DRN-4795667

## The complaint

Mr K and Ms Y complain about Acasta European Insurance Company Limited's decision to turn down their structural defects insurance claim.

Any reference to Acasta includes the actions of its agents.

## What happened

Mr K and Ms Y hold a ten-year structural defects policy with Acasta which started in 2019. They made a claim after a slope of land beyond the boundary of their property slipped and damaged their fence. They thought there should have been a retaining wall there and were concerned about the long-term stability of their property.

Acasta assessed the claim, but turned it down. It said there was no major damage to the property, as required under the warranty for a claim to be successful.

Mr K and Ms Y then raised several other concerns about the property. Acasta said none of those issues would be considered major damage.

Mr K and Ms Y were unhappy that their claim had been turned down, and that they hadn't been told Acasta's loss adjuster thought they should engage the services of a structural engineer to offer recommendations for the stability of the nearby slope. They sent Acasta their engineer's report from March 2023. However, Acasta didn't change its claims decision, and so Mr K and Ms Y brought a complaint to the Financial Ombudsman Service.

I issued a provisional decision on 12 April 2024. Here's what 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 warranty*

*The warranty explains the property is insured against Major Damage caused by a structural or latent defect during the course of construction (section two). The warranty also insures against the cost of removal or containment of Contamination (section three).*

*Section two of the warranty says:*

> *'The Insurer will indemnify the Policyholder against all claims discovered and notified to the Insurer via the Scheme Administrator during the Structural Insurance Period in respect of the cost of complete or partial rebuilding of or rectifying work to the Residential Property which has been affected by Major Damage…'*

*Words in bold have a specific meaning within the policy.*

*'Major damage' is defined as:*

*'a) Destruction of or physical damage to a load bearing element of the Residential Property caused by a defect in the design, workmanship, material or components of the Structure which adversely affects the Residential Property's structural stability, resistance to damp and/or water penetration' or*

*b) A condition requiring immediate remedial action to prevent damage to a load bearing element of the Residential Property which adversely affects its structural stability, resistance to damp and/or water penetration; or*

*c) A condition requiring immediate remedial action to prevent imminent danger to the health and safety of the occupants caused by a defect in the design, workmanship, material, components of the Structure or failure of the Developer to comply with Building Regulations in respect of chimneys or flues'*

*'Structure' is defined as:*

*'The following elements shall comprise the Structure of the Residential Property:*

*a) Foundations;*
*b) All load-bearing structures essential to its stability or strength including parts of ceilings, floors, staircases and associated guard rails, walls and roofs, together with retaining walls;*
*c) Roof covering;*
*d) Any external finishing surface (including rendering) necessary for the water-tightness of the Waterproof Envelope;*
*e) External windows and doors that contribute to the stability of the Structure;*
*f) Floor decking and screeds, where these fail to support normal loads.*
*g) Non load bearing partition walls.*
*h) Chimneys and flues.'*

*I understand there's been some discussions between the parties about the correct policy wording. The wording Mr K and Ms Y have provided (which I'll assume applies unless Acasta tells me differently in response to this decision) includes an automatic extension to section two. This says:*

*'The Insurer will indemnify the Policyholder in respect of the cost of repairing, replacing, rectifying and/or making good the residential property where such repair, replacement or rectification cost is the result of a present or imminent danger to the physical health and safety of the occupants of the Residential Property because the Residential Property does not comply with Building Regulations which were applied to the construction, conversion or refurbishment in relation to the following:*

*a) Part A – Structure; and/or*
*b) Part B – Fire Safety; and/or*
*c) Part C – Site preparation and resistance to contaminants and moisture; and/or*
*d) Part J – Combustion appliances and Fuel Storage systems; and/or*
*e) Part K – Protection from falling, collision and impact; and/or*
*f) Part N – Glazing – safety in relation to impact, opening and cleaning*

*The insurer will not be liable for any claim in respect of site preparations and resistance to moisture relating to ground that is outside the foundations of the Residential Property.'*

*<u>The nearby slope of land</u>*

*After Mr K and Ms Y bought the property, they arranged for a survey to take place by a RICS valuer (Mr A). Mr A said there was no retaining wall to the right or rear elevation and the fences were loose, with the grounds subsiding down the bank. Mr A recommended that a structural engineer's report be commissioned to put together a design to adequately retain the ground.*

*After Mr K and Ms Y made a claim, Acasta's loss adjuster carried out an inspection. They said the damage involved the landscaping surrounding the premises, including a small area of communal paving to the front, the side shingle path and a grassed area to the rear. This damage was due to the failure of the adjacent bankside which was slipping. They said they didn't identify any evidence of structural damage to the main house, and so didn't think the claim was covered. The loss adjuster also said they didn't anticipate any immediate action being required to prevent damage to a load bearing element of the property, and didn't think there was an imminent danger to Mr K and Ms Y's health and safety. They thought Mr K and Ms Y should engage the services of a structural engineer to inspect the site and offer recommendations for achieving long-term stability of the bank.*

*I note Mr K and Ms Y are unhappy that Acasta didn't tell them its loss adjuster thought they should engage a structural engineer, however, they'd already been given this advice by Mr A.*

*Mr K and Ms Y arranged for a chartered engineer (Mr D) to carry out an inspection in October 2021. Mr D said there was a steep slope beyond the northern boundary of the site with a fence at the crest of the slope. He said the fence was uneven and leaning out towards the slope, and there were numerous locations along the fence where there were depressions in the ground with gaps between the bottom of the fence and the ground. Mr D said there was a semi-circular crack in the ground along the crest of the slope which appeared to indicate some slope movement, and the western side of the crack appeared to extend under the block paving in front of the property, which had subsided and was disrupted.*

*Mr D inspected the slope. He said this was generally uneven and steep, though there were areas near the top where the slope was noticeably steeper. He observed that the roots of several trees were visible, while other trees were dislocated or had fallen over, possibly as a result of historical movement. Mr D said he inspected Mr K and Ms Y's property, and the external walls were in good condition with no significant cracks or other such defects.*

*Mr D then returned to the property in January 2023. He said the fence appeared to be more uneven and leaning out towards the slope by a greater amount compared to his initial visit. The semi-circular crack was also more noticeable. He also noticed a sub-surface void in the ground within the area bounded by the crack, which indicated there had been some ground movement in that area. Mr D also said the gaps between the bottom of the fence and the ground were more numerous and larger than before.*

*Mr D provided his conclusions on the stability of the slope. He said the stability is governed by soil strength and steepness of the slope (though other factors can affect the stability). He thought this slope, particularly the upper part, was inherently unstable. Mr D concluded the slope wasn't at risk of immediate failure, but said:*

> *"Given that the slope in its current condition is of marginal stability at best, there is a notable risk of slip failure if the conditions deteriorate. It is not possible to predict with any degree of confidence if and when this would occur, nor the extent of any slips that may develop, as the stability is affected by a number of external factors such as the weather, the extent of the tree roots and the like. It is possible that the slope could remain in its current state without notable deterioration for some time. It is equally possible that slips could occur in the short term, particularly if there is a*

*trigger such as an increased level of saturation of the slope or a reduction in the reinforcing effects provided by the roots of the trees and vegetation."*

*Mr D also said there was no evidence that the instability of the slope had undermined the foundations, or caused any damage to the property. However, he said the possibility of such issues occurring in the future couldn't be ruled out.*

*Mr D has since provided further comments, and says although he cannot say that the slope would fail immediately, he also cannot say that it won't. He also says it is his opinion that the existing instability of the slope represents a condition requiring immediate remedial action to prevent damage to a load bearing element of the property.*

*It's clear that the movement of the slope beyond the property's boundary hasn't caused any damage to a load bearing element of the property. So, for me to require Acasta to accept the claim, I'd need to be persuaded that it's more likely than not that further slips will happen to the slope which will cause damage to a load bearing element of the property (affecting its structural stability), and that immediate action is required to prevent this.*

*I think the greatest weight here should be placed on Mr D's opinion, as an engineer. Whilst I've only summarised his comments above, I have carefully considered everything he has said. Whilst Mr D thought the slope was unstable, he didn't think it was at risk of immediate failure. I appreciate Mr D thought that if conditions deteriorate then the slope was at risk of slip failure, and if that happened this could undermine the foundations of the property. But he also said the slope could remain in its current state for some time.*

*On balance, I don't think the evidence supports that immediate remedial action is required here to prevent damage to Mr K and Ms Y's property. I therefore find it was reasonable for Acasta to turn down the claim.*

*Having said that, if conditions do deteriorate and the stability of the slope worsens, then Mr K and Ms Y could well have a valid claim under the warranty before the cover ends. They should contact Acasta if that happens.*

*<u>Other issues</u>*

*Mr K and Ms Y did raise other concerns with Acasta about their property. Acasta said none of those issues would be considered major damage, as defined by the warranty. However, Mr K and Ms Y told our investigator they thought two of those issues should be covered. They thought a problem with the stairs would be considered a condition requiring immediate remedial action to prevent damage. They also thought foul water leakage would be a condition requiring immediate remedial action to prevent imminent danger to their health and safety.*

*Regarding the stairs, the loss adjuster noted the base of the stairs was visibly moving along the stringer (the vertical support board that runs alongside the stairs) and had formed a crack along the junction with the wall. They thought this might only be covered if it presented a danger to Mr K and Ms Y's physical health and safety - but this wasn't considered to be the case at that time. The loss adjuster made some suggestions about this.*

*Acasta concluded that this aspect of the claim wouldn't be considered major damage, which I think seems reasonable. I don't know if the stairs in the property are load bearing, but even assuming they are, I haven't seen any evidence to support that the damage affects the structural stability of the property, or that it presents imminent danger to Mr K and Ms Y's health and safety.*

*Regarding the foul water drains, the loss adjuster said there had been no signs of leaking drains during their inspection, and it hadn't been mentioned in a report they'd received at that time. Acasta later concluded that this wouldn't be considered major damage.*

*I see that Mr D commented on the drains, and said on his initial visit that the pump station was virtually full, and Mr K told him that had been the case for several months as the pumps were broken. Mr D couldn't detect any foul smells on that visit. When Mr D revisited the property in 2023, he said the pump station was almost full, but had been provided with two new pumps. He concluded the condition of the drains was generally satisfactory, though there were a few issues which he thought should be addressed. However, Mr D thought the pump station wasn't compliant with building regulations.*

*So whilst there were some issues with the foul water drains (and the pump station), the available evidence doesn't support that this meets the definition of major damage. Mr K and Ms Y say foul water leakage to the surface should be considered a condition requiring immediate action to prevent imminent danger to their health and safety. However, whilst Mr D thought foul water leakage might have happened when the pumps were broken, the pumps were then replaced and there's no evidence of this then happening. As the evidence doesn't suggest there was any danger to Mr K and Ms Y's health and safety, I think it was reasonable for Acasta to say the issues with the drains wouldn't be considered major damage.*

*I see that a gas safe notice was issued in respect of the boiler in 2021. It listed four defects with the boiler, two of which were not compliant with Building Regulations. Those two were – a Benchmark commissioning checklist hadn't been completed, and that the boiler required a new notification to Building Control with the correct address for the property.*

*The extension to section two of the warranty refers to a present or imminent danger to the occupants physical health and safety, because the property doesn't comply with building regulations in relation to combustion appliances and fuel storage systems. A boiler is a combustion appliance, but it seems to me that the identified defects that weren't compliant with Building Regulations wouldn't present a danger to Mr K and Ms Y's health and safety. So I don't require Acasta to do anything further here.*

*Mr K and Ms Y have also referred to some of the other issues they'd raised with Acasta, though I don't intend to list them all here. They've sent me some pictures and videos which include evidence of some cracks in the walls/ceilings, and where there had been a leak with a shower. They also say the floorboards were found to be loose.*

*Acasta's loss adjuster concluded that none of these issues would be considered major damage, and were either within acceptable tolerances or were snagging problems. Even where there's evidence of physical damage, this alone isn't enough to say there is major damage, as defined by the warranty. The information I've seen from Mr K and Ms Y doesn't support that the warranty definition of major damage has been met for any of these issues.*

*<u>Contamination</u>*

*Section three of the warranty provides cover for contamination. This is so long as certain circumstances are met, one of those being where the policyholder has been served with a statutory notice.*

*Mr K and Ms Y have sent me a Section 36 notice that was issued to them by the council. This refers to the provision of foul water drainage pumps and associated equipment, and said it appears that some Building Regulations had been contravened as a result of this work. Mr K and Ms Y think that because they've been issued with a Section 36 notice, they*

*should be covered under section three of the warranty.*

*Although the Section 36 notice is dated November 2022, it was only issued to Mr K and Ms Y in June 2023, which was after Acasta had issued its final response to their complaint on 25 April 2023. I note that Mr K and Ms Y also think the gas safe notice issued to them in respect of their boiler would be considered a statutory notice.*

*I'm not going to make a finding on whether the notices issued to Mr K and Ms Y would be considered statutory notices (as specifically defined in the warranty), or whether they may have a successful claim under section three of the warranty. That's because, as far as I can tell, Acasta hasn't considered a claim for contamination.*

*Mr K and Ms Y's solicitor mentioned contamination in a complaint letter to Acasta dated 24 April 2023. Acasta's solicitor responded after the date of Acasta's final response letter to say no particulars had been provided in relation to any contaminants or details of any statutory notice served. I can't see that this point was raised again with Acasta. Therefore, if Mr K and Ms Y want Acasta to consider a claim for contamination under the warranty, they should contact Acasta about this in the first instance.'*

I asked both parties for any further comments they wanted to make before I made a final decision.

Acasta didn't provide any further comments before the deadline we gave.

Mr K and Ms Y responded. They think Acasta ought to have considered whether there was contamination when their original claims were made. They also said that Acasta withheld a guidance report and issued a letter declining all of their claims without any context.

We also received further comments from Mr D, as Mr K and Ms Y had shared my provisional decision with him.

**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.

I explained in my provisional decision that, as far as I was aware, Acasta hadn't considered a claim for contamination.

On 24 April 2023, Mr K and Ms Y's solicitor wrote to Acasta. Their solicitor quoted some of the wording from the warranty, including the cover for contamination. Acasta's solicitor responded to say the reference to contamination wasn't understood, and that no particulars had been provided in relation to any contaminants known to be harmful or details of any statutory notice having been served, or how this related to any breach of the policy. I can't see that any response was provided on this.

So, it seems that Acasta hasn't assessed a claim for contamination, and I haven't seen that Mr K and Ms Y asked it to do so. I don't think Acasta did anything wrong by not considering whether Mr K and Ms Y had a valid claim under the contamination section of cover when the other claims were made. Mr K and Ms Y hadn't asked it to do so and hadn't provided evidence to support that they might have a valid claim under that section at the time. Therefore, if Mr K and Ms Y want Acasta to consider a claim for contamination, they should contact Acasta directly about this.

Mr K and Ms Y say that Acasta withheld a guidance report and declined their claims without any context. I assume the report they are referring to is the loss adjuster's report to Acasta. This contained the loss adjuster's opinion on each of the claims/issues raised by Mr K and Ms Y. As the report was written for Acasta, I wouldn't have expected Acasta to provide this to Mr K and Ms Y. The loss adjuster later wrote to Mr K and Ms Y and set out their reasons for declining each claim on Acasta's behalf, which is what I would expect.

I've also considered Mr D's further comments in respect of the nearby slope. Mr D says he accepts that movements of the slope to date have not caused any damage to a load bearing element of the property. He says that although he cannot say precisely if and when the slope might fail, he notes that slope failures often occur suddenly with little or no warning. And that slope failures can result in partial or total collapse of nearby structures, depending on their proximity to the slope. He thinks the uncertainty associated with the stability and potential failure of the slope is precisely why immediate remedial action is required to safeguard the property.

Mr D also says that the unpredictable and sudden nature of slope failures is a condition that requires immediate attention, and in his opinion the slope does satisfy the conditions that require the policy to respond.

I've carefully considered Mr D's comments, however I'm afraid these don't change my view on the matter. I remain of the opinion that the available evidence doesn't support that the condition of the slope is such that *immediate* remedial action (my emphasis) is needed to prevent structural damage to the property. Mr D doesn't think the slope is at risk of immediate failure based on its current condition, even though he says it's of marginal stability at best. As I mentioned in my provisional decision, if conditions do deteriorate and the slope's stability worsens, then Mr K and Ms Y may have a valid claim at that time (if this happens before the warranty ends).

**My final decision**

My final decision is that I don't uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr K and Ms Y to accept or reject my decision before 11 June 2024.

Chantelle Hurn-Ryan
**Ombudsman**