DRN-4728550

The complaint

Mr and Mrs B are unhappy U K Insurance Limited hasn't agreed to fully cover a claim on the occupiers and personal liability section of their home insurance policy.

Although the policy is in joint names as submissions have been made by Mr B, for ease I'll refer to him in this decision.

What happened

In April 2018 Mr B and UKI discussed correspondence he'd received from representatives of his neighbour. Damage had been discovered to their extension in August 2016 and the cause was believed to be clay shrinkage exacerbated by tree roots. They wanted Mr B to remove a tree on his property which they believed was partly responsible for the damage. Mr B was concerned removing the tree might cause damage to his own property. UKI says it advised Mr B to ask the representatives for evidence his tree was the cause of the damage.

Mr B told his neighbour's representatives in September 2018 he wouldn't be removing his tree as he hadn't been given assurances in relation to heave and damage to his own property. The representatives said the neighbour's insurers were preparing an underpinning scheme. In October 2019 Mr B's policy with UKI ended and he took out cover with a different insurer (L). Underpinning work at the neighbour's property was carried out between February and August 2020.

In March 2021 a letter of claim was served on Mr B by solicitors acting on behalf of the neighbour's insurer. They alleged their property had sustained subsidence as a result of clay shrinkage caused by the tree at Mr B's property. They claimed the cost of the underpinning work along with associated costs and losses relating to negligence and nuisance.

Mr B contacted both UKI and L in relation to the claim. There was discussion between them as to who should take responsibility for it but no agreement was reached. Mr B made a complaint to UKI and it issued a final response in November 2023. It said the largest element of the claim was the underpinning work the cost of which was incurred while L were providing cover. It thought any legal liability for those costs could only be because of ongoing movement and damage after October 2019 and so wouldn't be covered by its policy. But it had made a without prejudice offer to L to cover 50% of any damage and related costs which hadn't been accepted.

Our investigator reviewed UKI's policy terms and thought for cover to be provided the damage needed to have occurred while its policy was in place. In this case Mr B had notified UKI of damage in 2018 and the need for underpinning was identified later that year.
So she thought the third party was looking to claim for damage which occurred during UKI's period of insurance (and that was supported by surveys and reports carried out between 2016 and 2019). As a result she thought UKI should be responsible for 100% of the claim.

UKI didn't agree. In summary it said

- Having considered relevant case law it thought any legal liability for damages on the part of Mr B for the cost of underpinning works would arise when those costs were incurred and a legal cause of action for those costs by way of damages would crystallise at that time.

- As such the legal liability for damages that Mr B might have to his neighbour for those underpinning costs could only arise at the point in time when these costs were incurred which is when L were on cover.

- But it's policy would provide Mr B with an indemnity for his legal liability for damage to the neighbour's property that happened within its period of insurance (up until October 2019).

- Rather than have the issue of Mr B's legal liability for the underpinning costs determined by the courts it was prepare to stand by the offer it had previously made to L that each should indemnify Mr B for 50% of any damages and costs awarded against him and 50% of the costs of defending the claim going forward. And it thought it had acted fairly and reasonably in making that offer.

I can see it's expanded on that position in previous correspondence with Mr B where it said:

- Underpinning is to stop ongoing movement and to prevent further damage. It isn't carried out to repair existing damage to a property. And a claim can't be pursued for those costs until they're incurred.

- In support of that it cited the case of Delaware Mansions Ltd v Westminster City Council which found the owner of the building was able to pursue a claim despite having not been the owner of the property at the time that all the damage occurred.

- Its policy responded to legal liability for damages for damage to property that occurred during the period of insurance. And in this case the claimant had an actionable claim for nuisance every time there was damage to their property.

- The cost of the underpinning works was related to ongoing damage at the time and to prevent future damage; they wouldn't be required if the movement of the property had ceased. So as they related to ongoing damage which had taken place after October 2019 any legal liability for their costs wouldn't be covered by its policy.

So I need to reach a final 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.

The relevant rules and industry guidelines say UKI has a responsibility to handle claims promptly and fairly. And it shouldn't reject a claim unreasonably.

I've looked first at the terms and conditions of Mr B's policy. The Occupier's and Personal Liabilities section says:

"We will pay all amounts you become legally liable to pay as damages in your capacity as occupier of your home, or for any other reason, as a result of: a) accidental death of or bodily injury to any person; b) accidental loss of or damage to property, which happened during the period of insurance shown in your schedule". In addition the policy says it will cover "*costs, expenses and legal fees for defending you so long as we have agreed to do so in writing beforehand".*

I've thought first about whether it's appropriate for me to determine this complaint. I understand the claim against Mr B hasn't been progressed to date. So he hasn't yet become legally liable to pay any damages. However, UKI hasn't made any arguments on this point. And while Mr B's legal liability may not have been established the policy also provides for legal representation to defend a policyholder. As a claim letter has been issued there is the potential for Mr B to require assistance from his policy even if more formal legal action isn't progressed. Given that I think it is appropriate for me to decide whether that's something UKI should be responsible for providing in line with the terms of its policy.

UKI has accepted the policy would cover legal liability arising from damage to property which happened during its period of insurance. I think it's also agreed that the key issue here relates to the cost of the underpinning work carried out by the neighbours as that, and associated costs, comprise the main elements of the potential claim against Mr B.

UKI's position on that is the underpinning was required as a result of ongoing damage which didn't occur during its period of cover. I've carefully considered that point. I've also read the House of Lords judgement on the Delaware Mansions Ltd v Westminster City Council which UKI has cited. The focus of that case was on whether the new owner of a property was entitled to recover reasonable remedial expenditure relating to damage which occurred before they obtained the freehold of the property. The House of Lords concluded that they were on the basis there was a continuing nuisance of which the defendant knew, or ought to have known.

UKI says a claim couldn't be pursued for the cost of the underpinning works until those costs were incurred. And that was during L's period of cover. I appreciate that, as the Delaware Mansions judgment established, there could be a continuing nuisance (which in both that case and this is the ongoing presence of a tree and its alleged impact on the property in question). But the Delaware Mansions case related to whether a new owner was entitled to recover the costs of remedial work relating to damage caused prior to their ownership. It didn't involve a claim on an insurance policy. So I don't think there's a direct read across to the position in relation to Mr B's complaint.

I think the key issue here is whether UKI's policy covers the claim made against Mr B. And the primary cover provided by the policy is for "*all amounts you become legally liable to pay as damages".* And that's in relation to "*damage to property, which happened during the period of insurance"*. So that's the test to apply when deciding whether UKI is responsible for this claim or not.

I appreciate the underpinning works wouldn't themselves constitute repairs as their purpose would be to prevent further movement of the property by stabilising it. UKI has also suggested those underpinning works were related to the ongoing damage from October 2019 which was after it's period of cover had ended. But I think the question here is whether the damage to property which necessitated those works took place during UKI's period of insurance regardless of whether any associated nuisance (the continued presence of the tree) then continued into L's period of cover.

I don't think the available evidence supports UKI's position on that. A report accompanying the letter Mr B was sent by his neighbour's representatives in September 2017 (and dated

November 2016) said "*damage has occurred due to clay shrinkage subsidence. This has been caused by moisture extraction by roots altering the moisture content of the clay subsoil, resulting in volume changes, which in turn have affected the foundations*". It went on to say "*In the event the trees cannot be removed and movement progresses, then it seems little alternative exists other than to install a scheme of foundation stabilisation*".

The letter before claim sent to Mr B in March 2021 said "*clearly removal of [your tree] as recommended by the arboriculturalist would have enabled costs to be mitigated and avoid the potential of underpinning*". And it said "*the decision to underpin the property was notified to you on 06/09/2018 with underpinning commencing thereafter. It is therefore submitted that pursuant to Jones (Insurance Brokers) Limited v Portsmouth City Council (2002) you were given adequate notice and opportunity to undertake the identified preventative measures before the contract to underpin was entered into*".

So the claimants were arguing from the outset that Mr B's tree was causing damage and if he didn't remove it then underpinning would be required. I appreciate that work wasn't carried out until after UKI's period of cover ended but the claim against him alleges that it was a consequence of his decision not to remove the tree (which he told his neighbours about in September 2018 – during UKI's period of cover) that meant underpinning was required and a scheme drawn up.

I can also see there does appear to be a long standing history of subsidence at the neighbour's property which is referenced in the initial report Mr B was sent. Given that it may be that even if Mr B had removed his tree when the neighbours approached him then underpinning would still have been required. That may well call into question to what extent Mr B bears any responsibility for that work. But that's an issue which relates to the merits of the claim against him. I don't think it's one that impacts on which insurer should take responsibility for it.

In fact if underpinning would have been required regardless of whether he'd removed the tree in or after April 2018 that supports the argument that it wasn't the ongoing damage it was allegedly causing (after his policy with UKI ended) that meant there was a need for that. And so that would also suggest the claim relates to damage which was (allegedly) incurred during UKI's period of cover.

I can see in correspondence there's been reference to the Association of British Insurers (ABI) domestic subsidence agreement. UKI's representatives, while accepting it doesn't apply to this situation, thought it might provide useful guidance from which to draw parallels. On that basis they argued L should take responsibility because the claim had been made more than a year after the inception of the new policy.

I understand UKI isn't a signatory to that agreement. And I agree it wouldn't directly apply to this situation in any event. But even if it was fair to apply the principles it contains I don't think that supports UKI's position. The agreement says "*Where the Date of Notification is one year or more from the date of inception of the current Insurer's policy, any claim shall be accepted and dealt with by the current Insurer and no contribution shall be requested from the previous Insurer*".

UKI's representatives say as the letter before claim was received in March 2021 that supports its view that L should deal with the matter. But '*Date of Notification*' is defined in the agreement as "*The date on which the written or verbal communication notifying the damage and/or claim was first received by the current or previous Insurer or such Insurer's agent*". In this case I think it's clear the damage was first notified to Mr B in the letter he received in September 2017 and he contacted UKI about this in April 2018.

I appreciate that guidance to the agreement draws a distinction between the date a claim was registered and when advice was sought. But as UKI does appear to have been aware from at least April 2018 that a potential claim for damage had been made raised with Mr B, I think it's arguable that would nevertheless constitute "*verbal communication notifying the damage".* And so that would mean this is a claim UKI would be responsible for.

I recognise UKI has made an offer to share responsibility for the claim with L. But for the reasons I've explained I think the costs of the underpinning work are linked to damage which is alleged to have occurred during its period of cover. So it should be responsible for considering 100% of costs which relate to that (in line with the remaining terms and conditions of its policy). Of course, if the details of any claim made against Mr B contain elements of damage which clearly took place after UKI's period of cover ended, that isn't something it would be responsible for.

My final decision

I've decided to uphold this complaint. U K Insurance Limited will need to put things right by doing what I've said in this decision. Under the rules of the Financial Ombudsman Service, I'm required to ask Mr B and Mrs B to accept or reject my decision before 7 June 2024.

James Park
Ombudsman