

The complaint

Mr and Mrs R are represented by K, a law firm. They complain that Allianz Insurance Plc has declined their claim for water damage to their commercial let property. The claim was dealt with by loss adjusters although for convenience I shall refer to Allianz throughout, unless I say otherwise.

What happened

In June 2016 Mr and Mrs R's broker reported a claim to Allianz in respect of water damage to their property. The property was insured under a "perils based" policy i.e. the property was insured against the perils (e.g. storm, accidental damage etc) listed under the Property Damage section of the policy. There were two separate areas of damage, caused by water coming into the property from different places. These were to the first and second floors, and to the basement and lift shaft/machinery. It's unclear exactly when each incident of damage took place. Mr R says both took place in early April 2016.

Allianz sent loss adjusters out to inspect the damage in late July 2016. Following that visit further information was sought from Mr R. Following receipt of that, and a further site visit Allianz declined the claim for both areas of damage in July 2017. This was because it said that there had been gradual damage in both areas – the tenants in the adjoining property said there had been a problem with the roof for a couple of years. There was an exclusion in the policy for gradual loss and there was no indication that the damage in either case was caused by a one-off incident. Allianz further said that it wasn't satisfied from the information produced that the premises were occupied by tenants at the time of the loss.

On referral to the Financial Ombudsman Service, in April 2022, our Investigator said that the damage had been going on for a long time, in respect of both areas of damage. This was evident from the photos and the extent of damage. She also said that she was not persuaded that the claim could be dealt with under the storm peril as it was not a one-off event.

K responded that the claims were not presented under the storm peril, rather as claims for water damage/ingress after heavy rain. It further pointed out that the exclusion for damage caused by gradual deterioration only applied to accidental damage (AD), not claims under the "Storm tempest or flood" peril. It argued that both areas of damage were caused by flood and as the exclusion didn't apply, a build-up of water can be a flood. K further submitted that evidence from the lift engineer that there were tenants in occupation when he visited and Mr R's accountants concerning cash payments supported the fact that the premises were occupied.

Allianz responded that the claim was not considered under AD. It said that gradually operating causes and wear and tear are a general exclusion in the policy.

Our Investigator pointed out that the "flood" peril had not been asserted before so it couldn't be addressed. K disputed this.

I issued a provisional decision. In it I said that Allianz should reconsider the claim concerning

the damage to the lift shaft/machinery and basement. But I said that Allianz acted reasonably in declining the claim for damage to the first and second floors. I further proposed to award £100 compensation.

Allianz agreed with my provisional findings.

K responded on behalf of Mr and Mrs R. It said, in respect of my findings about the damage to the first and second floors:

- I had assumed that the leak to the neighbour's roof that had been previously repaired was what caused the water damage to the first and second floors of the clients' premises. This is categorically not the case. This was a completely separate incident.
- The photographs to which I referred were taken in June 2016, two months after the incident. Therefore, it is not surprising that in those photos it looked as though the damage had been there a long time.
- The broker saying to Allianz's claims handler she thought that the loss happened a month prior to the estimate dated April 2016 is not Mr and Mrs R's recollection. The broker was not categorical in her recollection.
- It submits that there was a flood in respect of the first and second floor damage. And that for there to have been water ingress on the scale that occurred here, it is more than likely that there was a build-up of water on the roof, which eventually caused the defective sealant to fail.
- There's a previous decision by an Ombudsman colleague which involved very similar facts, where damage was caused by a build-up of water which was felt to be a flood.

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.

My relevant provisional findings are set out below in italics:

"occupation of property

I'll consider this first, as if the property was unoccupied at the time of the loss, storm, flood, escape of water and accidental damage perils are not insured.

It is vague as to when exactly the damage occurred. Mr R says in April 2016, although the evidence points to it having started earlier. The evidence about occupation of the property is:

- *copies of nine leases for different periods, the only one showing rent payable was for the lease which covers the loss date and it is the only registered lease.*
- *bank statements showing cash payments into the account from July 2015 until April 2016.*
- *A letter from Mr R's accountants dated May 2017 confirming that the cash payments into the account were rent for the property.*
- *A letter from the lift engineer in November 2022 saying that tenants were in occupation*

of the premises when he visited in April 2016.

Allianz hasn't alleged fraud or that the documents were false. It has said that there was a wide variation in rental payments so it did not accept they were rental payments.

Mr R has said that he offered concessions on the rent for the January to March trading periods, including for 2016.

I can't consider the lift engineer's statement. My decision has to be based on the information available to Allianz when it declined the claim. Having said that if I accept the documents as accurate, in particular the accountants' statement about the cash payments being rent, then they would appear to show rent being paid from July 2015 through to April 2016. I can't see that any attempt was made to contact the accountants or to take a statement from Mr R. I think on the face of there is evidence of occupation so I'm not persuaded the premises were unoccupied at the time of the loss.

the claim

All parties accept that there were two separate and distinct areas of damage although there was just one claim. These were to the first and second floors, caused by a leak through the neighbour's roof, and to the basement/lift shaft/machinery caused by a faulty gutter on a single storey lean-to which allowed water to leak into the lift shaft and build up. As there were two separate causes I'll look at them separately.

damage to the first and second floors

On the face of it Mr R says that this damage was caused suddenly by heavy rainfall in April 2016. He asserts that there was previously a small leak in the roof which was repaired. However the evidence from the loss adjuster who visited in July 2016 is that the neighbouring tenants indicated the problem with the roof had been ongoing, on and off, for two years or so. The problem was only solved by that entire part of the roof being replaced.

K have confirmed that it is not asserted that this is storm damage.

In any event I'm not satisfied that the damage only started occurring in April 2016. The discussion with the broker who lodged the claim indicated that although an estimate was dated April 2016 the damage occurred about a month before that.

In his letter to the broker in June 2016 Mr R said he had "contacted [...], the neighbour's property manager, and informed him of the problem some time ago". Whilst K has sought to explain that this referred to a smaller leak in the roof reported in January 2016, it still seems to me to indicate the problem had been ongoing for some time both prior to and after that. Further, the cost of repair (over £30,000 for both areas, the bulk being this part of the claim) and the photos taken by Mr R also indicate to me that this had been going on for a long time, not just since April 2016.

Allianz said that the damage wasn't considered as AD (contrary to the heading in the final loss adjuster's report). In any event the AD cover does have an exclusion for "Damage caused by or consisting of inherent vice, latent defect, gradual deterioration, wear and tear...." And in respect of AD cover we say that exclusion is fair and the fact of not knowing about the loss occurring is irrelevant.

As K rightly points out this exclusion applies only to AD, not, as Allianz assert, as a general exclusion to the whole policy. But there still has to be a viable claim. It's been established that "storm" doesn't apply. And although K asserts that "flood" applied here, since flood

consists of a build-up of water, and there was no such build up here, I don't think that the flood peril applies. I don't think the damage comes under any other part of the policy.

I think Allianz acted reasonably in declining this part of the claim.

damage to the lift shaft/machinery and basement

Again I think this was a gradual loss caused, in respect of the lift shaft by a build-up of water over time. K asserts that this was a flood. And while that is certainly arguable, I think it comes under the "Escape of water from any tank, apparatus or pipe" peril. And our position in that respect is that since this is from a gutter/pipe (described as "rainwater goods" in the loss adjuster's report), it is an escape of water. And again the exclusion for gradual loss does not apply to this peril. All the information was there when the loss adjuster visited, they just thought the exclusion applied to the whole policy, and the damage only became apparent when the level of water reached the electrics. I think Allianz should reconsider this part of the claim. I won't make any directions about payment for the claim as the damage (and any subsequent repairs) need to be investigated."

In respect of K's comments I have not "assumed" that the damage to the first and second floor was caused by the leak to the neighbour's roof that had been previously repaired. What I said was, taking into account the available evidence it was likely that the leak had been going on for some time. In his letter of complaint to the Financial Ombudsman Mr R said :

"Part of their roof was completely replaced, however I presume the flashing /sealant adjacent to my side wall was done at a later date because the workmen returned when I complained due to a huge downpour of rainwater entering my building causing extensive damage to the 1st and 2nd floors of my property."

I am satisfied this indicates that the damage was still occurring after the replacement of the neighbour's roof.

The problem in this case is the lack of evidence from the time Mr R says the incident took place. But I think the surrounding evidence indicates that this was a problem that had been going on for some time exacerbated by rainfall. His photos were taken more than two months after the incident. Whilst K says this explains why the damage was said to have been there a long time, Mr and Mrs R didn't make their claim until late June 2016, and no photos were taken at the time of the loss.

In respect of the broker's recollection that the loss happened a month prior to the April 2016 estimate I accept that this was not categorical. But I note it was said in June 2016, rather than Mr and Mrs R's recollection some seven years later, so is more persuasive.

K has confirmed the claim was not brought under the storm peril. And as I think this was a gradual loss for the reasons set out in my provisional findings I don't think that AD applied either. And while the damage to the lift shaft/machinery and basement should be considered under the escape of water peril, there was no escape of water from any tank, apparatus, or pipe causing damage to the first and second floors.

K says there was a flood on the roof, and the water ingress came from this flood. In support of this it has referred me to a decision by my Ombudsman colleague involving water ingress causing a flood on the roof. My view is that decision involved a flood all parties had agreed happened. It concerned whether the flood had caused the damage rather than whether it had occurred in the first place.

Here, the first intimation that there was a flood was in K's response to our Investigator's

view, in February 2023. I've seen no contemporaneous evidence e.g. photos or other witnesses, to show there was a flood, build-up of water on the roof. Indeed Mr and Mrs R's evidence at the time didn't reflect what K now says about the water ingress. If evidence is put forward long after the event then I think in order to find that the damage should be covered under the policy, it would have had to have been obvious in the first place, as with the damage to the lift/basement. But, unlike the circumstances outlined in my ombudsman colleague's decision, I don't think there is evidence to show that at Mr and Mrs R's property there was a flood on the roof.

I stand by my provisional findings, as set out above. Those findings are now final and form part of this final decision.

Putting things right

Allianz should reconsider the claim in respect of the lift shaft/machinery and basement areas subject to the remaining terms and conditions of the policy.

Mr and Mrs R didn't choose to pursue a complaint about this matter for several years. For any inconvenience caused by turning down the original claim, I will award compensation of £100.

My final decision

I uphold the complaint in part and require Allianz Insurance Plc to provide the remedy set out under "Putting things right" above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr and Mrs R to accept or reject my decision before 2 August 2023.

Ray Lawley
Ombudsman