

The complaint

Mr and Mrs H are unhappy Society of Lloyd's ("SOL") has declined a claim they made under their home insurance policy for subsidence.

Mr H has primarily dealt with the claim and complaint, so for ease I will refer to him only.

Reference to SOL includes its agents and representatives.

What happened

The circumstances of this complaint aren't in dispute, so I'll summarise the main points:

- Mr H got in touch with SOL in 2020 to make a claim. Earlier that year, in the process of selling the house, a subsidence problem was discovered to the kitchen extension.
- SOL appointed a loss adjuster and carried out ground investigations. It said they showed the depth of the extension foundation was 0.98m. SOL thought they ought to have been deeper, noting the standards of a builder of new homes, N, suggested a minimum of 2.3m in the circumstances.
- SOL said this meant the claim was declined as the policy didn't cover subsidence damage caused as a result of faulty design.
- Mr H didn't think this was fair. He arranged for his own investigation, which showed the foundation was much deeper – 2.2m based on the current ground level and 2.3m based on the ground level at the time of construction. He also provided information, including planning and approval documents relating to the extension.
- SOL maintained the claim should be declined. It said the planning documents required a foundation depth of 2.5m and this hadn't been met.
- Our investigator didn't think SOL had acted fairly. She wasn't satisfied SOL had shown the damage had occurred as a result of faulty design. She recommended SOL reconsider the claim and pay the cost of the report Mr H provided.
- Mr H accepted what our investigator said. SOL didn't. It provided a significant amount of further information, so I'll summarise the most relevant points:
 - Building Regulations require a building to be constructed to resist subsidence movement. Documentation from 2004 required a minimum depth in clay soils of 0.75m but noted this depth would commonly need to be increased.
 - The 2013 version of the documents gave similar information. SOL says it incorporated N's standards, so it was reasonable to rely on them.
 - A number of technical reference documents are available, including N's standards, Building Regulations, guidance from the Building Research

Establishment and British Standards, amongst others. All of this guidance can be applied to an extension.

- Although most people think a Building Control certificate means a building has been constructed well, this is wrong. Some Building Control inspectors may not understand the guidance well. And some builders may obscure aspects of construction so they're not inspected – or change things after the inspection.
- Whilst N's standards don't apply to a builder not working for N, they're generally good guidance for how to comply with Regulations.
- Overall, the foundation should have been 2.5m deep – but it wasn't. And whilst it was built deeper than the lowest area of roots at 2m, it was still susceptible to the influence of roots at 2.3m deep.
- Mr H responded to what SOL had said. In summary:
 - SOL's loss adjuster had visited once and relied on ground investigations that have subsequently been accepted to be incorrect. No other visits have taken place from SOL or its agents. So its knowledge of the site is limited.
 - Whether the foundation needed to meet N's standards or not, it did. The drawings didn't require it to be 2.5m deep.
 - Given the specifics of the site, it may have been practical to vary the depth of the foundation. But where both ground investigations have been carried out, a depth of 2.3m is in line with N's standards.
- As an agreement couldn't be reached, the complaint has been passed to me.

My provisional decision

I 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.

- *The policy covers damage caused by subsidence, but not when it arises from faulty design, specification, workmanship or materials.*
- *SOL accepts the kitchen extension suffered subsidence damage. It's declined the claim, saying the foundation wasn't deep enough. I understand that to mean it thinks the design or workmanship was faulty. The onus is on SOL to show why it would be fair to rely on the policy term for faulty design to decline the claim.*
- *Whilst SOL initially relied on the findings of its own ground investigation to say the foundation was 0.98m deep, it later accepted the findings of Mr H's investigation which noted it was at least 2.2m deep based on the current ground level and up to 2.3m deep at the time of construction.*
- *SOL initially declined the claim because it said the foundation depth wasn't in line with N's standards. After Mr H's investigation, it accepted the depth met N's*

standards. But it then declined the claim because it said the foundation depth wasn't in line with the planning drawings which showed a depth of 2.5m.

- *Mr H said the drawings didn't specify a depth of 2.5m. This figure was in reference to a 'typical' foundation design. And the drawings were accompanied by a range of depths. He also noted the extension had received a Building Control certificate.*
- *In SOL's response to our investigator, it noted there was a wide variety of guidance available for constructing a building, including an extension. I agree there are numerous resources a designer and/or builder could turn to for guidance. But it's for SOL to show why it thinks the foundation design was faulty, including highlighting relevant parts of regulations or guidance that applied at the time of construction.*
- *In this case, SOL has pointed to two main things – N's standards and the information in the design drawings. So that's what I'll focus on.*
- *The policy doesn't set out the standard by which to judge whether the design or workmanship is faulty. In my view, it would be fair to consider anything the design was required to take into account to meet Regulations. And whether the foundation was built in accordance with the design.*
- *At the time of the design and build, Regulations required a minimum foundation depth of 0.75m in clay, noting this will commonly need to be increased. The Regulations don't set out by how much they should be increased and don't require adherence to N's standards. How much deeper than the minimum is a judgement for the designer to make based on the specific circumstances of the site.*
- *SOL has referred to Regulation from 2013, but the extension had been built by then, so I don't think any changes at that time are relevant here.*
- *Whilst the relevant Regulation doesn't refer to N's standards, the design seems to have taken them into account nonetheless. The design shows various recommended foundation depths based on the proximity of the nearest tree – up to 2.5m if the tree is 10m away. Depths of 2.2-2.3m were given for a tree distance of 12-13m. These recommendations are consistent with N's standards. So I agree with Mr H that whether those standards were required or not, the design is based on them.*
- *The drawings show a 'typical' foundation design with a 2.5m depth. As Mr H has pointed out, this doesn't appear to be a specific instruction to build to this depth. The purpose appears to be to set out the broad foundation design. The recommendations don't specify that a depth of 2.5m must be achieved. It only notes that if the closest tree were 10m away, 2.5m would be an appropriate depth. SOL has said the tree was 12m away, so I don't think 2.5m was required.*
- *There's disagreement about the exact distance of the tree. But even by SOL's estimate of 12m, a depth of 2.3m was recommended by the design and is in line with N's standards – and that's the depth that was achieved when the extension was built.*
- *Taking all of this into account, I'm not persuaded SOL has shown the design and/or workmanship was faulty. So I'm not satisfied it's shown the policy term applies.*
- *Even if my interpretation of the drawings and recommendations isn't correct, the local Building Control office provided a certificate of completion to confirm the extension met the requirements of Building Regulations. It's clear SOL has concerns about the*

certification process. But my role is not to judge that process. And I keep in mind that it wouldn't be reasonable to expect a policyholder to judge that process either.

- SOL accepts that most policyholders would consider a certificate to show a building had been well constructed. So I think it would be reasonable for Mr H to understand that the certificate meant the extension, including its foundation, had likely been built to an appropriate standard and had passed relevant checks. I don't think there are other practical steps he could reasonably have been expected to take to ensure the extension was constructed to a suitable standard when he bought the house.
- In these circumstances, even if the design and/or workmanship were shown by SOL to be faulty, I'm not satisfied it would be fair and reasonable to decline the claim.
- That means SOL acted unfairly when it declined the claim. To put things right, it should now accept the claim. The remaining terms and conditions of the policy apply.
- Mr H took advice from a company, who I'll call A, prior to making the claim with SOL. I don't think A's report has had a bearing on the claim. In these circumstances, I wouldn't usually ask SOL to pay for the report and I see no reason to do otherwise here. So I won't be asking SOL to pay for A's report.
- But Mr H did arrange for ground investigations which showed SOL's investigations were considerably inaccurate. This had a significant impact on the claim, so I will be asking SOL to make a payment. Mr H paid £1,427.80, so I'll be asking SOL to refund him this amount.
- It's common practice when considering a subsidence claim for an insurer to carry out ground investigations. But they should be accurate and they usually take place within a matter of weeks of the claim being made. Had that happened, and the claim been accepted soon after as should have happened, the position Mr H is in now would likely have been reached around two years earlier.
- Because that didn't happen, there has been a significant delay. As a result, plans to sell the house have been postponed, the damage hasn't been dealt with, and Mr H has had to spend a lot of time dealing with the claim. I'm satisfied this has caused avoidable distress and inconvenience to Mr and Mrs H. To put that right, SOL should pay compensation. I consider £750 to be reasonable and proportionate.
- The policy had been due to renew in January 2021 but I understand the underwriter at SOL didn't offer renewal. As a result, Mr H found a policy elsewhere without subsidence cover. That renewed in 2022 and is due to do so again in 2023.
- When an insurer accepts a subsidence claim, its best practice for it to offer a renewal to its policyholder, including ongoing subsidence cover. And to extend that offer to a potential purchaser of the house when the time comes. That avoids policyholders and/or potential buyers finding themselves unable to secure subsidence cover at a reasonable cost on the open market. As the claim will now be accepted, SOL should ensure the underwriter offers ongoing subsidence cover to Mr H and to a potential purchaser in the future, in line with best practice.
- I think it's unlikely that can be organised prior to the next renewal in January 2023. If that means Mr H has to pay a cancellation fee on his current policy when moving to a SOL policy with subsidence cover, SOL should reimburse that cost to ensure he doesn't lose out financially as a result of the way the renewal was dealt with.

Responses to my provisional decision

Mr H accepted my provisional findings and proposed award, but asked for clarification on two points:

- He paid £1,427.80 for the ground investigation *and* reinstatement of the area, including removing decking and landscaping. He asked me to confirm that all these costs would be paid by SOL to avoid any potential disagreement later.
- He also asked me to provide more information about what it meant for the underwriter to provide ongoing subsidence 'in line with best practice', including what impact that might have on the premium charged.

SOL accepted some of my provisional findings and proposed award, but disagreed with other parts. In summary:

- It agreed to accept the claim, pay compensation and pay for the ground investigation.
- It said the underwriter, A, didn't 'write this class of business' any longer and the arrangement under which it had previously offered the policy had lapsed. So it wasn't possible for A to provide ongoing subsidence cover.

I got in touch with SOL to set out the key points of the Association of British Insurers (ABI) guidance on continuation of cover following a subsidence claim. I also said I saw no reason why A couldn't offer continued cover to Mr H if it chose to. But an alternative was for SOL to approach other underwriters in its marketplace to treat Mr H in the same way I thought A should. In my view, that would also put Mr H in a fair position.

SOL made a number of further comments, which I'll summarise:

- SOL is a marketplace, rather than an insurer, so it can't provide the cover itself. Nor is it an intermediary who can arrange a policy for a consumer.
- Even if the claim had been accepted, it's likely A would have removed subsidence cover at renewal anyway, so Mr H may not have been any better off.
- Neither SOL nor A had subscribed to the ABI Domestic Subsidence Agreement. And neither were ABI members.
- The ABI guidance notes that in certain circumstances, ongoing cover isn't possible. SOL said this was one such circumstance because A no longer wrote this business.

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.

- Both parties agree the claim should be accepted and compensation of £750 should be paid. So I won't comment further on these points. I'll focus on the two outstanding points.
- SOL has agreed to pay £1,427.80 for the ground investigation, so I think an agreement has been reached on this point too. But for the avoid of doubt, this

amount includes the associated work to facilitate the investigation, as well as the investigation itself.

- The main point outstanding is about continued cover. I'll explain more about the best practice I referred to in my provisional decision and consider the objections raised by SOL about my proposed award on this point.
- Once a property has suffered subsidence, it's usually significantly more difficult to insure on normal terms. Generally, consumers are likely to find insurers don't offer cover at all. Or, if they do, only at a considerably increased premium and/or excess. As a result, it can be very difficult for consumers in these circumstances to find home insurance which provides subsidence cover at an affordable price.
- That's why the ABI provides guidance to insurers within the home insurance industry about this. In summary, if an insurer deals with a subsidence claim for a policyholder, the guidance says it's good practice for the insurer to offer continuous home insurance, including subsidence cover, on reasonable terms.
- I'm aware of ABI agreements which insurers can choose to opt into or out of, such as the one mentioned by SOL. But I don't think that's the case with the guidance I'm referring to as it isn't an 'agreement' as such, it's guidance on best practice across the home insurance industry. Even if SOL and A could and had opted out of it, I would still find it fair and reasonable for the guidance to be followed by these businesses. That's because the guidance represents long-established good industry practice. And Mr H would be put to significant detriment if the guidance weren't followed. Similarly, I don't think it's relevant whether SOL or A are members of ABI – the guidance represents best practice across the industry, so I'm satisfied it would be fair and reasonable for it to be taken into account in this case.
- Had A accepted the claim and then chosen to exclude subsidence cover at the next renewal, that wouldn't have followed the guidance and it wouldn't have treated Mr H fairly. The guidance means A would have been obliged to offer subsidence cover on reasonable terms indefinitely. My proposal was for SOL to effectively put Mr H in this position – whether with A or another underwriter from its marketplace.
- The guidance notes insurers can't guarantee to maintain cover in all circumstances, although it doesn't give any specific examples. However, it says even in 'problem cases', cover should be provided wherever possible. In my view, this means insurers should offer cover unless they can present a compelling reason not to. Generally, I think a compelling reason is one that would place the risk significantly outside of the insurer's usual underwriting criteria – but not in relation to subsidence, as that's what the industry guidance is seeking to remedy.
- The guidance doesn't comment on what should happen if an insurer chooses not to operate in the home insurance market any longer. But it does say that where 'block transfers of business' occur, the transfer agreement should specify how to handle cases where continuous subsidence cover is being provided. Whilst this isn't the situation A is in, I think it shows the spirit of the guidance is for an insurer who chooses to stop providing cover to policyholders to make arrangements to ensure impacted policyholders aren't disadvantaged. So I'm satisfied there's an onus on A to either continue providing the cover or to ensure another insurer does.
- I bear in mind that the spirit of the industry guidance is to seek to maintain cover where possible. If A isn't operating in the home insurance market any longer, I can

understand why it would prefer not to provide continuous cover to Mr H. But I'm not satisfied it's *unable* to do that. And whilst I've been clear that I would find it fair for another underwriter to step into the shoes of A, SOL hasn't presented any reason why that can't be arranged. So I'm not persuaded this is a situation where it's not possible for continuous cover to be provided by an underwriter.

- I recognise that SOL isn't an insurer or intermediary. That's why I proposed to require it to approach an insurer to provide the cover. In practice SOL need not be actively involved in arranging or setting up the policy with Mr H – it only needs to organise for A (or another underwriter to effectively step into A's shoes) to offer continuous subsidence cover in line with the guidance. The underwriter or an intermediary can contact Mr H directly to take the usual steps when setting up an insurance policy.
- To put things right, SOL should arrange for an underwriter to offer continued cover to Mr H, including subsidence cover, on reasonable terms. When doing so, it must ensure Mr H is treated fairly by calculating the premium and other terms according to general underwriting guidelines and offering reasonable terms in line with good industry practice. The premium and other policy terms shouldn't be set in a way that effectively prevents Mr H from accessing continued subsidence cover. To do so wouldn't fulfil the purpose or the spirit of the guidance.

My final decision

I uphold this complaint. I require Society of Lloyd's to:

- Accept the claim, subject to the remaining terms and conditions of the policy.
- Pay £1,427.80 for the ground investigation.
- Pay £750 compensation.
- Arrange for an underwriter to provide ongoing subsidence cover as set out in my findings above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs H and Mr H to accept or reject my decision before 4 April 2023.

James Neville
Ombudsman