

The complaint

R has complained about Society of Lloyd's ('SoL's') decision to decline a claim it made under a Premier Guarantee for New Homes policy.

What happened

R owns the freehold of a building which is covered by a Premier Guarantee for New Homes policy (the 'warranty').

A claim was submitted by the owners of the building in 2019 for major damage in relation to a path, underground drainage and movement in the sheet piled retaining wall (the 'retaining wall').

At that time, it was ultimately accepted that the structure of the building was not reliant on support from the retaining wall as the foundations of the building were designed to stand alone. Independent engineering consultants were appointed who concluded that the retaining wall was not part of the structure covered by the warranty. SoL then declined the claim in 2020.

R challenged SoL's decline decision, in March 2023, and said that the retaining wall and damaged path and underground drainage were part of the structure of the building in their own right and therefore should be covered by the warranty.

SoL responded to R's challenge and maintained its decline decision. SoL explained that cover would only engage if the damage was caused by a defect to a 'load-bearing wall necessary for stability.' It remained of the view that the cause of the damage to the path and underground drainage was the collapse of the non-load bearing retaining wall.

Our investigator looked into R's complaint and issued a view in December 2023 summarising the relevant warranty terms and giving his reasons for why he was not upholding the complaint. He highlighted the fact that independent engineering consultants had previously reviewed all of the evidence and concluded that the retaining wall would not come within the definition of '*Structure*' as detailed in the warranty terms and conditions. He said that in his view the reference to 'stability' was a reference to the stability of the building, not the drains. While the function of a retaining wall is to restrain soil and stabilise the ground to some extent, that does not of itself mean that it is a load-bearing wall necessary for the stability of the building. He concluded that SoL had acted fairly in declining the claim.

R did not agree with our investigator's view. It accepted that the retaining wall did not provide support to the building. However, R did not accept that the retaining wall was excluded from the definition of '*Structure*' in the warranty terms and conditions and remained of the view that the claim ought to be covered. R requested an ombudsman's decision on the complaint.

What I have 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.

R has disagreed with SoL's decision to decline its claim, on the basis that SoL has incorrectly interpreted the warranty's terms and conditions.

SoL has said that the retaining wall is not load-bearing and so does not form part of the 'Structure' that is covered by the warranty. SoL has also maintained that path and underground drainage were damaged by the collapse of the retaining wall which does not come within the definition of 'Major Damage' so is not covered by the warranty.

However, R disagreed and said that the definition of the 'Structure' included in the definition of the 'Housing Unit' which is covered, includes '*underground drainage that the policyholder is responsible for maintaining.*' As the retaining wall provides stability to the underground drainage, R says it is not excluded from the insured 'Housing Unit.'

In relation to the Premier Guarantee for New Homes warranty, SoL is not an insurer in the conventional sense. Part of its remit is to provide cover, for specified defects, during the relevant sections of cover under the warranty. So, I have first considered the warranty terms and conditions to determine whether R's claim has been fairly declined.

What the warranty covers

R's warranty is split into various sections of cover.

Section 3.3 '**Structural Insurance**' is the section that is relevant to R's claim and complaint. It states:

'The Underwriter will indemnify the Policyholder against all claims discovered and notified to the Underwriter during the Structural Insurance Period in respect of:

1. The cost of complete or partial rebuilding or rectifying work to the Housing Unit which has been affected by Major Damage provided always that the liability of the Underwriter does not exceed the reasonable cost of rebuilding each Housing Unit to its original specification;'

The warranty defines 'Housing Unit' and 'Major Damage' as:

'14. Housing Unit

The property described in the Final Certificate comprising;

- *the Structure;*
- *all non-load bearing elements and fixtures and fittings for which the Policyholder is responsible;*
- *any Common Parts, retaining or boundary walls forming part or providing support to the Structure....'*

'17. Major Damage

a) Destruction of or physical damage to any portion of the Housing Unit for which a Certificate of Insurance has been received by the Underwriter.

b) A condition requiring immediate remedial action to prevent actual destruction of or physical damage to any portion of the Housing Unit for which a Certificate of Insurance has been received by the Underwriter.

In either case caused by a defect in the design, workmanship, materials or components of the Structure or the waterproofing elements of the Waterproof Envelope which is first discovered during the Structural Insurance Period (as set out in the Certificate of Insurance).'

'Structure' is defined as:

'23. Structure

The following elements shall comprise the Structure of a Housing Unit:

- *foundations;*
- *load-bearing parts of ceilings, floors, staircases and associated guard rails, walls and roofs, together with load-bearing retaining walls necessary for stability;*
- *non-load bearing partition walls;*
- *chimneys and flues;*
- *roof covering;*
- *any external finishing surface (including rendering) necessary for the water-tightness of the external envelope;*
- *floor decking and screeds, where these fail to support normal loads;*
- *wet applied plaster;*
- *double or triple glazed panes to external windows and doors;*
- *underground drainage that the Policyholder is responsible for maintaining;*

The damage that R is claiming for is the collapsed retaining wall, the damaged path and the damaged underground drainage.

It is accepted that the retaining wall, path and underground drainage do not comprise part of the waterproof envelope. So, for R's claim to be covered under the terms of the warranty, the retaining wall, path and underground drainage first need to be considered part of the 'Structure' of the 'Housing Unit.' In addition, the repair works required to be carried out to the 'Housing Unit' would need to have been caused by 'Major Damage' for cover under the warranty to engage. I will consider these two issues separately below.

Is the retaining wall, path or underground drainage part of the 'Structure' of the 'Housing Unit'?

SoL has refused to cover R's claim on the basis that the retaining wall is not part of the 'Structure' or waterproof envelope so is not covered by the warranty at all. And SoL maintains that the damage to the path and underground drainage was not caused by a defect in the 'Structure,' rather it was caused by the collapse of the retaining wall.

R accepts that the retaining wall does not provide load-bearing support for the building. However, R says it does not need to, to be covered by the warranty terms as there is no reference to 'building' in the definitions. As 'underground drainage' is included within the definition of 'Housing Unit,' and the retaining wall provides support for the underground drainage, R maintains that it ought to be covered.

Having considered the definition of 'Housing Unit' which incorporates the definition of 'Structure' I agree that the 'underground drainage that the Policyholder is responsible for maintaining' does come within the definition of 'Housing Unit.' However, the non-load-bearing retaining wall does not.

Was the damage to the 'Housing Unit' caused by 'Major Damage'?

The damage to the underground drainage system would only be covered by the warranty terms if it were caused by '*Major Damage*.' To paraphrase the definition of '*Major Damage*' the relevant portion of the '*Housing Unit*' needs to have been damaged by a defect in the design, workmanship, materials or components of the '*Structure*.'

This is where R's claim fails. As the non-load-bearing retaining wall is not included in the definition of '*Structure*' (whereas a '*load-bearing retaining wall necessary for stability*' is included) I cannot conclude that a '*defect in the design, workmanship, materials or components of the Structure*' has caused the damage, so the requirement for the damage to have been caused by '*Major Damage*' has not been met.

R has suggested that because the retaining wall supports the underground drainage, it does come within the definition of '*Structure*.' I do not agree. Before considering whether it supports part of the '*Structure*,' such as the underground drainage, I first need to be satisfied that the wall meets the definition of being a load-bearing wall, and I do not think it does.

A load-bearing wall is commonly accepted to be a wall that is an active structural element of a building, which holds the weight of the elements above it, by conducting its weight to a foundation structure below it. It is not commonly accepted to be a retaining wall that has been designed to restrain soil and stabilise the ground, providing support to drainage beneath the ground.

So, while the underground drainage comes within the definition of the '*Housing Unit*,' this has suffered damage as a result of the failed retaining wall, not as a result of '*Major Damage*.' As the path was also damaged by the failing retaining wall, the same reasons apply. SoL has therefore fairly declined the claim in accordance with the warranty terms and conditions, so I do not uphold this complaint.

My final decision

My final decision is that I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I am required to ask R to accept or reject my decision before 20 November 2024.

Carolyn Harwood
Ombudsman