the developer in good faith. And the actions of the developer meant the premium paid was based on a wrong and lower value. So it wasn't fair for it to settle the claim in full, when only part of the premium that should have been paid was due.
- That it had enclosed copies of the reports it had relied on to evidence the cost and scope of repairs.

Mr S1 and Mr S2 didn't agree and referred the complaint to our service. In addition to the points set out above they added:

- That Allianz's proposed remedy of underpinning will devalue the property and make it difficult to sell on.
- That the premiums paid provide a policy cover of £500,000, so any settlement should be limited to this amount.
- They were concerned that the actual works will cost more than Allianz's estimate, and so they want this revisited should the actual costs exceed the estimate.
- That the side effects of the damage have led to insect infestations, a reduction in social gatherings due to the embarrassment caused by the damage. And that the overall experience has caused a great deal of distress and inconvenience.

Our investigator looked at everything and didn't recommend the complaint be upheld. They concluded that Allianz's decision to apply the 'Average' condition to the settlement was fair and reasonable. And they concluded that Allianz's decision to provide a settlement to underpin the property was reasonable and in line with the expert reports provided.

Our investigator said that due to the complexity of the claim and investigation required, they weren't satisfied that there were any instances of avoidable delays. Nor did they conclude that Allianz was responsible for the prolonged overall duration of the claim. And they concluded that Allianz's offer to reimburse a portion of Mr S1 and Mr S2's surveyor costs was fair and reasonable in the circumstance.

Mr S1 and Mr S2 didn't agree with the investigator's findings, so the complaint has now been 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'm aware Mr S1 and Mr S2 feel that their side of the complaint hasn't been properly heard. And I'm also aware that they asked for an extension to provide further information for me to consider. But since the extension has now passed and no further information has been provided, I've reviewed everything, and I'm satisfied that their arguments are clear. I'd like to once again reassure Mr S1 and Mr S2 that I've carefully considered their comments and the evidence they've provided.

It is clear that this has been a complex claim for all parties involved. Unfortunately, Mr S1 and Mr S2 are in a position where it appears that the actions of the developer have contributed to their current circumstances. And I can understand the frustration that this must have caused them.

I don't have jurisdiction to consider the actions of the developer here. This is because those actions happened between it and Allianz, and Mr S1 and Mr S2 weren't involved. But I will consider Mr S1 and Mr S2's unhappiness with the proposed method of repair, amount of the settlement, and their concerns about the impact of any delays in the claim. I'll also consider if Allianz's actions were fair and reasonable once the matter of underinsurance became apparent. Finally, I'll consider if any compensation is due to Mr S1 and Mr S2 for the distress, inconvenience, and costs they say the matter has caused.

### *Proposed method of repair*

I've considered all of the expert reports provided to decide whether Allianz's proposed method of repair is fair and reasonable. Mr S1 and Mr S2 say that they're unhappy with the proposed repair of underpinning, as they feel this will devalue the property and make it difficult to sell on.

But Allianz's responsibility under the policy isn't linked to the potential future value of the property. It's required to indemnify Mr S1 and Mr S2 against "...*the cost of repairing, replacing and/or strengthening the Premises following and consequent upon a Defect which becomes manifest...*" And in line with our service's general approach this means that Allianz is required to provide a remedy which leads to an effective and lasting repair of the damage.

Allianz's position is that C's report shows the property can be repaired, so it isn't necessary to consider more expensive options such as demolishing and rebuilding the property. It did consider cheaper options of repair such as an extended period of monitoring, but considered underpinning as the most reasonable option which would minimise the disruption to Mr S1 and Mr S2.

Allianz has also said that a more expensive repair would potentially lead to an even larger claims shortfall for Mr S1 and Mr S2, given the proportion of underinsurance and would have likely exceeded the sum insured in any event. So it considers a demolish and rebuild of the property disproportionate to the damage caused. And Allianz has pointed out that underpinning was recommended as a remedy by Mr S1 and Mr S2's own experts, T and R.

I'm persuaded by the reports given that C, T, and R have all recommended underpinning of the foundations as an effective and lasting repair. I'm therefore satisfied Allianz has chosen a suitable remedy for which to calculate the claim settlement – taking the other options into account. And I've not seen anything to persuade me that a different form of repair, such as a demolish and rebuild, would be any more effective in the circumstances. So I'll next consider the terms of the settlement and Allianz's application of the 'Average' provision.

### *Allianz's settlement*

I've already set out what Mr S1 and Mr S2's policy covers so I won't repeat that here. So the next question I need to consider is whether Allianz has applied the provision of 'Average' fairly and reasonably. And to do so I need to consider if it was responsible for the underinsurance of the policy.

When considering the provision of policy cover, Allianz's underwriters (B) consider the risk they are insuring in line with the policy they are providing. As part of this they need to know the value of the property, but this is the responsibility of the developer to provide. The underwriters carry out site surveys, but this is to ensure the property meets the design and specification the policy covers and not to value the property.

I've not seen anything to indicate B had any responsibility for matters concerning valuation, instead the evidence persuades me that the site visits it did carry out were for the purpose of arranging contracts of insurance. So I am satisfied that there wasn't anything which would have fairly put Allianz on notice that the developer had misrepresented the property value and underinsured it.

I've next considered the definition of 'Average' in the policy terms to see if it was applied fairly. The policy defines 'Average' as:

*"The Sum Insured stated in the Schedule of the Policy is hereby declared to be subject to Average.*

*If at the date of manifestation of a Defect the sum representing 85% of full rebuilding costs of the Premises exceeds the Sum Insured adjusted in accordance with General Provision (c) below, the Insured will only be entitled to recover such proportion of indemnifiable costs as the adjusted Sum Insured herein bears to the full rebuilding costs."*

And 'General Provision (c)' goes on to state:

*"The Insured may, from time to time request an increase in the Sum Insured stated in the Schedule by written application to the Insurers. If the increase is accepted, cover will comment upon payment to Insurers of such additional premium as they may require."*

I think these two terms together are important in the circumstances of this case. And I think they are clear. What they show is that the policy has a remedy available to the *insurer* if 85% of the total rebuild costs of the property exceed the stated sum insured. And it also shows there is a remedy available to the *insured* should they deem the sum insured isn't adequate.

I've already determined that Allianz wasn't responsible for verifying the value provided by the developer for the sum insured. And the policy terms show that Mr S1 and Mr S2 could've applied to increase the sum insured. And there was a policy term which required them to check it was suitable for their needs. Allianz has confirmed a mid-term adjustment was possible on the policy, subject to an additional premium being calculated, agreed and paid. So I can't fairly hold it responsible for the omissions or actions of other parties here.

Taking everything into account, I'm satisfied that it was fair and reasonable for Allianz to apply the provision of 'Average' to this claim. The only other alternative available appears to have been for it to avoid the policy, which would have left Mr S1 and Mr S2 facing a shortfall of hundreds of thousands of pounds.

I'm not going to go into the full details of how Allianz calculated and applied 'Average', but I find its explanation of the settlement figure to Mr S1 and Mr S2 thorough and persuasive. I can see it has clearly shown that the rebuild costs of the property exceeded the sum insured, and it applied the remaining policy terms proactively, and in Mr S1 and Mr S2's favour. This included the provision of AA costs, storage costs, and contingency costs which all increased the total claim value. And it applied the policy indexing of the sum insured amount which increased the proportion of the settlement due. So I'm satisfied that Allianz has treated Mr S1 and Mr S2 fairly and reasonably in calculating the claim settlement.

I've considered Mr S1 and Mr S2's comments about the policy covering a limit of £500,000, and their concerns that the total cost of repairs will exceed Allianz's settlement. But the £500,000 limit they refer to is the sum insured value if the actual sum insured figure [£300,000] is lower. So Allianz has used the higher, indexed £500,000 amount as the sum insured and based its 'Average' calculations on that, which I find reasonable.

I'm satisfied that the remaining policy terms allow Allianz to settle the claim in the way it has set out. There isn't any provision for additional works which aren't linked to the defect, and by settling the amount up front, Allianz has mitigated the possibility of Mr S1 and Mr S2 having to front the full cost of the works before it pays out. I've considered C's report which sets out the costs of repairs and the criteria it used, and I've not seen anything which refutes these costs, so I'm satisfied they are reasonable for the repair work required.

In summary, I find that Allianz's offer is fair and reasonable, in line with the policy terms, and I find it has clearly and transparently explained how it has arrived at this figure. So I'm not going to require it to do anything further here.

### *Delays in the investigations*

I'll now consider whether any underlying defects within the property can be shown to have been substantially made worse by Allianz's conduct since Mr S1 and Mr S2 made their claim.

I've considered the events which led to Allianz re-engaging with the claim and what it knew about the cause of damage at the time.

The claim was referred back to Allianz in July 2016 because Mr S1 and Mr S2's investigations via their surveyors suggested that the issue of subsidence was most likely due to defective foundations. This was in contrast to Allianz's initial findings which linked the subsidence to the proximity of tree roots in the soil.

However, at this stage I can see that it wasn't conclusive that the foundations were defective. Or that this was the predominant reason for the damage. I think the fact that both parties agreed that an independent expert needed to be engaged shows the complexity of the problem here. In addition, I can see that the independent expert also asked for further investigations and evidence to support their conclusions, which delayed matters by a number of months. As both parties had agreed to this expert, I can't fairly hold Allianz responsible for these delays.

From reviewing the subsequent timeline of events I can see that Allianz followed the expert's advice and recommendations and accepted the claim once it was apparent the foundations were defective. Whilst I appreciate this part of the claim took some ten months to conclude, I don't think Allianz was in a position to conclude this claim any sooner or offer Mr S1 and Mr S2 a settlement figure any earlier than it did. I say this because the complexity of the claim meant there were a number of insured and non-insured considerations, and therefore I think it was reasonable for Allianz to explore any possible overlaps of liability with other parties as part of its overall investigation.

I acknowledge that Mr S1 and Mr S2 have said the problem was likely structural from the outset and Allianz should've carried out more thorough investigations to identify the cause of the damage. But the evidence shows that the conclusions Allianz reached in initially declining the claim weren't unreasonable – they were based on the surveyor's reports following their investigations. And once it became apparent that there was a likely different cause for the damage Allianz re-engaged with the claim. So I can't fairly say that this period of time caused damage which Allianz should be liable for outside of its settlement terms.

In order to uphold this point in Mr S1 and Mr S2's favour, I'd need to see some evidence of the specific damage they feel the delays have caused. And I would need to see how this was clearly different from any damage linked to the underlying defect in the property.

Based on the information available to me, I haven't seen anything which leads me to conclude Allianz is responsible for any additional damage, or anything to verify any additional damage costs. So I don't uphold this part of the complaint.

## Compensation

In determining whether any compensation for distress and inconvenience is due, I've considered a number of factors. I've looked to see if there were any delays in the duration of the claim which I would deem as avoidable. I've also considered Allianz's overall service to Mr S1 and Mr S2 – which includes the actions of its appointed agents and contractors. Finally, I've also considered the amount of time Mr S1 and Mr S2 spent dealing with the various issues in proportion to the overall complexity of the claim.

In conclusion, I can see that the investigations required by Allianz to identify the main cause of subsidence damage were extensive. The expert reports show that it wasn't immediately apparent that the foundations were defective when the matter was initially referred to Allianz in December 2014. Or when it was referred back a second time in July 2016.

The reports provided by Mr S1 and Mr S2 in July 2016 were new evidence, and as such Allianz was required to undertake a series of investigations in order to establish if the claim could be covered. This included a referral to an independent expert and further site investigations in order to obtain soil samples at the bottom of the foundation depths. Ultimately, a number of experts were required to determine that the subsidence was due to *both* defective foundations and the impact of tree roots.

I can see that once it was accepted that this was a valid claim, Allianz referred the matter to another expert in order to obtain costings and a scope of repairs. And the issue of underinsurance effectively meant this process needed to be restarted in order for Allianz to arrive at a fair and reasonable settlement.

Having reviewed everything, I've not seen any evidence which suggests that this process took substantially longer than it should. And in any event, I've not seen anything which should've put Allianz on earlier notice as to the full extent of its liability under the policy.

In order to recommend compensation here, I'd need to be satisfied that any delays by Allianz significantly worsened the issues being caused by the underlying defect for which it has already offered terms of settlement. And given the extensive scope of the investigations and actions required, I'm not persuaded that it did so. So I won't be requiring Allianz to pay any compensation for distress and inconvenience.

With regard to the costs incurred by Mr S1 and Mr S2 for legal and professional fees, I can see that the policy terms don't provide a benefit for this. The legal and professional fees referenced in the policy apply to fees incurred in the repairing, replacing and/or strengthening of the property. The policy specifically excludes “...fees incurred for the purpose of preparing a claim under this Policy”. So I can't require Allianz to fairly reimburse these costs. But I do find its gesture of goodwill to proportionately reimburse the fees incurred by Mr S1 and Mr S2 prior to them instructing a solicitor fair and reasonable in the circumstances.

I have little doubt that Mr S1 and Mr S2 will be extremely disappointed with my decision. The developer's actions in underinsuring the property will potentially cause them to incur considerable financial loss and upset. But as I've set out above, I'm satisfied that the developer's actions weren't the responsibility of Allianz. And I find that it has provided a fair and reasonable settlement offer in the circumstances. So I won't be requiring it to do anything further, which I appreciate won't be the outcome they're hoping for.



**My final decision**

My final decision is that I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr S1 and Mr S2 to accept or reject my decision before 28 October 2021.

Dan Prevett  
**Ombudsman**