DRN-4876259

The complaint

R complains about the way Royal & Sun Alliance Insurance Limited handled a claim they made for subsidence damage on their buildings insurance policy. Specifically, it's refusal to pay for underpinning to the property.

There are three directors of R, they've all brought this complaint. R is being represented for the purpose of bringing the complaint, but for ease I've referred to all actions and comments as being those of R.

What happened

This is a long running claim, the background of which is well known to both parties, so I've provided only a summary of key events.

In the early 2000s, a subsidence claim was concluded at R's property, which is made up of three flats. Sometime later, further damage was reported. Mitigation works to trees were agreed to by the local authority in 2005 as a result of it being shown that the subsidence was caused by the local authority's trees. RSA then settled that claim in 2010.

Later in 2010 and in December 2011, R contacted RSA to report further damage to the property. RSA investigated the damage, it said the likely cause was issues with drains, as well as root ingress under the foundations. An arborist report followed in 2012. Following which a tree was removed, T1. Following a period of monitoring a further tree was removed in 2018, T2. Monitoring continued after 2018 but there was disagreement between the parties as to the stability of the building. There was also disagreement as to the required repair works. R wanted the property underpinned; RSA didn't think it was necessary and set out its proposal for superstructure repairs. At this point, R said it would go ahead with underpinning works to the property before the necessary superstructure repair works were carried out. It also made a complaint about how matters had been handled.

R's complaint was in summary that RSA should:

- meet the costs of underpinning;
- meet the costs for engineers/surveyors reports instructed by R;
- pay loss of rent for the period the property was underpinned;
- contribute to R's costs for legal and professional advice.

R said the works to underpin the property had started in April 2022, at its own expense, given light of valuation advice that the flats wouldn't pass a survey for mortgage purposes unless it had been underpinned. It said this should be reimbursed by RSA.

RSA accepted it had taken too long to progress the claim, it offered £5,000 compensation as a result. But it was satisfied it had paid what R was entitled to for loss of rent, under the policy terms, so it didn't agree to make any further payment. It said that it had shown it could provide a suitable repair to the property without the need of underpinning, so it wouldn't agree to cover those costs.

In relation to loss of rent, RSA believed it had acted reasonably. It said in relation to flat A and C it had provided cover in line with the policy terms. In relation to flat B, which had been the worst affected by the subsidence, it said it hadn't applied a loss of rent policy limit in

order to be reasonable. It said it had exceeded that policy limit in order to provide a fair period of loss of rent for flat B already, and the only period for lost rent it hadn't agreed to, was the period that the property was underpinned. It was satisfied this was fair given its view that the property didn't require underpinning.

Unhappy with RSA's response, R brought the complaint to the Financial Ombudsman Service for a review. In summary it said:

- R had lost faith in RSA's assertion that the property was stable as previous assurances made had proved to be unfounded.
- In saying the property doesn't need underpinning RSA has disregarded the history and foreseeable risks of continuing structural damage.
- The tree removed in 2018 should have been done in 2012, if not earlier. And if RSA had done so, the claim wouldn't have carried on for so long.
- RSA had managed to successfully pursue the local authority for its costs – due to the subsidence being caused by council owned trees. It says RSA refused the cost of underpinning because it hadn't included costs for those in its litigation against the local authority.

Our Investigator said under the rules that govern this Service, there are certain time limits involved. And given the length of time the claim had been ongoing, we'd only be able to consider matters which happened in the last six years from before the date of the final response letter, which was in 2022. So he reviewed matters since 2016.

Having done so, he didn't think RSA had reached an unreasonable position in its refusal to meet the costs of underpinning. He didn't think the reports provided by R showed that the property was still moving, or that the only way for RSA to carry out a lasting and effective repair was to underpin the property. He thought the expert reports provided by R focussed on the possible loss in sale value of the property, which isn't something that is covered under the policy.

R didn't accept the outcome of the Investigator. It said it was denied the right to pursue the local council for uninsured losses in tandem with RSA. And RSA did so deliberately because of the dispute over underpinning.

It also said when RSA pursued the local authority through the courts for reimbursement, an expert was noted to have said "*the location of tree T2 would, on a balance of probabilities, indicate that tree T2 was an effective and material cause of damage to the property since 2012*." So R says RSA's assertion that T2 was not initially implicated, is misleading, and it should have known that was the case when it provided its complaint response.

It also said RSA did not demonstrate, on a balance of probability, that the removal of tree T2 precluded the property from further subsidence or heave in the foreseeable future. Nor did they prove that superstructure repairs alone would solve the problem.

Our Investigator reviewed R's points but didn't agree to change his outcome. He said any complaint about RSA not inviting R to pursue uninsured losses hadn't been made to RSA, so it wasn't something this Service should consider under this complaint.

In June 2024, I issued a provisional decision on this complaint. I have copied what I said below.

As this is an informal service I'm not going to respond to every point or piece of evidence R and RSA have provided. Instead I've focused on those I consider to be key to the outcome I've reached. But I would like to reassure both that I have considered everything submitted.

There are jurisdiction rules that apply to this Service on time limits. The rules say we can't look at a complaint if it was made more than:

- *Six years after the event complained of; or if later*
- *Three years from when the customer was aware, or ought reasonably to have been aware, of cause for complaint.*

It was our Investigator's view that given the ongoing nature of the claim and R's awareness of an ability to complain, that means we can only look at issues for the six years before the final response letter was issued. But for me to be persuaded any of the complaint is out of time, I'd need to be satisfied that the event R is complaining about, not the claim itself, needed to have happened more than six years ago, or more than three years since R was or ought to have been aware it had cause for complaint. To do that it's important to examine what the complaint being brought is about.

One of R's complaint points refers to the action that RSA took in relation to trees T1 and T2 in 2012 and 2013. It says RSA should have been aware that only removing T1 wouldn't stabilise the property. So for that complaint point, essentially R has six years to complain from the date of that event (i.e. T1 only being removed) or three years from when it became aware it had cause to complain about the decision not to seek its removal at that time. Having reviewed matters, I can see T2 was later removed in May 2018, but I'm not persuaded this means R knew, in 2018, it had cause to complain about RSA's decision not to remove it earlier at this stage. The information around the influencing trees, and the likelihood of them causing damage, doesn't seem to have come to light until much later, when there was a disagreement about the stability of the property and R's representative became involved. And it seems to me a complaint was made within three years of that happening.

So that means I'm minded to say I can review all of R's complaint points, including those about RSA's decision not to remove T2 at the same time T1 was felled. I'll consider any arguments I get as to the jurisdiction in response to this provisional decision.

So I'm currently satisfied I can review the merits of R's complaint. I think the logical place to start is whether RSA made a reasonable decision not to agree to underpin the property or contribute to R's underpinning costs.

The underpinning of the property has now happened, so I've reviewed the available monitoring, and reports, from before it was underpinned to see whether RSA should meet this cost.

When meeting an insurance claim, the insurer must provide a lasting and effective repair. Underpinning a property is one way to do so, but it isn't necessary in all subsidence related claims for an insurer to do that. And we'd generally say if RSA can show it can carry out a lasting and effective repair, and that the building is stable without undertaking underpinning of the foundations, it has still met its obligations under the policy to indemnify its policyholder.

There's no dispute in this case that the main cause of the subsidence was the presence of trees, namely T1 and T2. By 2018, these had been removed, and RSA carried out monitoring to assess the impact of the trees being removed, and the buildings stability. I've seen monitoring reports from 2019 to 2021.

RSA's position on underpinning was that the property had shown to have stabilised in 2021, following the removal of T2.

Its view is that this is the normal way to deal with subsidence damage caused by nearby trees, which is to remove the cause, and then allow the property to recover and carry out the repairs to the superstructure.

R says its expert, E, didn't agree, and said in a report dated October 2021

"As previously advised the above property has been severely affected by subsidence, and is at risk from further damage, and requires underpinning to achieve stability."

Whilst R has provided comments from experts about the need for underpinning, it hasn't provided any persuasive evidence which disputes RSA's finding that the property was stable in 2021. It also hasn't provided any persuasive evidence of what further damage it is referring to, and why it thinks this is likely to happen.

R has commented that heave can continue for 15 years, even more possibly, following removal of a tree, and it can't be certain that wouldn't have happened, had the property not been underpinned in April 2022. I accept it can't be proved there wouldn't have been more heave. But I can't fairly say, based on the monitoring data I've seen, that it was more likely than not that heave would continue. I say this because the reports I've seen seem to show very minimal movement in the level monitoring beyond 2020. RSA's view was that showed the soil was recovering, and so the tree removal had been successful in stopping the subsidence. Having reviewed the monitoring reports, I think RSA made a reasonable decision that the property had reached stability such that it could move to its proposed superstructure repairs.

R says even with the monitoring showing a levelling off, given RSA's previous inaccurate assurances that the property was stable, it should at the very least contribute to the underpinning costs. I think central to this complaint point is a worry about any potential sale of the property. R has provided expert evidence from a valuer, C, who assessed the property before it was underpinned. C's view was that without underpinning the property is unsaleable.

RSA disputed that view, it said many properties in the local area had been affected by subsidence, and it remains an attractive area to live. In any event, it said any loss in market value of the property, as a result of subsidence, is excluded under the policy. I can understand R's concerns about a potential future sale, having any property affected by subsidence will likely cause a worry. But I can't hold RSA responsible for the subsidence occurring, and its responsibility is to indemnify the policyholder and carry out a lasting and effective repair. I haven't been provided any evidence that it wouldn't have been able to do that based on the superstructure repairs it agreed to. So concerns over a future sale, don't persuade me that RSA should go beyond its policy terms to assist.

Finally, R's other argument from its expert, E, on underpinning says that because the adjoining property had already been underpinned, any competent structural engineer wouldn't have pursued the local authority for tree removal for six years. It said ground recovery is inevitable post tree removal, but as the piled foundations and party wall wouldn't move, it would be inevitable that the front and rear elevations of R's property would suffer from the differential movements causing severe dislocation to foundations, walls and floor etc.

RSA's view is that adjoining an already underpinned property is not reason enough for it to carry out the underpinning of R's property. It says whatever the comments, it had been shown that tree removal had been successful in recovering the soil and stopping the movement. And as its repair schedule accounted for putting right the impact the movement had had on the structure it had taken reasonable steps.

Having reviewed matters, its clear different experts do have different views on what steps should have been taken throughout the claim. However, I consider my role is to decide whether RSA made a reasonable decision to pursue removal of the trees and not underpin the property. Having done so, I'm minded to say it did. I accept one of the engineering solutions, at any point in a claim, is to carry out underpinning. But I'm not currently persuaded by R's expert that no competent expert would recommend anything other that underpinning, when trees are the cause of the subsidence movement, even if the adjoining property is underpinned. From my own experience of dealing with complaints involving these

types of claims, vegetation removal is accepted as a legitimate means to arrest subsidence movement. As it was possible to remove the vegetation in this case, I don't think it's unreasonable that RSA pursued it.

The next related argument is that by only agreeing to fell T1 in 2012, RSA caused the claim to go on for a further six years, as it then had to remove T2 in 2018, after further movement occurred.

RSA's view is that the arborist didn't recommend T2s removal in 2012. It says it did highlight T2 as having potential to cause future damage, but that wouldn't have been enough for the council to remove it. So it said it couldn't have pursued its removal even if it had wanted to. I've seen the arborist report that recommends T1 should be felled. It does identify T2 as a potential future risk. However, I don't think I need to decide whether RSA should have done more to pursue the removal of T2 in 2012, as I don't think it will impact the outcome of this complaint. Even if I accept RSA's actions extended the life of the claim by several years, I'm not currently persuaded this means it should now contribute to the underpinning of the property, as a result of the delays.

RSA has already paid £5,000 compensation for the unnecessary inconvenience caused in how long it took the claim to conclude. Having considered our guidelines on these payments, I'm satisfied it is in line with similar awards we've made. Whilst I don't doubt this was a difficult time for the directors of R, I can only make awards where errors from RSA have caused inconvenience to the policyholder, R. So even if I accepted RSA should have done more to pursue the removal of T2 in 2012, and its failure to do so caused years of inconvenience, I'm not minded to ask RSA to do anything more to put things right.

The final point for me to consider is the loss of rental income. The policy does cover for lost rental income. There seems to be no dispute between the parties that RSA has met the policy terms in regard to providing the loss of rent to R. RSA has said it has actually gone above the policy limit for flat B, in order to be fair to the parties. So I haven't seen any evidence from R that RSA hasn't met its obligations under the policy in this respect. RSA also agreed to cover loss of rent for the six months it had estimated for the superstructure repairs it agreed to be carried out, which is fair and reasonable and in line with what I'd expect based on the policy terms.

From what I can see, the only period for which RSA wouldn't cover the lost rent of flat B was for the time it took for the underpinning to take place. R has argued that RSA should have also covered these losses. RSA said because it hadn't been shown underpinning was necessary, it wouldn't reimburse for lost rent for that period. Having considered all of the arguments, and the timeline of events, I think this was a reasonable position for RSA to reach. I've already set out above that I think it's made a fair and reasonable decision to not underpin the property. And so whist I don't doubt there was a loss incurred by R during this period, I don't consider it reasonable to ask RSA to provide cover for it.

R has asked for RSA to reimburse reports it had carried out, as well as professional fees. I can see RSA has agreed to cover some of the costs R incurred under the policy. For others it has refused on the basis that it didn't give permission for the reports to be carried out, and in any event, the reports haven't had a material outcome on the claim.

One of the reports RSA refused to reimburse, from what I can see, was R's report on how the underpinning would be carried out, I think this to be reasonable given that I don't think underpinning has been shown to be necessary for RSA to meet its liability.

Another report carried out by R was the valuation one, carried out to consider the marketing implications of not underpinning, I also consider RSA was reasonable in its refusal to refund that, given that its responsibility under the property is to repair the damage, not for it to ensure the property will sell in the future. I haven't seen evidence of any reports RSA unfairly

refused to consider, so I'm not minded to direct it to do anything differently in relation to these.

My provisional decision

My provisional decision is that this complaint hasn't been brought out of time, and I'm not going to uphold it.

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.

Neither party responded to the provisional decision. So no objection has been raised in relation to the jurisdiction of this complaint. Therefore I'm satisfied that I can consider all of the complaint points brought by R as being 'in time'.

Since I haven't received any responses to the findings I set out in relation to the merits of the complaint, I see no reason to depart from those. So my provisional findings are now those of this, my final decision.

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 R to accept or reject my decision before 25 July 2024.

Michelle Henderson
Ombudsman