DRN-5620696

The complaint

Mr D and Mrs D complain about Royal & Sun Alliance Insurance Limited's decision to decline a claim made under their home insurance policy relating to damage they believe has been caused by subsidence.

What happened

The background to this complaint is well known to both parties, so I'll provide only a brief summary here.

Mr D and Mrs D have home insurance underwritten by RSA which covers their home and its contents. They bought the property in 2013, as new. They made a claim in 2018 after discovering damage to their home.

RSA declined the claim on the basis that the damage wasn't caused by subsidence but by settlement.

Mr D and Mrs D made a complaint to RSA, which they then brought to us. That complaint was resolved in December 2022, when we said that RSA had reasonably and fairly offered to carry our further monitoring to determine whether the property was moving and, if so, in what direction.

In November 2023, after carrying out further investigations, RSA informed Mr D and Mrs D that the claim was still to be declined.

They said the movement and resulting damage was due to the property's foundations and floor slab settling into made ground. And they pointed out that damage caused by settlement into made ground was specifically excluded from cover under the terms of the policy.

Mr D and Mrs D made a further complaint to RSA about their claim decision. RSA provided a final response letter (FRL) in June 2024.

They said the site on which the property was built was a "cut and fill" site – and that the foundations and floor slab were settling into made ground. They said the foundations of the property were inadequate.

And they pointed out the policy term which says RSA won't cover damage caused by the movement of solid floor slabs unless the foundations of the property are damaged at the same time by the same cause.

Mr D and Mrs D weren't happy with this and brought their complaint to us. Our investigator looked into it and didn't think it should be upheld.

She said the further investigations carried out by RSA, since the resolution of the previous case in December 2022, justified their view that the damage was caused by settlement not subsidence.

And given the absence of any evidence of a different cause, it wasn't unreasonable for RSA

to conclude that the damage was caused by settlement of the property into the made ground on which it stands – in part at least due to the inadequacy of the foundations to keep the property stable.

Mr D and Mrs D disagreed and asked for a final decision from an ombudsman.

I disagreed with the outcome proposed by our investigator, so I issued a provisional decision. This allowed both parties a chance to provide more information or evidence and/or to comment on my thinking before I made a final decision.

In response to that provisional decision, Mr D and Mrs D advised me that, since our investigator gave their view on the case, they'd had works carried out at the property to stabilise it. In brief, they'd had a company carry out resin injections into the ground beneath the house.

That meant that the outcome put forward in my provisional decision was largely redundant. So, I issued a further provisional decision, to allow both parties a further opportunity to provide more information or evidence and/or to comment on my thinking before I issue my final decision in this case.

My provisional decisions

It's worth setting out my provisional decisions here in full because much of the reasoning for my final decision is set out in those two provisional decisions.

In my first provisional decision, I said:

> "I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.
>
> RSA have set out the reasons for their claim decision in the letter declining the claim (in November 2023) and in the FRL (June 2024). The reasons aren't exactly the same in those two documents, which doesn't help. However, they seem to be as follows.
>
> One, the damage is caused by settlement of the property into made ground (both the decline letter and the FRL say this).
>
> Two, the foundations of the property are inadequate (the FRL says this directly, whilst the decline letter might be read as implying it).
>
> Three, the damage is caused by the movement of the floor slab (this is in the FRL only).
>
> *Movement of the floor slab*
>
> I don't think RSA can rely on the latter of those three explanations in order to decline the claim.
>
> The relevant exclusion set out in the policy terms says damage caused by the movement of a floor slab is not covered unless the foundations of the outside walls of the property are also damaged by the same cause at the same time.
>
> In the preceding paragraph of the FRL, RSA say quite explicitly that the issue has been caused by movement of the floor slab and the foundations.

It seems obvious then that the exclusion will not apply because the foundations have in fact been damaged at the same time as the floor slab and by the same cause.

Inadequate foundations?

If RSA wish to rely on the second of the three explanations set out above – that the foundations are inadequate – they would be relying on an exclusion set out in the policy terms which says damage isn't covered if it's caused by faulty design or workmanship.

Leaving aside the fact that neither the decline letter nor the FRL mentions that exclusion, I don't think RSA have evidenced that the foundations are in fact inadequate.

The trial pits RSA's contractor excavated in 2023 showed the concrete foundations at a depth of around 800 to 1,000 millimetres.

RSA haven't pointed to any building regulations or guidance which suggests the foundations should have been deeper than that, in all the circumstances of the build.

Nor can I see any expert assessment of the foundation depth and whether that was or was not adequate for the task in hand.

Nor have RSA asked Mr D and Mrs D to provide any documentation from the builder to show building control approval of the property and/or its foundations.

If approval / certification had been given by the relevant building control authority – as it ought to have been – that would suggest that the foundations were in fact adequate or, at the very least, were reasonably assumed to be adequate at the relevant time.

It's our view – and this is broadly accepted within the insurance industry – that it's for a policyholder to show that their claim is for actual damage potentially caused by an insured event. It's for the insurer to show that any exclusion applies.

For the reasons I've set out above, I can't reasonably conclude that RSA have shown or evidenced that the exclusion for faulty design or workmanship (inadequate foundations, in this case) applies here.

Settlement into made ground

RSA's contractor's investigations show that the property is in fact built on made ground. It's not unreasonable to think that comes with greater risk in terms of the property moving. That's why RSA have the relevant exclusion written into their policy terms.

In order to fairly and reasonably rely on the relevant exclusion though, RSA would have to do more than simply determine that the property stands on made ground.

They would have to show the causal link between that fact and the damage to the property. I'm not convinced, as things stand, that RSA have done that. I'll explain why.

One - it's now 12 years since Mr D and Mrs D bought the property, as new. I have no reason to disbelieve Mr D and Mrs D when they tell us the property is still moving and the damage getting worse.

Even if the property rests on made ground, it would be unusual – to say the least – to find that it is still settling or bedding down into the made ground after 12 years. The time span suggests very strongly that something more profound is happening with the property.

Two - that suspicion is supported by comments made by the loss adjuster when they visited the property in August 2023. They reported that the access road appeared to be "*off camber suggesting possible creep towards the embankment*".

I am assuming that the embankment to which they refer is the embankment to the nearby major river. In any case, those comments suggest that the whole site may be moving (not just the house) and that it may be moving in part sideways, rather than just downwards. And that wouldn't be settlement.

Three – there are no expert reports or analyses that I'm aware of – from RSA staff / contractors or others - to support the idea that the damage is caused by settlement into made ground. RSA appear to have simply asserted that's the case based on the fact that the property is in fact built on made ground.

Four – Mr D and Mrs D commissioned their own expert report in 2022. This pointed towards other possible causes of the movement at the property.

The structural engineer instructed by Mr D and Mrs D referred to common ground below the property being remodelled and drained by a neighbour, affecting the stability of the slope above and causing subsidence.

They also said above average rainfall had resulted in parts of the soil beneath the property being washed away – again, affecting the stability of the property itself and causing subsidence.

And they said higher river heights and flows might also be affecting the site.

As thing stand, with the information I have available to me at this point, I don't think RSA have done enough to refute those expert explanations of the issues with the property. Or to show that their own explanations are more likely to be true.

For the sake of completeness, I should note at this point that the policy terms include an exclusion for damage caused by the erosion of coasts or riverbanks. However, I can't see any immediate reason to believe that the other factors referenced in the expert report would be subject to any exclusion.

Summary and the current position

When the previous complaint was resolved (in December 2022), RSA were to carry out further monitoring at the property to assess whether and how it was moving.

I believe they were carrying out level monitoring at the time. However, they wrote to Mr D and Mrs D in August 2023, to say that they'd be continuing level monitoring - with readings taken every two months for a further six months.

That should have taken us through to February 2024. But it was in November 2023 that RSA told Mr D and Mrs D that they'd made their decision to decline the claim. I haven't seen any further results from level monitoring after that point.

In August 2023, RSA also told Mr D and Mrs D they'd be carrying out further investigations, in the form of trial pits – which showed that the ground was made ground – and a drain survey – which showed no issues with the drains.

We've seen level monitoring reports up to May 2023, showing the raw data. I can't see any expert analysis of that data by RSA (or their agents). The data seem to suggest that the property is still moving.

When we resolved the previous complaint in December 2022 that wasn't an invitation to RSA take more time to find more evidence to support their decline decision. It was with a view to RSA establishing whether the property was still moving – and, if so, how and why.

I don't think we're any closer now to understanding what is happening to Mr D and Mrs D's property – or the causes for that. And that makes it difficult for me to come to a conclusion now about the outcome of this case.

I'm minded as things stand – and unless I get further information or evidence to make me change my mind – to uphold the complaint and to require RSA to pay Mr D and Mrs D £500 in compensation for the on-going delays in reaching a satisfactory and reliable outcome to their claim.

I bear in mind that Mr D and Mrs D are experiencing significant stress and upset as this issue continues on. Their house, according to their own view and that of their expert, is in severe danger of collapse at some point unless action is taken to stop the movement at the site. And they are living in a house with considerable damage already affecting their enjoyment and use of the property.

I'm also minded to require RSA to appoint an independent expert to advise on the causes of the movement at the property and on what needs to be done to stop the on-going damage to the property and repair the damage that's already in evidence.

That expert would be appointed as follows. RSA should identify three qualified experts, from which Mr D and Mrs D can choose one to carry out the work. RSA will pay the expert's costs and fees.

The appointed expert should review the evidence currently available and determine whether it's possible at present to reliably identify the cause(s) of the damage to the property.

If so, RSA will need to re-consider the claim in light of the expert's findings. In other words, they will use the expert's diagnosis to inform their decision as to whether the damage is covered under the terms of the policy. And if it is covered, they'll use the expert's findings to inform the mitigation / repair work that now needs to be carried out.

If it's not currently possible to reliably identify the cause(s) of the damage, the expert should specify exactly what further investigations and/or monitoring are necessary.

RSA would then need to pay for those investigations to be carried out (by the expert or another independent party) and provide the results to the expert for a further

> analysis and report (and then re- consider the claim and/or carry out any covered mitigation / repairs, as above)."

RSA said they accepted my first provisional decision. As I've mentioned above, Mr D and Mrs D responded to say they'd now had the resin injection works carried out at their own expense.

They said they'd been forced to take action due to the fact their property was deteriorating further and had become practically uninhabitable.

This work alone was at a cost of over £50,000. Mr D and Mrs D estimated that the total cost of the completed repairs to the property as a whole would reach around £125,000.

Mr D and Mrs D were keen to stress that they'd felt compelled to take this step to protect their investment in the property (which their surveyor had said would collapse) and because they could, for example, no longer open or close any of the doors and windows, rendering the property essentially uninhabitable.

They also said they'd taken legal advice about the prospects of suing the architect or surveyor(s) involved in the development of the property – and/or the local Council who'd approved the plans and/or build. They provided the relevant approval certification from the Council.

The advice was that any legal action was now likely to be outside the 5-year time bar for bringing such proceedings. It's Mr D and Mrs D's contention that RSA's delays have effectively put them outside that time bar.

I assume the fundamental point was that even if the issues with the property are the fault of poor design or workmanship (including inadequate foundations), then RSA have caused Mr D and Mrs D's losses by delaying their investigations and the claim in general, such that they now have no recourse against those involved in the development of the property.

On that basis, in my second provisional decision, I said:

> "I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.
>
> I'm grateful to RSA for agreeing to accept my previous provisional decision and to commission a further expert report.
>
> I understand Mr D and Mrs D's point about the prospects of now suing any of the parties involved in approving or developing the property.
>
> However, I'm not convinced it will be relevant because I think it's unlikely that RSA can rely on the exclusion for poor workmanship / design or inadequate foundations in any case.
>
> As I said in my provisional decision, I don't think this damage can fairly be said to have been caused by settlement or by inadequate foundations. And I bear in mind that Mr D and Mrs D have now shown that the plans and build were approved by the relevant authorities.
>
> The news that Mr D and Mr D have now had the property stabilised and/or had other repairs carried out or commissioned clearly renders my previously proposed outcome redundant, to a great extent.

I absolutely understand their reasons for commissioning that work, particularly in light of what their own surveyor has said about the likelihood of on-going and severe damage to the property.

And I don't think it would be in any way fair or reasonable now for RSA (having had several years to investigate the claim and the causes of the damage to the property) to say that Mr D and Mrs D's decision to get this work done has denied them the chance to properly investigate and nail down the causes of the damage.

I'm now minded then, as things stand, to require RSA to pay the £500 compensation suggested in my previous provisional decision, for the same reasons given in that decision.

I'm also minded to require them to commission an independent expert, as set out in my provisional decision (and by the method set out in that decision – that is, by giving Mr D and Mrs D a choice of three experts).

The brief for that expert will now change, of course. And I understand that some of the investigations they may have carried out, had the stabilisation work not been carried out, may now be impossible.

However, the expert should be instructed to review the evidence currently available, including the expert reports previously provided by Mr D and Mrs D, and to carry out any inspection or investigations of their own that they feel might be useful. RSA should of course pay for any such investigations.

The expert must be asked to determine the most likely dominant cause of the movement to the property. RSA should take care to ensure that the expert is aware that they are not being asked to make a finding based on any degree of certainty. The brief should simply be to identify the most likely dominant cause.

RSA must then re-consider the claim based on the understanding that the expert's most likely dominant cause of the movement should be taken to be the cause of the damage to Mr D and Mrs D's property. Whether they pay the claim will depend then on whether the expert's identified most likely dominant cause is an insured peril."

And on that basis, I said I was minded to conclude that RSA should:

- pay Mr D and Mrs D £500 in compensation for their trouble and upset;
- appoint an independent expert to identify the most likely dominant cause of the damage to the property (as set out above); and
- re-consider Mr D and Mrs D's claim in light of that expert's report.

The responses to my second provisional decision

Mr D and Mrs D responded to say they agreed with my second provisional decision.

RSA also responded.

They said their experts had visited the site and found no evidence that the site is possibly creeping or that there was instability in the slope of the site.

They said settlement can continue to occur for many years if left unchecked. And, in this

case, there's no evidence of any other external influence which might be causing the movement.

They said resin injection is a well-known solution to the problems caused by consolidation settlement. So, the fact that Mr D and Mrs D had chosen this solution supported the idea that the movement was caused by settlement. They added that they'd like to see the report from the experts involved in carrying out the work at Mr D and Mrs D's property.

They also said that, although this wasn't directly relevant for RSA, Mr D and Mrs D might be mistaken about the time limits on their ability to sue the property's developers / architects. They believe the *Building Safety Act 2022* may have extended the relevant limitation period to 30 years.

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'm grateful to Mr D and Mrs D for their confirmation that they agree with my provisional decision.

I'm also grateful for RSA for their comments.

I'm sure Mr D and Mrs D will be interested in RSA's understanding of the legal situation. As RSA said though, that's not directly relevant to them or to my considerations in this case. I wasn't at any point suggesting that RSA should now cover the claim (or indeed do anything else) *because* they'd delayed the claim to the point where Mr D and Mrs D could no longer take legal action.

I understand that resin injection might be an effective response in cases of settlement, as RSA suggest.

However, as I understand it, it is also used in cases where there *is* subsidence, in order to stabilise the ground. So, the fact that Mr D and Ms D have chosen to employ this solution now doesn't demonstrate that their problems were due to settlement.

And I remain of the view that settlement would normally be expected to occur – and cease - within the first ten years or so of the build, in the vast majority of cases.

So, despite RSA's comments, I still think it's inherently unlikely that the movement is caused by settlement in this case, on the basis of the evidence we currently have.

I understand RSA's conclusions after their – I assume brief – visit to the site. And I understand that no-one has, as yet, *definitively* identified the cause (or causes) of the movement to the property.

That is, at least in part, a result of RSA's decisions about what investigations to carry out during their consideration of the claim. To put it bluntly, RSA have had a number of years to work out what's causing the movement but have failed to do so – at least in any manner that's convincing or persuasive.

That failure on RSA's part shouldn't be taken as evidence that the movement must be due to settlement – because there's no other definitive candidate to explain the movement. Indeed, Mr D and Mrs D's own expert identified a number of other possible explanations as to how the movement may have occurred.

To cut to the point, that's precisely why I think the fair and reasonable outcome here is to have a review carried out by an independent expert, with a brief to identify the most likely cause (or causes) of the movement in the property.

It's conceivable that the expert will agree with RSA's view – either on review of the current evidence or after further investigations. It's also conceivable that they'll come to a completely different conclusion - and be able to point to a causal mechanism by which subsidence is in fact occurring and affecting the property. At present, we simply don't know what's causing the movement.

In short, I remain of the view that the most reasonable outcome to this case is to have the evidence reviewed – and, if necessary, further investigations carried out – by an independent expert.

So, nothing either party has said in response to my second provisional has caused me to change my mind about the fair and reasonable outcome of this case.

For the sake of complete clarity though, I do accept RSA's point that the appointed expert should have access to any reports or communications from the contractors who carried out the resin injection.

The evidence the expert is to review should be any and all evidence which might help identify the cause(s) of the movement at the property. Mr D and Mrs D will need to provide that evidence to the expert to enable them to complete their review and report.

Putting things right

I explained in my provisional decisions what I thought RSA needed to do to put things right for Mr D and Mrs D – and why.

My opinion hasn't changed. I'll repeat the outcome in the section below.

My final decision

For the reasons set out above and in my provisional decisions, I uphold Mr D and Mrs D's complaint.

Royal & Sun Alliance Insurance Limited must:

- pay Mr D and Mrs D £500 in compensation for their trouble and upset;
- appoint an independent expert to identify the most likely dominant cause of the damage to the property (as set out above); and
- re-consider Mr D and Mrs D's claim in light of that expert's report.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr D and Mrs D to accept or reject my decision before 11 July 2025.

Neil Marshall
Ombudsman