

complaint

Miss M's complaint is about a property insurance policy she holds with Society of Lloyd's (SoL). She has been told by two different mortgage lenders that their surveyors have identified signs of movement in her property, but SoL won't accept a claim and won't complete any repairs to her property. Miss M is unhappy about this as she believes that until SoL repairs her property, she can't refinance it.

background

In late 2014 Miss M took out a property insurance policy for a property she owns and rents out. It covered the property for a number of specific 'perils' or events, which included subsidence.

In early 2019 Miss M applied via a broker to re-mortgage her property. The lender surveyed the property and commented that there was evidence of structural movement. The lender asked Miss M to arranged for a suitably qualified professional to produce a report on the structural integrity of the property.

Miss M contacted SoL and asked that it investigate the problems in the property identified by the lender's surveyor. SoL arranged for the property to be inspected in February 2019. It was concluded that there were no signs of *current* subsidence in the property and the internal cracking was likely due to thermal movement or vibration from passing traffic. SoL's expert also concluded the damage to the property was longstanding and likely had occurred before the insurance policy existed. However, SoL was willing to consider any evidence from Miss M that its conclusions were wrong and her property was suffering from current subsidence.

In light of SoL's conclusions, Miss M returned to her mortgage broker and paid another fee to the broker for a further re-mortgage application. The property was surveyed again and the result was that the surveyor found there were signs of structural movement and before confirming the property was suitable to lend on, Miss M needed to get a structural integrity report produced on the property.

Miss M went back to SoL as she'd decided its conclusions about the property were wrong. When it again declined to complete any repairs to the property she complained. SoL considered Miss M's complaint, but didn't alter its conclusions or decision – there wasn't a valid claim under the insurance policy. Miss M wasn't happy with this response and referred her complaint to this service.

One of our investigators considered the complaint, but she didn't recommend it be upheld. Miss M didn't accept the investigator's conclusion. She highlighted that two surveyors had said there was subsidence/structural movement, so SoL needed to investigate further and rectify the faults. Miss M said she felt it unfair if the customer has to pay for an investigation. She asked if that is the case, what is insurance for? She asked that the complaint be referred to an ombudsman for a second review.

Whilst the complaint was waiting to be considered by an ombudsman Miss M arranged for an engineer to assess her property and complete some site investigations. The report produced detailed the various evidence of movement in the property and the engineer said:

'the property has suffered from longstanding movement with a general slope of the property being downwards towards the right and to the front.' The pattern of cracking *'would suggest*

... that further ongoing movement may well be occurring to the front and side wall, party wall and internal walls. In addition, it was detailed *'Sloping of the front wall and particularly with the cracking beneath the cill and opening up of the joint to the stonework to the bay would tend to suggest that further movement particularly to the front is ongoing.'*

The site investigations identified the property was built on what is called 'made ground', where soil and other materials are brought to a building site. The borehole taken indicated the made ground was possibly over 2m deep. Below the made ground there was peat with sand and sandstone gravel mixed in. The engineer explained that both these types of ground were weak and this was likely the cause of the movement the property had suffered. He said that in order to avoid further movement the property needed to be underpinned.

Our investigator wasn't persuaded to change her opinion on the outcome of the complaint. The complaint was passed to me to consider and I asked SoL for its comments on the reports.

SoL confirmed it had already reviewed the reports and provided a copy of its final assessment of the claim, which had been sent to Miss M in October 2020. This stated the tenants in the property had confirmed the internal cracking had been there throughout their ten-year tenancy and had reappeared every time they decorated, but it didn't appear to have become noticeably worse. SoL also included a photograph of the exterior of the property taken in 2009, which showed cracking above the front door. The cracking was in the same place when compared with a 2019 photo it had taken, and showed the cracking hadn't worsened.

SoL continued by confirming that having seen the site investigations, it agreed the likely cause of the movement the property had suffered was due to the poor load-bearing capacity of the ground. However, given the comments of the tenant and the photographic evidence, it remained satisfied there had been historic settlement of the building. It said any further, more recent movement *'whether ongoing or now arrested, commenced prior to the start [renewal] of this insurance policy in December 2018.'* It also said the property could be level monitored to confirm whether the property was stable or currently moving.

However, SoL decided not to monitor the property as it concluded that when Miss M applied for the policy, she hadn't answered the question about cracking to the property correctly. Had she done so, it would likely have asked for a structural engineering report before agreeing to insure the property for subsidence. Had that happened, it is satisfied the report would have said the same thing as Miss M's engineer did in August 2019. At which point, it would have declined to offer subsidence cover on the policy. In light of this, it amended the policy from inception and removed the subsidence cover. Given the change, SoL said that when Miss M made her claim, there wouldn't have been any cover in place that could have covered it. Therefore, it maintained its rejection of her claim.

I asked SoL for more information in light of the change to its position on the claim. It provided further information about its underwriting of the policy. It also confirmed that when Miss M originally applied for the policy she had been asked *'Is the property free from cracking or any other signs of damage, heave or landslip?'* Miss M said 'Yes'. The question and Miss M's answer were included in the statement of facts, which she was sent in 2014 and asked to check. SoL said a further copy had been provided at each of the policy renewals since then with a request to check the information contained in it. At no point had Miss M said any of the information was incorrect.

On 15 January 2021 I issued a provisional decision explaining my conclusions in this case and reasons for reaching them. Below is an excerpt.

'The circumstances of this complaint has changed materially since it was referred to this service. At the time there was a dispute about whether the property was currently suffering from subsidence. However, following new evidence from Miss M's engineer, which said the property was likely to be currently moving, SoL completely reassessed the claim. That is what I would have expected it to do when receiving new expert evidence.

Before I consider the detail of the current situation with the claim and complaint, I will comment on a concern Miss M had early in the process. Miss M's prospective mortgage lender had a valuation done on the property. The surveyor identified that there was evidence the property had suffered from some form of movement. Due to this, the lender asked Miss M to obtain a report on the structural integrity of the property. The lender would have been expecting Miss M to have approached a structural engineer or other similar expert to have the property assessed and reported on (as she did in 2020 after her claim had been declined).

Miss M had been told by the prospective lender what she needed to do to have her application considered further. She hadn't done what she'd been asked to do and so the outcome of the new application was the same as the first. Whilst SoL said the property wasn't suffering from current subsidence, lenders in this type of situation would want more information than that. It wouldn't be the role of an insurer to provide the type of report Miss M needed to use with a mortgage application. So, I can't find SoL was responsible for the costs Miss M incurred for her second re-mortgage application.

In this case, whilst SoL appears to have now accepted Miss M's property may be suffering from ongoing subsidence, it has looked further into the circumstances of the claim and policy application. When a claim for subsidence is made and there is evidence of longstanding movement, it is quite normal for an insurer to look at what it was told about the property when the policy was taken out. That is what SoL has done.

SoL has provided evidence that Miss M was asked whether there was any cracking to the property in 2014. She said no, that there was not. However, the evidence it has obtained shows that was not the case. The photograph SoL provided from 2009 shows a significant crack to the outside wall above the front door. That crack was still there when Miss M made her claim in 2019, so would have been there when she applied for the policy. Miss M's tenants also said that the internal cracking has been present for throughout the ten years they've been living in the property. In light of this information, I am satisfied that SoL is right in saying Miss M didn't answer the question she was asked correctly.

When a policyholder hasn't disclosed information they should, we will establish, as best we can, what the position would have been if the correct information had been given to the insurer. In this case it is a case of what the insurer would have done, had it been told about the cracking. Many insurers would have declined to offer a policy without further consideration, however, SoL has explained the policy Miss M applied for accepts some non-standard risks, so it doesn't take that type of position. Its underwriter has said that, if the cracking had been declared, it would have asked for more information about it. Miss M would have been asked to obtain a structural engineering report on the condition of the property (much as her prospective mortgage lenders did in 2019). SoL said it would still have offered her a policy, but whether it would have included cover for subsidence would have depended on what the structural engineer said about the cracking.

It is not possible to know for certain what would have been said in 2014 if a structural engineering report had been commissioned. SoL has said it has assumed that had a structural engineer investigated the cracking in 2014 the same conclusions would have been reached as were in 2020. I don't think that is an unreasonable assumption. The underwriter has said that had it been told the property had progressive subsidence, cover for subsidence wouldn't have been included in the policy it offered. I see no reason to question this, as it would be highly unusual for an insurer to offer cover for damage that already exists.

In the situation where there has been a misrepresentation of facts on a commercial policy application, an insurer is allowed to put itself back in the position it would have been in, but for that misrepresentation. In this case, the policy Miss M had wouldn't have included subsidence cover, and so SoL has removed that cover from her policy from inception. That is not unreasonable. Therefore, there would have been no cover in place for the claim Miss M made in 2019 and so I don't think SoL has done anything wrong in again declining to accept her claim.'

SoL confirmed it had received my provisional decision, but made no further comment.

Miss M didn't accept my conclusions. She made various comments about the condition of the property at the time of the claim and how she believes it evidenced the property was subsiding at that time. In addition, she considered that as subsidence cover was included in the policy when it was taken out, the claim should be covered.

Miss M highlighted that since the first surveyor's visit to the property she had always declared to SoL that there was cracking at the property. SoL told them this was acceptable at the time of notifying it of the claim and said it was quite normal for a property of that age. She said she's lost a lot of money because SoL didn't settle the claim and she still can't re-mortgage the property as the lender still feels there is structural movement in the property.

my findings

I have considered all the available evidence and arguments from the outset, along with Miss M's further comments, to decide what's fair and reasonable in the circumstances of this complaint.

Whilst I have noted Miss M's further comments in this case, as I explained in my provisional decision, the issues in this case changed notably during the course of her complaint. SoL is no longer declining the claim because there is no movement in the property, but rather it is saying that had Miss M declared the cracking to it *before* she took out the policy, it would never have given her subsidence cover and so a claim could never have been made.

I have looked at the evidence again and I remain satisfied that if Miss M had given SoL an accurate answer when she took the policy out, she would never have had subsidence cover on her policy. Given the misrepresentation was a mistake on Miss M's part, SoL is entitled to retrospectively alter the policy to what it should have been – a policy without cover for subsidence. As such, I can't find that SoL did anything wrong in not settling Miss M's claim.

my final decision

My final decision is that I don't uphold this complaint. Under the rules of the Financial Ombudsman Service, I am required to ask Miss M to accept or reject my decision before 17 March 2021.

Derry Baxter
Ombudsman