

The complaint

Mr and Mrs H are unhappy Amtrust Europe Limited declined a claim they made under their new home warranty.

Reference to Amtrust includes its agents and representatives.

What happened

Mr and Mrs H bought a new home which benefitted from a new home warranty underwritten by Amtrust. They had separate buildings insurance with a different insurance company, who I'll refer to as X.

In late 2016 they noticed cracking in their home. They got in touch with X to make a claim. I understand X said the damage had been caused by subsidence. But because of the depth of the foundation, the claim wouldn't be covered under X's policy.

After that, Mr and Mrs H got in touch with Amtrust to claim under the new home warranty. Because of the timing of the damage, Amtrust considered the claim under section 3.3 – the structural insurance period. It arranged for monitoring to be carried out. It reviewed the situation in late 2018. It agreed there was a subsidence problem. But it didn't think the problem had been caused by a construction defect, so it didn't agree to cover the claim.

Mr and Mrs H took expert advice during 2019 and shared this with Amtrust. They thought this supported their position that the foundation was defective and had caused damage. They noted a nearby Oak tree was present prior to construction and thought this had caused the subsidence problem. They said the foundation was defective because it hadn't been designed to withstand the impact of the Oak tree.

Amtrust said a group of Leyland Cypress trees had been removed in 2017 and since then the monitoring had shown the property was stable. So it thought the Cypress trees were the cause of the subsidence problem and not the Oak tree. As the Cypress trees were planted after construction, the foundation design couldn't have taken them into account. Amtrust didn't think it had been shown the subsidence damage was the result of a construction defect. Because of that, it declined the claim. It accepted the evidence provided by Mr and Mrs H was 'compelling' but said its Technical Manual doesn't set out a method to determine the exact foundation depth required when building near trees.

Mr and Mrs H referred their complaint to this service. Our investigator didn't think it should be upheld. He thought Amtrust had shown the damage was caused by the Cypress trees, rather than the Oak, and that wasn't something the design could have taken into account. And as a result, it was fair for Amtrust to decline the claim.

Mr and Mrs H disagreed and provided further information, including:

- Further monitoring data
- Evidence from the loss adjuster appointed by X to consider the claim under the buildings insurance policy
- A new structural engineer report

Our investigator wasn't persuaded to change his mind.

An agreement couldn't be reached, so the complaint has been passed to me.

My provisional decision

I recently issued a provisional decision in which I said:

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

This complaint is solely about Amtrust and whether it acted fairly when it declined Mr and Mrs H's claim under their new home warranty. So I haven't considered the way X handled the separate claim under the separate buildings insurance policy.

There are numerous expert reports and investigations, gathered over a number of years. Whilst I've read and considered everything, I won't comment specifically on each and every piece of evidence provided. I'll focus on the points that I consider are key to the outcome of the complaint.

I'll summarise the parts of the warranty document that are relevant to this dispute and set out what that means.

Policy cover

Section 3.3, the structural insurance period, provides cover for 'rectifying work to the housing unit which has been affected by major damage'.

The phrase 'major damage' means physical damage caused by a defect in the design, workmanship, materials or components of the structure of the housing unit. The structure includes the foundations.

In summary, that means the warranty covers damage if it can be shown:

- There was a defect in the foundation design, *and*
- That defect has caused the damage

The dispute in summary

There's no dispute the house has suffered damage. But there's disagreement about whether both the points above have been fulfilled – what caused the damage and whether it's the result of a defect in the foundation design.

Three areas of vegetation have been implicated in causing damage to the house – the Oak tree, a group of Cypress trees, and other vegetation that was removed to develop the site prior to construction.

The Cypress trees were planted by a neighbour after the house was built. That means the design of the foundation couldn't have taken them into account. And it wouldn't amount to a defect if the foundation wasn't deep enough to withstand the impact of them. So if these trees are the sole cause of the damage, both points haven't been fulfilled and it would be fair for Amtrust to decline the claim. Amtrust says this is what happened.

The Oak tree was present when the house was built. And the other vegetation had been removed shortly before construction. So both of these areas should have been taken into account when designing the foundation. If they weren't, that may amount to a defect. And if that has caused some damage, both points have been fulfilled and Amtrust should accept the claim. Mr and Mrs H think this is what happened.

I'll review the expert reports and investigations and go to consider whether both points have been fulfilled.

Expert reports and investigation

Mr and Mrs H have provided evidence gathered by the loss adjuster for X in 2017.

The loss adjuster carried out investigations to establish the foundation was 1,500mm deep and built on clay. Root samples were found beneath the foundation, to a depth of 2,100mm and identified as Cypress and Oak. The loss adjuster concluded the property was suffering from subsidence due to tree root induced clay shrinkage from the Oak and the group of Cypress trees. It went on to say that guidelines provided by a certain builder of new homes, N, recommended a foundation depth of at least 2,450mm to account for the Cypress trees. It didn't say what recommendations N would have made for the Oak tree alone.

The loss adjuster's involvement ended shortly after this, when the claim under X's policy was declined and Mr and Mrs H got in touch with Amtrust. But at this stage they had identified both the Oak and the group of Cypress trees as contributing to the subsidence problem and causing damage.

Amtrust setup monitoring in 2017 and initially took readings until late 2018. During that time, it took advice from a structural engineer I'll refer to as S.

S initially said it wasn't entirely convinced the damage had been caused by subsidence and recommended further investigation. But it said the Oak tree would have been the most important factor when designing the foundation. And using the guidelines of N, the foundation should have been at least 1,950mm at the front left corner to account for it.

As readings were collected during 2018, S reviewed them and the results of other investigations. It produced a second report late that year. I don't think any of this has been shared with Mr and Mrs H.

S said the investigations showed the clay subsoil was very dry and 'considered to be desiccated having been affected by the nearby Oak tree'. It said there was 'no doubt' the movement was related to the impact of the Oak tree on the clay subsoil and made recommendations for how to put that right.

It concluded the foundation was inadequate to take into account the Oak tree based on the guidelines of N. It noted Amtrust had more recently introduced guidance for foundation depths and these also showed the foundation to be inadequate, although this guidance didn't apply at the time of construction. Lastly, S noted a trend of upward movement in the monitoring. It said the foundation didn't have heave protection and warned heave could be problematic and should be considered subject to further monitoring.

Amtrust sought a second opinion and asked a chartered surveyor, R, to consider the matter. It agreed there had been a subsidence problem. It said this was due to the

'combined effect of all the nearby vegetation, the dry weather, and the depth of the foundation'. It didn't go on to comment specifically on whether the Oak was contributing to the problem or not – nor whether the foundation was adequate or not.

Mr and Mrs H sought advice from V, a structural engineer, in 2019. It inspected, gave an initial report, arranged for further investigation including an arborist report and distortion survey, and then produced a second report in 2020. In summary it said:

- The evidence showed there had been subsidence and upward movement. Because the level monitoring hadn't been carried out relative to a fixed reference point, it was difficult to be certain exactly what movement had occurred. But relative to each other, the monitoring points showed the property sloping from right to left – toward the Oak tree – and this distortion had likely occurred after construction.
- Previous investigations had confirmed the foundation was 1,500mm deep. It should have been at least 2,000mm deep to take the Oak tree into account.
- Trees that had been felled prior to building the house could account for the upward movement. Anti-heave measures should have been taken into account when designing the foundation.
- It thought the damage was too widespread to have been caused by the Cypress trees alone. Had they been the sole cause, recovery and stabilisation would likely have followed their removal. But the monitoring showed continued movement.

An arborist agreed with the findings related to the trees and their likely impact on the property.

Amtrust responded to Mr and Mrs H's complaint in early 2020. It agreed there had been subsidence and upward movement, which it said was due to ground recovery following the removal of the Cypress trees in 2017. It said the crack monitoring hadn't shown any significant movement, showing the property to be stable for 33 months. As the Oak tree remained in place during this time, it thought this showed the Oak wasn't having an impact and the Cypress trees had been shown to be the cause of the subsidence problem.

Monitoring recommenced soon after and I've seen a further year of level readings up to early 2021 and a couple of crack readings. There's been little change to the crack widths but persistent upward movement in the level monitoring.

I haven't seen expert commentary on these more recent readings. But I do note comments made internally by Amtrust much earlier in the claim about factors to consider:

- N's guidelines recommended a minimum foundation of 1,950mm.
- Heave protection should have been added.
- The foundation was designed by an engineer with heave protection – but this wasn't how it was built.
- When the foundation was installed, a significant amount of Oak tree roots would have been cut, leading to heave forces acting on the foundation.

And, after further monitoring:

- The upward trend in 2018 could be recovery – but it could also be upward heave movement near to the Oak tree.

- If the upward movement continued beyond 2018, it would suggest heave from the severed Oak tree roots.
- Level monitoring should have been setup with an independent reference point.

Was there a defect in the foundation design?

There seems to be broad agreement amongst the experts that the foundation was inadequate.

The loss adjuster for X based that judgement on the Cypress tress, which the design couldn't have taken into account, so I've disregarded their findings on this point.

S and V both thought the foundation ought to have been around 2,000mm deep and internally Amtrust seems to have agreed with this too. Similarly, there's agreement that heave protection should have been included. It's unclear what R's opinion on this is but it hasn't put forward an argument to say why the foundation was adequate.

Amtrust says the judgements of S and V are based on the guidelines of N – which don't strictly apply to Amtrust. It has its own set of guidelines. At the time of construction that didn't include specific foundation depths. It later produced this kind of guidance. S considers the foundation inadequate by those standards – although they didn't strictly apply at the time.

Amtrust has shown that at the time of construction, it used a Technical Manual which set out many standards for building. Whilst there weren't specific foundation depths, there were other relevant guidelines. These include:

- All work undertaken shall comply with all relevant Building Regulations, including designing and constructing the foundation in accordance with Requirement A2
- Design and specifications shall provide a satisfactory level of performance
- Foundations shall be designed and constructed so that they are suitable for the size, form of construction and location of the Housing Unit in relation to the nature and load-bearing capacity of the ground and site conditions
- Foundations should be designed and constructed to allow for possible movements in the ground caused by swelling or shrinkage of the subsoil, or subsidence, due to the weather, the presence of trees or some other cause

At the time of construction, Requirement A2 said something similar to the final bullet point above. The Regulations go on to give guidance about how to achieve this. Amongst other things, it says foundations in clay soil should be at least 750mm deep but will commonly need to be increased. It says this should be to a depth where anticipated ground movement will not impair the stability of the building, taking due consideration of the influence of vegetation and trees.

Regulations don't specify *how much* deeper the foundation should be. That's a judgement for the designer to make based on the specific conditions of the site. I haven't seen any evidence to show why 1,500mm was thought to be sufficient to take into account the Oak tree and other recently removed vegetation.

The evidence shows the experts consider this depth was inadequate. They've used guidance they think is reasonable in order to make a judgement about the

appropriate foundation depth in the particular circumstances of this site. I haven't seen any alternative expert judgements.

Overall, I'm satisfied the evidence shows the foundation was inadequate and amounts to a defect in the design. That means the first point has been fulfilled.

Did that defect cause the damage?

To recap, the opinions of the experts are:

- The loss adjuster for X thought the Oak and the Cypress trees were both contributing to subsidence due to an inadequate foundation
- S thought the Oak tree was causing subsidence and there may be a heave problem caused by the foundation
- R noted that *all* vegetation and the foundation depth were contributing to the subsidence problem
- V said the Oak tree was the main cause of subsidence and noted a heave problem with the foundation
- Internally Amtrust acknowledged a potential heave problem with the foundation which continued monitoring seems to support

I'm satisfied the weight of expert opinion points firmly to the inadequate foundation causing damage – possibly by subsidence, heave or some combination of the two – as the Oak tree is thought to have caused at least some damage. And it may be the dominant cause. Overall this means the defect has caused damage – and that fulfils the second of the two points.

Amtrust took a different view when it answered Mr and Mrs H's complaint. I find it hard to reconcile that view with the expert evidence. In part its position was based on the monitoring showing stability over a prolonged period of time. But this isn't supported by the evidence.

Whilst the crack monitoring hasn't shown the amount of movement usually considered to be significant, the level monitoring has. In late 2018 all points were showing upward movement relative to point one, some by around 7mm. In the more recent readings, that had increased for all points, particularly those on the left side of the property, and some by more than 10mm. Point five, on the left side, had increased by over 15mm. The trend for upward movement was continuing and hasn't shown signs of levelling out. In my experience, most structural engineers find level monitoring more precise and insightful than crack monitoring. So I'm not persuaded the level monitoring can be disregarded.

Because of this, I'm not satisfied the monitoring shows stability. On the contrary, it shows continued movement. After removing the Cypress trees, a degree of upward movement is expected as the ground recovers, rehydrates and swells. The monitoring shows upward movement taking place three to four years after removal of the trees, which is an unusually long period of time. I'm not satisfied Amtrust has adequately explained how the monitoring evidence supports its position.

Putting things right

For the reasons given above, I'm not satisfied it was fair for Amtrust to decline the claim. It should now accept the claim.

It will need to take steps to determine the cause of the movement. Amtrust should bear in mind it's required to carry out a lasting and effective repair of the damage caused by the defect. That means ensuring the building is stable and then carrying out suitable repairs.

I've considered the history of the claim and I'm satisfied Amtrust should have accepted it much earlier. It had a thorough report from S, based on investigations, and the other internal comments I've noted in late 2018. Despite that, it turned to R, which didn't add meaningful to the available information. Amtrust received further detailed information from V, based on further investigations, in 2019, but still chose to decline the claim. Its reasoning was inconsistent with the evidence gathered and the weight of expert opinion.

Because of this, I'm not satisfied Amtrust treated Mr and Mrs H fairly and reasonably in the way it handled the claim. It caused avoidable delays reaching the stage of accepting the claim in the order of 2-3 years.

During that time Mr and Mrs H have seen the damage get worse and faced the uncertainty of when it will be dealt with and how it will be paid for. They've understandably been concerned about the stability of their home and the impact the damage has on their ability to remortgage and/or sell it in the future. Whilst a claim of this nature will inevitably cause a degree of distress and inconvenience to the owners, the way Amtrust has handled this claim has unnecessarily increased that significantly and over a prolonged period of time. For that reason, I think Amtrust should pay compensation to Mr and Mrs H. I'm satisfied £2,500 is reasonable and proportionate in the circumstances.

Mr and Mrs H have also spent money gathering expert advice. I understand they paid for V's reports and associated distortion survey and arborist report. Had Amtrust relied on the expert evidence it already had, it wouldn't have been necessary for Mr and Mrs H to pay to show their claim was covered. And more recently they've paid for a further expert report to support their position. I haven't included it in my findings because I don't think Amtrust have seen it and had the chance to comment on it.

I think Amtrust should reimburse Mr and Mrs H the cost of those reports. They should provide the invoices in response to this provisional decision. And because they've been without the money unnecessarily, Amtrust should add interest when it makes the payment.

Responses to my provisional decision

Mrs and Mrs H responded and said, in summary:

- They support the conclusions I reached.
- From the outset, they felt Amtrust was focused on declining the claim and hadn't taken a fair and honest approach – particularly as some of the expert evidence I relied upon hadn't previously been shared by Amtrust.
- As a result of the way the claim has been handled, they have no confidence in Amtrust and R. They're concerned about the next steps for the claim, noting the work to design and implement an effective solution will be significant.

Amtrust 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 Mr and Mrs H accepted my findings and Amtrust didn't respond, I see no reason to change my mind or comment on those points any further.

I'll focus on the points made by Mr and Mrs H in response to my provisional decision.

I understand why they feel let down by Amtrust. It had the opportunity to reach this stage of the claim much sooner, which would have avoided a great deal of distress and inconvenience for them. It also had the opportunity to be more open with them about the expert information it had gathered and the impact this had on the claim.

Amtrust have a duty to treat their policyholders fairly and they failed to fulfil it here. I remain satisfied my award, including significant compensation, is a fair remedy for what happened.

But it's important Amtrust takes this duty into account when it handles the remainder of the claim. As Mr and Mrs H have noted, the problem and the steps to put it right may be significant. So Amtrust will need to act fairly, promptly and openly to restore Mr and Mrs H's trust and ensure the claim progresses in an appropriate way.

If Mr and Mrs H have further cause for complaint about what happens next, they'll be entitled to do so. But I would expect Amtrust to take steps to ensure that's not necessary.

It wouldn't be appropriate for me at this stage to dictate exactly what should happen next. Both parties will need to work together to progress the claim. But Mr and Mrs H would like to be involved in deciding who is appointed, and I understand they have individuals in mind.

So I think it would be reasonable for Amtrust to take into account any suggestions Mr and Mrs H would like to make. Given the way Amtrust has handled the claim, it should be open and clear with them about the next steps and any relevant information gathered. It should also bear in mind they've lost faith in R and consider appointing a different individual.

As part of handling the claim fairly and reasonably and ensuring a lasting and effective repair of the damage caused by the defect, Amtrust should rely on suitably qualified and experienced individuals. In a claim like this, that would usually mean paying for a chartered structural engineer with relevant experience in resolving building movement problems.

The next steps will be for Amtrust to determine the cause of the continued movement resulting from the defect – and what the appropriate solution is to stop the movement – then repair the damage caused by the defect.

My final decision

I uphold this complaint and require Amtrust Europe Limited to:

- Accept the claim
- Reimburse the cost of the reports, subject to receipt of the invoices
- Pay simple interest at 8% per year on each invoiced amount, from the date each one was paid by Mr and Mrs H until the date this award is paid to them
- Pay £2,500 compensation

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr H and Ms H to

accept or reject my decision before 11 July 2022.

James Neville
Ombudsman