

The complaint

Mr S and Mrs B complain about the unfair treatment of their claim for a crack in the flooring and a leak, on their late father's policy with Ageas Insurance Limited.

What happened

I sent the parties my provisional decision in February 2022, in which I set out the following background information to the complaint and my provisional findings.

The late Mr S took out a policy with Ageas in 2016. In July 2018 Mr S was selling his home and was alerted to a problem with the floor slab by a buyer's structural survey report. The report highlighted that the concrete floor slab had reacted with moisture causing bumps to appear in the kitchen and lounge floors.

Mr S's son (who I have referred to as Mr S throughout) reported a potential subsidence claim. Ageas appointed loss adjusters whose subsidence and drainage experts surveyed the property in August, September and December 2018 and later. They said the problem was potentially due to an escape of water and described the drain as 'unserviceable' and leaking water when in use. They recommended excavation and repair but said this was the responsibility of the local water authority.

The experts found no damp-proof membrane between the concrete floor and the hardcore sub-base material. They said the expansion of sub-base material is a major factor in the fragmentation of the concrete floor, referred to as 'sulphate attack'. They said the source of the water triggering the attack needed to be found and although the drains were leaking, they decided that this wasn't a contributory factor. They described the damage as gradually operating due to a defect in the use of the shale material withing the sub-base, but without a damp-proof membrane.

Mr S obtained a report from a structural engineer who found that the floor slabs had cracked as a consequence of heave from shale expansion in contact with leaking water. He also obtained a report from his local authority in November 2018 that stated the sub-base contained shale which is known to expand and is likely to have been a major contributory factor in the fragmentation of the concrete base.

Ageas said although the claim was rejected it offered a cash settlement for the kitchen floor damage under the escape of water peril in the policy. Mr S rejected this and requested the whole floor be inspected and covered by the claim. The subsidence experts instructed by Ageas' loss adjusters reported in July 2019 that the crack to the kitchen floor tracks across the lounge floor and so a claim for damage to the lounge would be harder to decline given acceptance of the damage to the kitchen floor.

Mr S instructed a structural engineer who inspected and reviewed other expert reports. He said CCTV showed the drains were leaking and there's shale present but no damp-proof membrane. But he didn't find evidence of sulphate attack. He said a second drainage report had found chlorides in the kitchen floor and said the damage was due to expansion of the shale reacting with leaking water. He said the lounge floor crack was a continuation of the

kitchen floor crack and is obviously of the same cause. He recommended the complete replacement of the ground floor slab on top of a damp-proof membrane.

Ageas' loss adjusters arranged an independent report by structural engineers. The report stated that damage to the floor slab in the kitchen and lounge was caused by sulphate attack whereby sulphates in the sub-base reacted with the cement within the concrete expanding and cracking the floor slab. The report states that this isn't linked to the expansion of shale. The report states that sulphate attack is accelerated by the presence of moisture, and increased moisture from a leak with expedite the effects. It states that, 'The evidence shows that leaking drains were adding to local ground moisture', but the degree of accelerated sulphate attack from this cannot be answered. The report recommended that if then claim were accepted, the work needed would be removal of the sub-base, installation of a dampproof membrane and replacement of the concrete floor.

Ageas didn't think that a leaking drain was the cause of the damage as the levels of sulphates in the concrete floor are high, and cracking and heave is likely to be ongoing and progressive, even if the drain isn't leaking. It said that the recommendation for full excavation of the ground floor, even after the drain is fixed means the primary mode of failure is sulphate attack, not any escape of water. Ageas declined the claim saying that there's no cover under the policy. Mr S didn't agree and complained to Ageas.

In its final response in September 2020 Ageas said it couldn't be certain about the source of the moisture within the sub-base and so had made a partial offer of settlement. When rejected, Ageas obtained an independent report which it said concluded that the primary cause of damage is a latent building defect, that would cause damage even if the drains were not leaking. Ageas rejected the claim again as no insurable event had taken place.

Mr S referred his complaint to us. Our investigator didn't recommend it be upheld. She said the expert appointed by Ageas was most qualified to diagnose the issue and their findings were convincing that even if there wasn't a leak the sulphate attack would have occurred anyway as the sub-base was in contact with wet ground. And she thought the damage was due to sulphate attack rather than an escape of water. She concluded that there's no policy cover for latent defects or a sulphate attack and so she couldn't tell Ageas to pay the claim.

Mr S disagreed with the investigator. He said chlorinated water was found in the sub-base material and so there had been an escape of water from the drain and the claim should be covered under this peril. He said his neighbour didn't have the same problem and so the leak must have been the cause. Mr S requested an ombudsman review the complaint.

My provisional findings

I've looked closely at Ageas' handling of the claim to see if it acted within the terms of the policy and treated Mr S and Mrs B fairly. This involves determining whether Ageas was fair in deciding that the damage to the late Mr S's home doesn't fall within an insured peril. To do this I've looked at the policy and the various expert reports. I'm not an expert and so I have to decide on the basis of which I think gives the most likely explanation of the causes of the damage.

Firstly, the policy: this provides cover for damage caused by the ground moving, whether upwards or downwards. However, cover is excluded for movement of solid floors slabs unless the foundations are damaged at the same time and by the same cause.

The reports deal with the chemical reaction from the sub-base to the floor slab through the agency of moisture. I haven't seen a report which indicates that damage to the foundations was also present and so I don't think the subsidence peril of the policy applies to the claim.

The policy also covers damage from an escape of water from a drainage installation. And so, the key questions are, has there been an escape of water and if so, was this the cause of the damage to the floor slab.

Damage to the drain at the rear of the property is widely acknowledged by the experts and has been repaired by the local water authority. And so I think it very likely that water has been leaking from the drain into the area in and around the house.

The first part of the analysis about the failure of the floor slab appears largely to be agreed by the experts as a 'sulphate attack' causing the floor slab to distort and crack. The reaction to moisture is agreed as the cause of the attack, but the source of the moisture is disputed.

From the expert reports it doesn't appear to me to be arguable that the kitchen and lounge floor slabs have cracked for different reasons. The cracks are described as continuous and are very likely to have been caused by the same factors, the sulphate attack. This means that either the whole floor slab needs to be replaced under the claim, or none at all.

I think Ageas has accepted this point and its expert's comment that offering a cash settlement for only the kitchen floor repair looks anomalous. I can see that Ageas were trying to be helpful to Mr S and reach a resolution to the claim that they felt the policy didn't respond to, and so when Mr S decided the offer didn't go far enough they withdrew it as contradictory to the facts of the claim. I can see Ageas has reinstated its offer.

I take Ageas' position to be that the ground around the sub-base is wet due to the presence of natural moisture and this is sufficient to trigger the sulphate attack. And so, Ageas thinks there's no liability for it to meet a claim under the escape of water peril as this isn't required to have caused the damage. It also thinks there's poor design due to the lack of a dampproof membrane, which is excluded by the policy. Ageas concludes that natural moisture is the primary cause of the damage and a leaking drain would only be a contributory factor. However, Mr S's position is that the damage is due to escape of water. And since that is covered as a peril under the policy, the claim for repairs should be met by Ageas.

It's common sense that the lack of a damp-proof membrane means the floor slab is prone to moisture ingress. I haven't seen anything to suggest that not deploying a damp-proof membrane was in contravention of the planning rules applying when the house was built and so I don't think policy exclusions for faulty design and materials apply. And the lack of dampproof membrane does not in itself appear to be self a cause of the floor slab's failure. I'm aware that similarly designed and aged houses near to Mr S's house apparently have no problem with cracked floor slabs.

I've looked at what the experts say about an escape of water and its impact on the floor slab. I've placed most reliance on the expertise and in-depth findings of the independent expert. He thought the damage was due to sulphate attack and this would be accelerated by the presence of moisture in the sub-base. He said this is commonly considered to be a latent defect. But he said it wasn't possible to know if the leaking drain was the cause of the problem; 'There is a question as to whether the floor failure can be attributed to the drain leak, but this is not a question that can be answered by anyone'.

The independent expert didn't know when the repaired drain started leaking or if there was pre-existing damage to the floor slab. And I don't have information about this either. The expert didn't think tests for chlorides and nitrates (as relied on in other reports and the basis of Ageas' partial offer of settlement) were of any use in determining the source of the water. I don't think the open-minded conclusions about the causes of the damage from the independent expert are accurately reflected by Ageas in its final response to the complaint.

Ageas concluded that the primary cause of damage is a latent building defect, that would

cause damage even if the drains were not leaking. But I don't think that's the correct conclusion to draw from the expert report, which is far less certain about the cause. The independent expert is unlikely to have been exercised about not knowing when the drain began to leak and the condition of the floor at the time if this wasn't a factor in the damage. He said this 'blurs the lines on proportionality, and causality; particularly as it relates to the increase in local ground moisture levels.'

From the other reports I don't think the dampness in the sub-base is shown as occurring independently from an escape of water and there appears to be evidence that water escaped from the drain and entered the sub-base. I also take note of Mr S's expert's comments that none of the adjacent/similar properties in the area have shown similar defects. He concludes that if the drains weren't broken, the floor slabs would still be in good condition. On the balance of probabilities, I'm inclined to agree. The evidence I've seen leads me to conclude that Ageas isn't on safe ground when it says it doesn't consider that the leaking drain is the cause of the sulphate attack on the floor slab.

It follows from this that I don't think Ageas have acted fairly in declining this claim and I am minded to require Ageas to accept the claim and repair the flooring. As a consequence, I also think Ageas should be reimburse Mr S and Mrs B for the fees they incurred by use of experts to prove this claim. And so, on production of evidence of invoice and payment I currently think Ageas should refund expert report fees related to the claim to Mr S.

My provisional decision and the parties' responses

I provisionally upheld the complaint to require Ageas to accept Mr S and Mrs B's claim for damage to floor slabs under the escape of water peril in the policy. And for Ageas to recompense Mr S and Mrs B for the cost of expert reports in support of the claim.

Mr S and Mrs B said they agreed with the provisional decision with no further comment, and Ageas didn't respond.

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.

As there is no further information to consider in relation to this complaint, I see no reason to alter my provisional decision.

My final decision

For the reasons I have given it is my final decision that the complaint is upheld. I require Ageas Insurance Limited to accept Mr S and Mrs B's claim for damage to the floor slabs at their late father's property, under the escape of water peril in his policy. I also require Ageas Insurance Limited to recompense Mr S and Mrs B for the cost of the expert reports they paid for in support of his claim. If they haven't already done so, Mr S and Mrs B should provide evidence of the costs and payment to Ageas.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr S and Mrs B and the estate of Mr S to accept or reject my decision before 19 April 2022.

Andrew Fraser
Ombudsman