

complaint

Mr and Mrs B complain that Lloyds Bank General Insurance Limited unfairly declined their home insurance claim for subsidence damage.

background

Mr and Mrs B reported a claim in November 2016, for damage to their two-storey extension and conservatory. Mr and Mrs B bought the property in about 2008. At the time of purchase, a first-storey extension at the rear of the property was already in place having been built in 1988. They added a second storey to that existing extension in about 2010; and the conservatory was built soon after.

Lloyds conducted investigations and it concluded that the extension and conservatory were suffering from subsidence as result of clay shrinkage caused by nearby trees. However, Lloyds went on to decline the claim on the basis that, but for defective foundations, the additional structures to the property wouldn't have subsided. Lloyds relied on a policy exclusion contained within the terms which excludes any damage caused by faulty workmanship, poor design, and defective or unsuitable materials.

Lloyds based its decision on published standards applied by builders of certain new homes. Lloyds said given the proximity of a nearby oak tree, the foundations should have been at least 1,600mm deep. However, the trial pits dug on site showed the two-storey extension foundations were only 1,000mm deep, and the conservatory foundations 250mm deep.

Mr and Mrs B were unhappy with Lloyds' decision and they made a complaint. In doing so, they first engaged a solicitor who wrote to Lloyds. In response, Lloyds explained that its decision remained unchanged, but Mr and Mrs B could provide their own independent surveyor's report which Lloyds would consider.

Mr and Mrs B went on to obtain a report from a structural engineer. The report accepted that, in accordance with the guidelines Lloyds had relied on, the foundations ought to have been 1,600mm deep. However, the engineer noted the first-storey extension had already been built at the time Mr and Mrs B bought the property, and it had been approved by the local authority under building regulations – as was the second storey they later built. So, the engineer didn't think their claim had been fairly declined.

The engineer thought that the only viable option for the extension would be underpinning the foundations. In respect of the conservatory, the engineer noted that due to *the "extremely shallow nature of the foundations"* he was of the view it needed to be demolished and reconstructed on suitably designed foundations.

Mr and Mrs B referred their complaint to this service, where it was considered by one of our investigators. Our investigator didn't think the complaint should be upheld. To summarise, she thought Mr and Mrs B's builder ought reasonably to have considered the depth of the foundations before adding a second storey to the extension and building the conservatory.

Lloyds told our investigator that based on the standards it's relying on, and the proximity of a hawthorn tree that's the same age of the property and closer to it than the more mature oak tree, the extension's foundations depth should have been 2,100mm and the conservatory foundation's 2,500mm – rather than the 1,600mm previously quoted. In her assessment letter, our investigator quoted the higher depths, but without explaining the figures were based on the hawthorn tree.

Mr and Mrs B were unhappy with our investigator's conclusions, so their complaint has been passed to me to decide. Mr and Mrs B also appointed a loss assessor to act on their behalf.

The loss assessor has provided an email and a letter from Mr and Mrs B's local council that confirms the foundations were inspected by building control in 1989 and considered adequate in respect of complying with the appropriate building regulations.

The loss assessor also questioned why we hadn't conducted our own investigations into the depth of the foundations and the relevance of the standards being applied by Lloyds given the years the extensions and conservatory were built. He also provided a further building structure survey report, which noted:

- The conservatory's foundation depth is 250mm, and this is clearly inadequate. There was no need for a building control inspection due to its size. However, the builder of the conservatory should have made adequate foundation provisions to negate the effects of the oak tree. It's clear the conservatory foundation was poorly designed and not fit for purpose.
- The local council has confirmed that the extension's foundations were assessed by a building control officer in April 1989 during its construction, and they were found to be adequate. The foundations are now not to an adequate depth due to the influence of the tree roots in the clay sub soil. However, this does not indicate a failure in design at the time.

I issued my provisional decision in June 2020. I explained I intended to uphold the complaint about the two-storey extension, but not the conservatory. I also explained that I intended to decide Lloyds should cover Mr and Mrs B's engineer fees and pay them compensation due to the claim delays. In my 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.

Lloyds doesn't dispute that Mr and Mrs B's extension and conservatory are suffering from subsidence, which their home insurance policy covers. So, what I need to decide here is whether the policy exclusion Lloyds has applied in order to decline the claim has been applied fairly.

Mr and Mrs B's loss assessor has questioned why this service hasn't investigated the depth of the foundations. However, that's not our role here. It's for the parties to the complaint to make their submissions, which we will then consider in order to decide what we are more persuaded by – or, we may decide we require more information to be provided.

Lloyds commissioned a specialist to undertake investigations at the property, including three trial pit holes to determine the depth of the foundations. I've not seen anything that leads me to doubt the credibility of that report, and nor has any contradictory information been submitted. Therefore, I consider it reasonable to accept the depths reported.

I will set out my provisional findings under the following four headings: 'extension', 'conservatory', 'report costs', and 'delays'.

extension

In my view, it's not unreasonable for a business to look towards good industry practice when determining what ought to have happened; and I understand the standards Lloyds is relying on were first published before the first-storey extension was built. However, there are other considerations here that persuade me Lloyds' claim decision, in respect of the extension, wasn't fair or reasonable.

The policy terms don't stipulate the foundations of the home need to be a certain depth or comply with the standards Lloyds is applying. There's also no suggestion that the first or second storey extensions were subject to these standards when they were built. So, the builder wasn't under an obligation to take them into account.

In addition, Mr and Mrs B have provided information that supports both storeys were subject to planning regulation and control; and Lloyds hasn't provided anything that suggests the 1,000mm depth was non-compliant at the time of the two builds.

I'm conscious the second-storey was added to the existing extension in about 2010, but the completion inspection wasn't undertaken until March 2016. Mr and Mrs B have explained that they weren't aware they needed a completion certificate at the time, but the council inspected the building at every stage, and they thought that was all that was required. However, they commenced an extension to the front of the house in about 2015, and through that process they became aware they needed a completion certificate for the second-storey extension at the rear. Therefore, they applied for this. I accept what Mr and Mrs B say here.

So, taking everything into consideration, I'm not persuaded that Lloyds can reasonably say the extension wasn't built properly, or fairly rely on a general policy exclusion for faulty workmanship and poor design. Therefore, I intend to decide Lloyds needs to deal with Mr and Mrs B's claim for their extension.

conservatory

It's my understanding the conservatory was exempt from building control, and as such, the same arguments can't be made about regulations being followed in terms of it being designed and built properly.

Furthermore, all the experts that have reported accept the conservatory foundations were insufficient at the time it was built – including the two experts who provided reports for Mr and Mrs B.

Therefore, I'm persuaded Lloyds can fairly decline the conservatory due to faulty workmanship and poor design.

report costs

I'm conscious that Mr and Mrs B have engaged several parties to support them with their claim and complaint. They haven't raised these costs with us, but for completeness I will consider them here.

Mr and Mrs B engaged a solicitor to make their complaint to Lloyds, and they later appointed a loss assessor to represent them whilst we considered the matter. However, in my opinion, I can't reasonably hold Lloyds responsible for these fees given professional representation wasn't needed to make a complaint or have one considered by our service.

Mr and Mrs B also appointed an engineer to support their claim, after it was declined. Given I'm not persuaded Lloyds fairly declined their claim, I consider it fair for Lloyds to cover this report cost, plus 8% simple interest from when it was paid for. So, when responding to my provisional decision, Mr and Mrs B should provide evidence to show the amount paid.

However, in respect of the further report the loss assessor commissioned, it's not my opinion that Lloyds should be responsible for this cost. I say this because the complaint was already with us, and the report wasn't requested or needed by us.

delays

I understand Mr and Mrs B first made their claim in November 2016, but it wasn't declined until February 2018.

In January 2018, Lloyds paid Mr and Mrs B £450 for the delays up to that date – and those delays were considered by our service under a separate complaint. So, it's not appropriate here for me to consider the delays between the claim registration and the declinature.

However, further delays have now been caused by the February 2018 claim decision, which I intend to decide wasn't fair or reasonable. Mr and Mrs B haven't said the ongoing issues have had an impact on them, but nonetheless, I'm persuaded a further two-year delay of living with the damage, and uncertainty, would have caused them a degree of distress. Taking everything into consideration, I intend to award Mr and Mrs B a further £500."

In response to my provisional decision, Mr and Mrs B's loss assessor provided:

- the scope proposal and price estimate
- plans and drawings regarding the required underpinning of the property
- three invoices from the engineer

Lloyds disagreed with my provisional decision. It made the following points:

- My provisional decision relies on the policy document not stating what the depth of the foundations should be. This is an unreasonable position to take as it suggests that all potential exclusions need to be listed in the policy document and general exclusions are not to be used. This would result in an infinitely longer policy document which would be of little benefit to either consumer or insurer.

- The second storey addition in 2010 was a material alteration requiring careful design and adherence to building regulation provisions. The 2010 building regulations in terms of structural stability will have applied to the existing foundations and the existing structure generally.
- It's not the case that foundations suitable for a single storey extension in 1988 would automatically remain suitable for effectively doubling the loadings on the foundations, by adding another storey. Unless the 1988 extension was built with foundations that were adequate to support a doubling of the load and to withstand the effects of nearby vegetation, then before construction was considered in 2010, someone competent in the design of foundations should have investigated the situation.
- The plans for the 2010 extension contained the caveat that care should be taken to check the foundations prior to any work commencing. No evidence has been provided to show such checks took place, and if it did what the results were.
- The checks should have formed part of the basic design obligations in 2010 and they should have included: finding out the existing construction, comparing it against good practice and if necessary, designing something else if it was judged deficient. Finding out about the existing construction is not just having a look at a set of drawings from 1988; it's digging a hole to find out what the builder did. There's no evidence such investigations happened and failure within six years of construction points to the design of the second storey extension being ill thought out and its failure was foreseeable from the outset.
- A 1,000mm foundation supporting a two-storey extension in highly plastic soil, with a mature oak tree within influencing distance, isn't considered effective by 2010 (or 1988) building regulation design standards. The oak tree has a potential mature height of 24m and pre-dates the house. If the proper investigations had been undertaken in 2010, it would have been obvious underpinning was required.
- The 2010 building regulations, that were in place when the second-storey extension was constructed, contained a requirement for consideration to be given to 'loading' and 'ground movement'. There's no evidence these were considered or approved.
- Those building regulations also explain that in clay soils subject to volume change on drying, foundations should be taken to a depth where anticipated ground movements won't impair the stability of the building, taking due consideration of the influence of vegetation and trees on the ground. They explain the depth to the underside of the foundations shouldn't be less than 750mm on low shrinkage clay soils, 900mm on medium shrinkage clay soils, or 1,000mm on high shrinkage clay soils – although these depths may need to be increased in order to transfer the loading onto satisfactory ground or where there are trees nearby.
- The foundations don't meet the basic 2010 building regulation criteria and there's no evidence to suggest that the influence of trees on the ground were taken into account.

- Other standards are also used to guide designers (such as those originally relied on by Lloyds when quoting a foundation depth of 1,600mm), and these too show that a 1,000mm deep foundation in this situation won't be ineffective. There's no evidence that the retrospective completion notice issued in 2016, six years after completion, paid any attention to the adequacy of the foundations.
- Taking all the information into account, the 2010 extension was inherently defective in design, and therefore any claim engages the defective design exclusion and should fail. It's not the role of insurance to pay for wholly foreseeable claims.
- Mr and Mrs B have a clear legal remedy against either their building contractor or their designer. That would appear the appropriate route for them to take. Seeking building control 'sign off' is a diligent measure, but it doesn't then mean that their building is free from defect, or that they are unable to pursue a claim against the building contractor.
- Lloyds carried out extensive technical investigations during this claim and the report provided by Mr and Mrs B offered nothing new to the claim, and it supported Lloyds' findings that the foundations were inadequate. On this basis it doesn't seem fair or reasonable for Lloyds to pay the reports costs with 8% simple interest. Lloyds also considers the claim to have been correctly declined, so it doesn't consider it's responsible for any delays and doesn't agree with any further award.

my findings

I have reconsidered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint. Where evidence is inconclusive or incomplete, I have reached my decision on the balance of probabilities – this means I have determined what I consider is more likely to have happened, based on all the evidence that is available and the wider surrounding circumstances.

Neither party has disagreed with my provisional findings regarding the conservatory or provided any further information in respect of that part of the claim. Therefore, I won't comment further on the conservatory and my decision about it remains the same.

It wasn't my intention to suggest that it's unreasonable for an insurer to rely on a general exclusion. However, the issue is not that Lloyds sought to rely on a general exclusion for poor design or faulty workmanship, but rather, it applied standards which the extension wasn't subject to at the time of construction. I remain of the view that such practice is unreasonable. In my opinion, if an insurer is to rely on such an exclusion it needs to demonstrate the structure was poorly designed or built, based on the standards or regulations that specifically applied to it when it was built.

Nonetheless, Lloyds has now pointed towards the building regulations. Therefore, I've given the applicable regulations, in relation to the points Lloyds has made, consideration.

Lloyds has referred to the increased loading caused by the second storey addition, and the nearby trees. The regulations are made up of 'requirements' and supporting guidance. The 'loading' requirements explain a building should be constructed so the loads are sustained and transmitted to the ground safely and without causing deflection or deformation of the building, or ground movement. The 'ground movement' requirements explain a building should be constructed so ground movement caused by subsidence will not impair the stability of the building.

Lloyds has specifically pointed towards the guidance that supports the 'ground movement' requirements. The guidance that Lloyds has pointed towards states:

- *"In clay soils subject to volume change on drying ('shrinkable clays', with Modified Plasticity Index greater or equal to 10%), strip foundations should be taken to a depth where anticipated ground movements will not impair the stability of any part of the building taking due consideration of the influence of vegetation and trees on the ground. The depth to the underside of the foundations on clay soils should not be less than 0.75m on low shrinkage clay soils, 0.9m on medium shrinkage clay soils and 1.0m on high shrinkage clay soils, although these depths may need to be increased in order to transfer the loading onto satisfactory ground or where there are trees nearby."*

The arboricultural report that Lloyds commissioned explains the supporting clay subsoil is "of predominately medium-high volume change potential". Lloyds therefore argues that, as per the guidelines, the foundation depths needed to have been deeper than 1,000mm to take account of loading and the nearby trees.

However, Lloyds is referencing guidance that *didn't* apply at the time of the build. The above guidance wasn't introduced until three years later, in 2013. The guidance that applied in 2010 stated:

- *"In clay soils subject to volume change on drying ('shrinkable clays', with Plasticity Index greater than or equal to 10%), strip foundations should be taken to a depth where anticipated ground movements will not impair the stability of any part of the building taking due consideration of the influence of vegetation and trees on the ground. The depth to the underside of foundations on clay soils should not be less than 0.75m, although this depth will commonly need to be increased in order to transfer the loading onto satisfactory ground."*

So, the guidance in place at the time the second storey was built was foundations should be at least 750mm deep, with the need to increase the depth to account for loading and nearby trees. Therefore, the question here is whether it's reasonable for me to decide that due consideration wasn't given, and the 'poor design' policy exclusion fairly applies, as the depths were only 250mm above the recommended minimum.

In my view, this case is finely balanced. Irrespective of Lloyds quoting the wrong guidelines, given the nearby trees and the clay subsoil, Lloyds make some persuasive arguments that action should have been taken, in terms of the foundations, before the second-storey was added. However, *on balance*, given the foundation depths were 33% above the minimum requirement at that time, I'm not persuaded that I can reasonably decide consideration wasn't given to loading or the nearby trees, or it was unreasonable that Mr and Mrs B proceeded without taking further steps, such as underpinning.

I appreciate the point Lloyds makes about the structure failing within six years of the second storey being built. However, the policy doesn't set out a minimum amount of time a structure must be defect free before a claim will be accepted. Equally, simply because a structure has begun to fail doesn't automatically mean it was poorly designed or built, otherwise no subsidence claim would ever be covered.

Ultimately, the onus is on Lloyds to show a policy exclusion fairly applies to the claim. I'm not persuaded it would be reasonable to retrospectively apply building regulation guidance that didn't apply at the time the second storey was built (*i.e.* a minimum depth of 1,000mm), or guidance that simply didn't apply to the builder in question (*i.e.* the 1,600mm or 2,100mm previously quoted by Lloyds). On balance, I'm more persuaded the design and build was compliant with the regulations and supporting guidance that applied at the time.

So, having carefully considered the arguments presented, overall, I'm not persuaded Lloyds has sufficiently shown the second-storey was poorly designed and/or built bearing in mind the building regulation guidance at the time it was added to the first-storey extension.

Therefore, I'm not persuaded Lloyds fairly declined the two-storey extension, and I remain of the view it should deal with this part of the claim. As such, it follows that I remain of the view Lloyds should reimburse Mr and Mrs B their engineer fees plus interest and compensate them a further £500.

Mr and Mrs B's loss assessor submitted three engineer invoices in response to my provisional decision, dated:

- October 2018 – initial inspection and report: £270
- January 2020 – soil investigations: £1,031
- June 2020 – specifications for underpinning and superstructure repairs: £2,244

At the time of my provisional decision, I wasn't aware of the engineer's fees beyond an initial report. I'm mindful the January 2020 and June 2020 fees were incurred whilst the case was waiting for a final decision from an ombudsman at this service and without any engagement with us. But equally, I don't consider it unreasonable that Mr and Mrs B decided to progress towards completing the repairs themselves, given the claim had already been declined and our investigator had concluded Lloyds' outcome was fair. By January 2020 the issues had been ongoing for over three years. If Lloyds hadn't declined Mr and Mrs B's claim, they wouldn't have incurred those further report costs. As such, I'm satisfied Lloyds should reimburse all three invoices.

Mr and Mrs B should share their soil investigation report and their repair specifications with Lloyds, if it asks to see these to assist with the claim settlement. If a dispute arises about what repairs are required to the two-storey extension, or how those repairs should be completed or cash settled, then a separate complaint will need to be made.

my final decision

For the reasons I've set out above, and in my provisional decision, I uphold this complaint. My final decision is Lloyds Bank General Insurance Limited should:

- deal with the claim for the two-storey extension, but *not* the conservatory;

- reimburse Mr and Mrs B their engineer fees as per their three invoices (£270, £1,031, and £2,244), and pay interest¹ at 8% simple per year on this amount, from the date they paid each invoice until the date this part of the settlement is paid; and
- compensate Mr and Mrs B £500

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr and Mrs B to accept or reject my decision before 26 September 2020.

Vince Martin
ombudsman

¹If Lloyds Bank General Insurance Limited considers that it's required by HM Revenue & Customs to deduct income tax from the interest paid, it should tell Mr and Mrs B how much tax it has taken off. If requested, it should also give Mr and Mrs B a certificate showing the amount deducted, so they can reclaim it from HM Revenue & Customs if appropriate.