

The complaint

Mr L complains about the way Ocaso SA, Compania de Seguros y Reaseguros has handled a claim he's made on his buildings insurance policy for subsidence. He's also unhappy with Ocaso's proposals to deal with the subsidence and is concerned it's not adhering to the requirements of the lease.

What happened

References to Mr L and Ocaso include respective representatives unless stated otherwise.

The background to this complaint is well known to the parties and has been comprehensively detailed by our Investigator previously, so I'll provide a brief summary here.

- Mr L is the freeholder of a property divided into two flats. He lives in the first floor flat and a leaseholder lives in the ground floor flat. Mr L's flat is insured by Ocaso and the other flat by a different insurer.
- In 2017, Mr L reported damage to the property to Ocaso. The claim was accepted and Ocaso appointed a specialist to investigate and manage the claim.
- In 2018 an arboriculturist visited the site and produced a report which identified a local authority owned tree on the pavement outside Mr L's property as the cause of the subsidence damage.
- He said annual pollarding of the tree to 12 metres was likely to be successful in controlling soil drying close to the tree. Ocaso decided it didn't need to pursue an engineering solution to address the subsidence and pollarding would be sufficient.
- Mr L wasn't happy with this as he said the local authority only pollarded the tree infrequently and he had no way to compel it to do so more often and in line with the report. He complained to Ocaso.
- Ocaso issued its final response in January 2021 and maintained its position. It said it couldn't force the council to remove the tree as was Mr L's preference and it was the council's responsibility to manage the tree so it didn't have any adverse impact on his property.
- Our Investigator considered the evidence and said she didn't think Ocaso's approach was fair as she wasn't persuaded it would result in an effective and lasting repair. She said Ocaso should re-engage with the insurer of the ground floor flat to find an engineered solution, pay Mr L £750 for the impact of its poor handling and explain how it intended to comply with the terms of the lease.
- Ocaso didn't accept or reject the recommendations and so the case has come to me for an Ombudsman's decision.

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 background, I note Ocaso has been very slow to respond to enquiries made by this Service and we have had to chase on numerous occasions for responses to specific questions. Following our Investigator's initial view on the complaint, Ocaso did provide a couple of documents in response but with no explanation about how or why these supported its position. It also hasn't responded to say whether it accepted or rejected the Investigator's recommendations despite being chased several times, which is why the case is now with me for a decision.

In light of the timeframe we've given to Ocaso to respond, I'm satisfied it has been given an ample opportunity to provide submissions to this Service and clarify its position and explain any reasons for disagreeing.

Ocaso's proposals to address the cause of the subsidence

It's not in dispute that Mr L's property has been damaged by subsidence and the root cause of this is a local council owned tree on the pavement outside the property. What is disputed though is Ocaso's proposed solution to address the subsidence. Ocaso has said regular pollarding of the tree will bring about stability so there's no need for an engineering solution. But Mr L has no confidence this approach will avoid future subsidence and damage to his property.

The terms of Mr L's policy allow Ocaso the option of how to settle the claim including whether to repair, reinstate or rebuild the part of the building that's damaged by an insured peril. This is common among policies of this nature and means Ocaso can decide how to put things right when handling the claim.

I know Mr L is of the opinion Ocaso favours the pollarding option as a way of saving money over the cost of an engineering solution such as underpinning the property. Insurers do take account of costs when considering possible methods of repair or how to settle a claim. This isn't inherently unfair, and I don't think it's unreasonable for an insurer to be prudent when making this kind of decision. But, in handling a claim and considering costs, an insurer mustn't lose sight of its obligations under the policy – and in this instance, to ensure an effective and lasting repair.

To decide whether Ocaso has acted fairly, I've gone on to consider the evidence available to me.

Ocaso instructed an arboriculturist to undertake an investigation into the cause of the subsidence and possible approach to resolve the issue. The report explains:

"Pruning to trees involved in subsidence damage to buildings is generally unreliable unless repeated frequently...This is a "borderline" case: there cannot be an absolute guarantee that pruning will produce stasis in the building in this case....but there is a possibility that pruning alone, provided that the tree is treated regularly, might limit soil drying...some sort of repetition not less than every year would be required. This might be difficult to ensure and would strictly require specification and timing appropriate to the state of the tree at the time"

It concludes that the local council pollarding the tree to 12 metres every year would be required to be successful.

Having considered this report very carefully, it's clear the expert has concerns about the effectiveness and/or practicality of this approach. And it seems to me the *possible* success of this approach is entirely contingent on the local council undertaking regular annual pollarding. From Mr L's testimony, it seems the council's past record of pollarding is infrequent and unpredictable at best and certainly some way outside the annual pollarding recommended in the report to ensure its ongoing success. I've also seen nothing which persuades me Ocaso has obtained agreement from the council to undertake the pollarding in the required way and timescale.

Ocaso's view is that it will be down to the council to ensure there's no further damage to Mr L's property by undertaking the required pollarding. It says if this doesn't prove successful, it can hold the council accountable for further damage should it arise due to any insufficient work they may have done.

I can see why Mr L wouldn't be happy with this approach as he's already been dealing with this insurance claim since 2017, so the prospect of having to go through it again if the council – over which he nor Ocaso have any control – fail to undertake the required pollarding, would be understandably distressing. And even more so in the knowledge that Ocaso is withdrawing from the UK insurance market and therefore has been unable to renew his policy and this may well leave Mr L without subsidence cover.

I also take Mr L's point that the tree has been pollarded at times over the last 30 years he's been living in the property and yet it's still resulted in it being the cause of the damage. I understand why he wouldn't feel confident in this approach.

Mr L's downstairs neighbours, perhaps self-evidently, are impacted by the subsidence as well and have made a claim on their policy with a different insurer. Another arboriculturist report was undertaken in connection with this other claim and a copy of this has been provided to this Service. The report says:

"We note that [the tree] has been subject to regular pollarding, however it has proved ineffective; in the context of the current claim we consider the above vegetation is simply too large and/or close for pruning to be deemed realistically effective.

Removal of [the tree] will offer the most certain and reliable arboricultural solution likely to restore stability"

So in summary, there's one expert who says Ocaso's proposed solution *possibly* might provide stability – subject to conditions outside its or Mr L's control – and another who rules it out as a solution entirely.

In this case, the council has ruled out the removal of the tree despite representations from Ocaso. One of Ocaso's engineers commented in internal communications:

"If the LA [local authority] are adamant that the tree will not be removed...then underpinning would be the only solution"

As long as the tree remains, and the required pollarding cannot be guaranteed, based on the evidence, it seems to me there's an ongoing risk of future subsidence and damage. Overall, I'm not persuaded the evidence shows Ocaso's proposed solution will more likely than not provide an effective and lasting repair.

I know Mr L would like this Service to state what engineering solution should be employed to best deal with the subsidence. That's simply outside the scope of this Service's role and Ocaso – working with his neighbour's insurer, which it seems has proposed an engineering

solution - will have access to experts better placed to decide on this. It also wouldn't be appropriate for me to reach a decision on this as it would have implications for his neighbour who's not a party to this complaint.

I will therefore be directing Ocaso to re-engage with the insurer of Mr L's downstairs neighbour to agree, at pace, the most appropriate engineering solution to address the subsidence. I'll take this opportunity to remind Ocaso of its obligation to deal with claims promptly and fairly, particularly given the length of time this matter has already been going on.

Claim handling

In my experience, incidents of subsidence are often stressful for a homeowner to deal with and insurance claims relating to them, by their nature, generally take considerable time to resolve and this can be made worse when third parties are involved, as is the case here. I can't hold the insurer responsible for this but I can consider if they've handled the claim promptly and fairly in line with their obligations or if they've caused unnecessary delays and distress.

Ocaso declined to provide a timeline of events over the life of the claim. But I've seen enough from the evidence to be persuaded it didn't meet its obligation to handle the claim promptly and fairly and this has made an already difficult situation worse for Mr L.

For example, Mr L's explained that for long periods of time, Ocaso failed to keep him up to date with progress on the claim and at times was out of contact with him for extended periods despite him chasing them for information.

It also seems the relationship between Mr L and Ocaso's representative became strained through the claim and there was a six-month delay in Mr L being reimbursed for expenses he incurred.

It's clear Ocaso spent a significant period of time engaging with the council in an effort to come to an agreement about the removal of the tree. I can see why Ocaso were keen to pursue this option as it would likely be considerably cheaper than an engineering solution. But the amount of time it pursued this option to me seems excessive and over what I would consider reasonable. I would have expected Ocaso to have considered alternatives such as an engineering solution in light of the lack of progress while pursuing its preferred option.

Overall, the claim was first made in 2017 and has been going on for some four years and there's really no significant progress and Mr L still doesn't have any certainty about how the subsidence problem is going to be resolved. In the time he's been waiting, the property has experienced further cracking and damage that may well have been avoided if the claim had been progressed more quickly.

I've borne all this in mind in reaching my decision about the amount of compensation Ocaso should pay Mr L.

Compliance with the lease

As the freeholder of the property, Mr L is concerned to ensure Ocaso will comply with the terms of the lease. This is to ensure the costs relating to the remedial work are correctly apportioned between the two flats.

I'm pleased to see in the evidence submitted by Ocaso, it has confirmed it has considered the terms of the lease and will ensure the requirements contained in them will be adhered to.

I see no reason to comment on this further, other than to say Ocaso should provide Mr L with a clear explanation about how it's done this.

Putting things right

I've detailed above the remedial action Ocaso should take to resolve the subsidence and comply with the lease.

It's clear from the evidence Mr L has found this claim very distressing to deal with, not just as he's the owner of the upstairs flat but also the freeholder of the entire building. It's no surprise that a claim that's gone on for as long as this without any certainty that a suitable, effective and lasting solution will be provided will only add to this distress.

And while Ocaso's decision to exit the UK insurance market is outside the scope of this complaint, I have to overlay the additional uncertainty Mr L experienced knowing he'd no longer be able to secure insurance through Ocaso.

I've balanced this with the need for Ocaso to deal with third parties and that the downstairs property is insured by another insurer and it's been a particular challenge to coordinate the policyholders' requirements and the insurers' different proposed approaches.

I've thought about all this very carefully and have reached the conclusion that Ocaso hasn't handled the claim as well as I'd expect and has caused unnecessary delays over the life of the claim. I have decided it should pay Mr L £750 in recognition of the distress and inconvenience it's caused him.

My final decision

My final decision is that I uphold this complaint and direct Ocaso SA, Compania de Seguros y Reaseguros to:

- Re-engage with the insurers of Mr L's downstairs neighbour to agree, at pace, a suitable engineering solution to address the cause of the subsidence to bring about an effective and lasting repair.
- In any claims handling it should seek to comply with the terms of the lease to ensure costs are apportioned appropriately and provide Mr L a clear explanation about how it has done this.
- Pay Mr L £750 for the distress and inconvenience it's caused him as a result of its poor claim handling.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr L to accept or reject my decision before 22 August 2022.

Paul Phillips
Ombudsman