DRN-5053053

The complaint

Mrs S has complained about her commercial property insurer Royal & Sun Alliance Insurance Limited (RSA). She thinks it delayed a claim and is not happy with the settlement offered, which RSA says encompasses repairs and lost rent.

What happened

Mrs S found crack damage to her building in late 2018. She made a claim and RSA had a loss adjuster visit in early 2019. It was felt there was no subsidence – the most commonly seen cause of crack damage. It was then suggested that the council may have caused accidental damage by installing street-Christmas lights, secured to the building by high-tension cables. The council were approached but weren't inclined to accept liability.

In early 2020, with the claim having stalled because of the council's position, Mrs S and RSA reviewed the policy position. Further evidence was presented by Mrs S and in October 2020 RSA accepted liability under accidental damage on the policy. The parties then began discussing what was required to settle the claim, with various experts being appointed, and there was some debate about the extent of the work required, and therefore what necessary works would cost, to resolve the insured damage.

RSA, in February 2022, put an offer to Mrs S for building repairs. It had used an engineer to report on the damage and then, by using quantity surveying tools, created three scopes to cover the different repair options. RSA felt the scope with the least work was all that was required to resolve insured damage. But it said, in order to settle matters, given the debates that were on-going about what work was needed, it would pay an average sum of the lowest and highest scope, after an 'uplift' had been applied to each to allow for things like VAT. The resultant settlement sum proposed was £127,500. Mrs S wasn't prepared to accept that – she felt reinstatement could cost as much as £1.4 million, and at least £275,000.

In the interim, Mrs S had raised a claim with RSA for lost rent. The premises in question comprise a restaurant (let at £30,000 per annum), with two offices above (let at £8,200 per annum). Seemingly Mrs S had been unable to let the offices at all on account of the damage, and the restaurant had been empty for two years. She felt RSA should be paying her at least £76,000. RSA considered the lost rent claim but felt, regarding the offices at least, that it hadn't been provided with everything needed to establish a loss. It also noted the policy cover was for one-year only.

Mrs S was unhappy with how the claim was progressing – and she complained. RSA reviewed matters and, in March 2023 issued a final response letter (FRL). In the FRL RSA said it was uplifting its settlement offer of £127,500 to £200,000. It said this sum was designed to cover any, as yet, unestablished rental losses and any additional report costs not already paid for by it. It said delays at the start of the claim had been another factor in it deciding to increase its settlement offer. Mrs S wasn't happy with the offer and complained to the Financial Ombudsman Service.

Our Investigator made some enquiries with RSA. It confirmed that the £200,000 was a 'global' settlement offer – it had no real break down for it. However, RSA confirmed that the

global offer had not really been intended to increase the building reinstatement cost. It showed that it had made payments to Mrs S of £50,000 and £20,000, with £130,00 being paid to her in May 2023. Meaning it had settled with her in full for the £200,000 offered.

Following that clarification, our Investigator considered the various expert reports and what RSA had offered regarding building reinstatement. She noted that evidence was outstanding regarding the rent loss claim – but that RSA had felt £8,200 for one year might be a fair sum. She felt though that even if RSA should pay for more than one year, the settlement would allow for that. She didn't identify any delays, but accepted RSA had allowed for compensation within its settlement. Having taken all of that into account, she felt that the settlement paid by RSA of £200,000 was fair and reasonable. She explained that this Service has certain award limits which apply – she said that, in this case, the most we could require RSA to pay would be £415,000.

Mrs S was unhappy – she noted some additional costs that she felt hadn't been considered. Regarding the award limit – Mrs S said that the fair outcome here would be for us to just make RSA pay in line with that. She said the delays had been terrible, not least impacting the rental income as she'd still been unable to let the offices (most affected by the damage).

Our Investigator didn't think the costs set out by Mrs S materially changed anything. She also didn't think RSA had caused a delay that would mean it should reasonably have to pay anything further. She confirmed that as Mrs S remained unhappy, her complaint would be referred for an Ombudsman's decision.

Mrs S's complaint came to me for consideration. Like our Investigator, I wasn't minded to uphold it. But my reasoning was different to that shared by our Investigator, which caused me to issue a provisional decision to explain my views to both parties. My provisional findings were:

"Settlement offer
RSA said its offer was a 'global' £200,000. But taking into account everything I've set out above, I think that sum does reasonably breakdown. At least into building repair at £127,500 and other costs/losses of £72,500. With those other costs and losses then reasonably needing to cover; report costs, rental losses and compensation for upset caused by delay. On that basis I'll consider whether what RSA has offered was fair and reasonable.

£127,500 for repairs
This sum was an averaged figure. It was based on the costs sets out in two of the three scopes RSA obtained.

RSA produced three scopes to consider the cost of the varying level of repairs. The lowest – reflecting the least level of work required, to apply wall ties – was for £55,000. This sum did not include things like VAT and professional fees, none of the scopes included those type of costs. So, when looking to settle, RSA uplifted the base sum of £55,000 to £80,000 to allow for these additional costs. Its highest scope – reflecting the most level of work, taking down and rebuilding the whole façade of the building – was for £126,000. RSA applied a similar uplift to this sum to attain a figure of £175,000. I can see the premise of the uplift was the same. Clearly that resulted in a bigger difference in the highest scope from the original sum than that seen for the lowest scope. But I think that makes sense given that VAT and professional fees are usually applied as percentage sums against the base rate (so where the base rate is lower, the uplift to be applied will be less). The uplifted sums of £80,000 and £175,000, when averaged, created the reinstatement sum of £127,500.

I can see that RSA maintains that the work set out in the highest scope is not required to resolve its liability for repairing insured damage under the claim. It thinks the lowest scope

will do that. Whereas Mrs S thinks the lowest scope is not a viable solution and that whilst rebuilding the façade, as reflected in the highest scope, is likely required, the works set out in the highest scope are not sufficient to do that. It is on these points really that the multiple expert reports have ranged.

I've considered all the reports and all of the expert evidence, though I don't intend to set out everything they say here within this decision. I'm mindful that two engineers, respectively representing Mrs S and RSA, met at the property in 2021 to discuss the damage, the overall state of the property (with some suggestions having been made that there was historic uninsured damage) and what was needed for its reinstatement. RSA's expert ultimately felt repair was possible – with the three scopes being completed, but Mrs S's engineer said "repair is almost an impossible approach". I don't find that a particularly compelling conclusion. RSA's engineer has not said why they think a repair is viable. But I think that a professional engineer would not have put forward a scope for purely repairs if they were not satisfied such was viable. The lack of detail from RSA's engineer though does mean that its view of the viability of repair is only about as compelling as Mrs S's expert's. I think that RSA's general rounding up of costs – and it making an offer to settle at least in part on the basis of rebuild costs it doesn't accept it is liable for – is indicative of it trying to fairly balance the available expert evidence, allowing a reasonable outcome to be reached without further delay or investigation.

In saying that I'm mindful that RSA has said that to really consider the need for rebuilding further, more exploratory work would have been required and/or further assessments would be needed, which would take time. And that Mr S hadn't been prepared to allow further exploratory work. I'm mindful also that Mrs S was concerned about how long this claim had been going on for too. I think RSA settling, in this way, on this occasion, was fair and reasonable. I think the sum of £127,500 fairly reflects the likely cost of the necessary insured work required to reinstate the building whilst giving some reasonable latitude for the possibility that works in addition to repairs alone might be required. I haven't seen anything which compels me to say that is unfair in this instance or that it should reasonably have to pay more.

I know Mrs S has said that RSA agreed to cover her 11% cost for professional fees to manage the repair/rebuild work. Given what I've said about RSA's uplift of the respective base values for repair and rebuild costs, I think that fee is reasonably covered by, or accounted for within, the sum of £127,500.

<u>£72,500 for other costs and losses</u>
Loss of rent – for the moment, in this section, I am going to focus on loss of rent due under the policy. I'm mindful Mrs S thinks RSA is liable for some loss due to delays. I'll look at those arguments separately.

The file RSA has submitted actually says very little about lost rent. I know it had concerns that any loss for the offices hadn't been established and it says it has settled (seemingly separately) for loss for the restaurant. Given that, I think that when RSA said £8,200 for the year might be fair, it must have been speaking about what might be fair settlement for the offices. However, the policy does give cover for one years lost rent, and that would give a maximum sum due to Mrs S under the policy of £38,200 for both the offices and the restaurant. If the restaurant has been settled separately, at £30,000, the maximum to consider within the £200,000 settlement, would be just £8,200.

Report costs – RSA has reimbursed the costs Mrs S had incurred for the experts she had instructed to report on the damage. But it seems it accepts that other needs might arise during the works for professional input and perhaps reports to be provided. I've said above that professional fees incurred to manage the claim are likely reasonably covered by the

reinstatement portion of the settlement. Mrs S has said that one pre-existing report, at a cost of £504 has not been paid for and that she'll likely incur architect's fees of around £22,000. So the established outstanding/unaccounted for costs so far total roughly £22,5000.

Running total – these two claim elements then likely account for, at most, £60,700 of the 'uplift' sum RSA applied to reach its global settlement sum of £200,000. That leaves around £11,800 'spare' to be used for any additional cost or losses that might present themselves and/or for compensation for upset. If the restaurant rent was settled separately, that would 'free up' another £30,000 of the settlement – but, for now, as I haven't seen clear evidence of such a payment, I'll stick with the £11,800 'spare' sum.

Compensation for distress and inconvenience – RSA hasn't said what it thinks a fair and reasonable payment for compensation is. That's on account of the nature of this 'global' settlement. But I bear in mind that the compensation we would usually award for distress and inconvenience caused by failures of the insurer, where there has been delay of more than a year but no personal injury, is £1,500 – £5,000. So, assuming for the purpose of this section, that RSA reasonably owes Mrs S compensation, it's likely that it wouldn't be found to reasonably owe her more than £5,000 in that respect. I've said above that the sum of £11,800 is 'spare' for taking into account things like compensation. Which means that assuming RSA reasonably has to compensate Mrs S for distress and inconvenience, and even if the fair and reasonable sum for that is £5,000, that would still leave a remaining figure of £6,800 'available' from the total £200,000 settlement sum.

<u>Is the £200,000 settlement, as a whole, fair?</u>
Having set everything out above which I can see has reasonably to be factored into the £200,000 settlement, I do think it's fair. It, in my view, reasonably, accounts for reinstatement costs for the building. It also then leaves sufficient sums aside to cover a reasonable loss of rent claim under the policy – and that is even though RSA thinks a loss in this respect hasn't been fully shown or validated. And, even with both those areas factored into the settlement sum, I've seen there's ample left over to cover established report costs and compensation, were any warranted. With still some to spare. I'm not minded, at this time, to say RSA should reasonably increase this sum, to make additional payments for the claim and compensation elements considered above.

<u>Did a delay by RSA likely cause a loss of rent?</u>
In terms of delay, I should first explain that a claim like this is likely to be subject to some delay. For example, where a claim involves a third-party the insurer has no control over – such as the council – it is likely that delays will occur. It is also possible that those delays won't be anything the insurer could do anything about. There are also, in a claim like this, which has at its heart some very technical building issues, going to be natural pauses whilst expert evidence is gathered and considered. Delays of that type – reasonable on account of the claim and not caused by any failure of the insurer – are unlikely to result in the insurer reasonably having to pay outside of the policy cover for losses incurred by the policyholder.

I also need to explain here that whilst we are now in 2024, I can only focus on what happened during the claim up until RSA's FRL of March 2023. Further that final response came around a year after RSA had first made its offer to pay £127,500 to settle the building reinstatement claim – a sum which I have found is fair. That offer came in February 2022. I'm satisfied that I can't reasonably blame RSA for the claim not progressing after that point. That is because Mrs S had the option of accepting that reasonable offer in order to start mitigating her ongoing rental loss situation by starting the reinstatement. So my focus regarding delay will be on what RSA did between the claim being made in 2018 and February 2022.

I think RSA acted reasonably initially, including in a reasonably timely manner. It initially considered if this was subsidence and undertook to visit the property and assess the damage. I see that, within a couple of months, focus turned to the council's actions, and the possibility that damage had been caused by it. I think a process of RSA gathering evidence and dealing with the council then ensued which lasted until towards the end of 2019. I'm reasonably satisfied there weren't any avoidable delays caused by RSA in this period.

When the council weren't prepared to accept liability, RSA seems to have thought that reasonably meant the policy didn't need to respond and the claim was closed. I think that likely frustrated Mrs S, but I note she challenged the position RSA had taken in this respect, the claim was re-opened and RSA asked for additional evidence. I see it was several months before the additional evidence was provided and that when it was this prompted RSA to accept a claim for accidental damage 'on the balance probabilities'. I'm reasonably satisfied there weren't any avoidable delays caused by RSA in this period.

RSA accepted the claim in late 2020 and in early 2021, as I've mentioned above, engineers for both parties met at the property. I think that, under all of the prevailing circumstances, that timescale was likely reasonable. A further year then passed before RSA put forward its February 2022 offer. That was quite a long time and I'm mindful that RSA hasn't given us much detail about what exactly was occurring in the run up to its offer being made. But I know it was considering all of the possible reinstatement options and seeking costings based on three different plans. I also know, from everything I've read, that this is a heavily technical claim, with lots of complex building issues and expert views to weigh up. I'm mindful that the experts weighing up the technical issues also were not expert in the operation of the insurance policy. So I think it's likely that the expert views had to be considered by others expert in the policy – such as RSA's loss adjuster. I think it's fair to say that any assessments like that would have naturally taken time. Nothing I've seen makes me think RSA acted unfairly in 2021, and in January 2022, such as to cause avoidable delays, thereby, unreasonably delaying the settlement offer for reinstatement work.

Overall, I'm not persuaded that RSA handled this claim so badly as to cause avoidable delays. I think it's taken a very long time to progress – but I don't think that is unreasonable in all of the circumstances. I know RSA, in increasing the settlement offer to £200,000 said that one of the factors it had taken into account when doing so was "the delays in acknowledging the claim". But the detail within its FRL doesn't say exactly what it felt those delays were. And, as I've said above, I haven't found that there were any avoidable delays caused by its failures. Where avoidable delays are key, as I've explained, to my being able to reasonably say compensation for lost rent, beyond what the policy offers cover for, should be paid by RSA. Nothing I've seen makes me think RSA reasonably needs to pay Mrs S compensation for rent lost due to delays in the claim."

RSA said it had nothing further to add. Mrs S said she wanted to challenge my findings.

Mrs S said £127,500 is an inadequate sum for reinstatement – it doesn't account for all the necessary work. She said the evidence she had provided showed the lowest of RSA's scopes wasn't viable, confirming it was "almost an impossible approach". She feels her evidence should be given more weight. Mrs S reiterated that re-building, in line with building regulations, which will require more work than allowed for by any of RSA's scopes, is the only realistic answer. It's also necessary with the building being a listed property, which RSA has failed to take into account. The need, Mrs S said, for work in-line with building regulations, means further exploratory work is unnecessary.

In terms of compensation, Mrs S said, RSA should have to pay towards the top-end of the bracket I had mentioned of £1,500 – £5,000. Regarding rent Mrs S said losses had been incurred due to RSA's avoidable delays as it did not act in a timely manner. The delay, she

said, between 2020 and 2022 was unjustified. Mrs S said her total loss was far beyond the £8,200 sum referenced by RSA and it was RSA's delays which had caused rent, beyond that covered by the policy, to be lost.

In summary Mrs S said she wants:

- The settlement increased to reflect the full scope of necessary repairs.
- The 11% professional fees to be accounted for separately.
- Full reimbursement for expert costs and exploratory work already incurred.
- Payment of increased compensation.
- RSA to be held liable for rental losses caused by delay.

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 note the further clarification provided by Mrs S regarding the reinstatement work. But I'm mindful that all of these points have been raised previously and were considered by me in reaching my provisional outcome. No new points or evidence have been provided for me to consider. Whilst I've carefully reviewed the reinstatement issue, I've seen nothing to make me think my provisional findings were unfair or need to be changed.

In terms of compensation, I explained provisionally what the maximum sum I might award would be. And that this maximum, £5,000, was reasonably accounted for within the £200,000 RSA has already paid. I'm not persuaded to make it pay compensation in addition to that allowed for within the £200,000 already paid.

I see, regarding rental losses, that Mrs S has said that RSA did cause avoidable delays in 2020 to 2022. However, she hasn't set out anything specific in this respect – so there's no further detail available to me about the course of the claim and delays than that which I assessed to reach my provisional decision. Having reviewed matters, I'm not persuaded that, despite the long running course of this claim, RSA caused avoidable delays, or that it should reasonably be made to cover rental loss beyond that offered by the policy.

I appreciate that Mrs S would like me to make awards as she's set out. However, having reviewed the complaint in light of Mrs S's response to my provisional decision, my views on it haven't changed. As such my provisional findings, along with my comments here, are now the findings of this, my final decision.

My final decision

I don't uphold this complaint. I don't make any award against Royal & Sun Alliance Insurance Limited.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs S to accept or reject my decision before 29 October 2024.

Fiona Robinson
Ombudsman