

complaint

Delays occurred in dealing with a claim for damage caused by subsidence.

background

By May 2003 a tree owned by the local authority had been identified as responsible for the damage and its removal was recommended. Zurich Insurance PLC's loss adjusters contacted the local authority about this and in the meantime the property was monitored for further movement. The loss adjusters reported in June 2004 that the local authority would not accept that the tree was responsible for the damage.

New loss adjusters were appointed by Zurich and they said the property had continued to move and they agreed the damage was caused by the tree. They repeated the request for its removal and said it would be inappropriate to proceed with superstructure repairs while it remained in place.

In June 2006 the local authority reiterated its position and said it thought underpinning might be preferable. The loss adjusters said further investigations were necessary in order to do this. It seems the decision to underpin and repair the property had been taken by August 2006. By May 2007 contractors had been appointed to carry out the work.

I issued a provisional decision in April 2013. The evidence indicated the claim was made around December 2002 but the executors suggested it was actually made in 1998. I asked the parties to provide further evidence on this point.

The executors said the work took longer than it should and was not carried out satisfactorily. The loss adjusters agreed the work had taken longer than anticipated. They said some of it was incomplete/unacceptable/sub-standard, and the cost of outstanding work would be paid to the executors to allow them to carry it out themselves and/or appoint a contractor of their choice to do so.

The executors told us the house was marketed early in 2008 and they completed the repair work that was left outstanding. The sale was completed in December 2009.

I thought the handling of the claim had been poor. The local authority was allowed around a year to respond to the request to remove the tree and I was not satisfied it was reasonable for meaningful progress towards the repair of insured damage to have been delayed that long. However, given a need for monitoring of the property for continuing movement, I was not satisfied the resolution of the claim was delayed significantly by the extended communication with the local authority.

A decision to proceed with repairs had been taken by the loss adjusters by June 2004. Therefore, I considered Zurich should have started making arrangements for repairs, including underpinning, at that time. In the event, it did not do so until August 2006 and the work did not begin until around May 2007.

If arrangements had started around June 2004, I thought the repair work would have been complete by around mid - 2005. Given the death of the late Mr D in September 2005, I thought it likely the executors would have put the house up for sale. While I could not be certain when that would have been possible, spring 2006 seemed feasible.

It seems the repairs were carried out by contractors chosen by the loss adjusters – Zurich referred to the contractors as *“our contractor”*.

Therefore, I considered Zurich could reasonably be taken to have chosen to settle the claim by undertaking and/or arranging the necessary repairs, and it used the contractors identified by the loss adjusters. My ombudsmen colleagues and I consider such a choice means it must reasonably ensure the work is carried out efficiently, effectively and expeditiously. It seemed Zurich had not done that.

I thought Zurich should reasonably have been able to infer that the sale of the property might be contemplated (and possibly necessary), and the possibility of adverse market conditions should have been within its contemplation. I had seen no evidence that it raised with the executors the possibilities of settling the claim by paying the diminution in the market value or by assigning the benefit of the claim to a purchaser.

The executors said the delay meant a loan could not be repaid as the property could not be sold or let. Consequently, additional interest was incurred. Also, the property could not be sold before market conditions deteriorated, so interest on the sum for which it could have been sold was lost, costs were incurred running the property, and Capital Gains Tax had to be paid.

It seemed to me that if the house had been put up for sale in spring 2006 it may have sold before the deterioration in market conditions that has been experienced in recent years and the costs of running/maintaining the property would then have ceased. It seemed likely that any outstanding loan secured on the house would have been repaid at that time.

Zurich suggested a need for modernisation had made the house more difficult to sell. To deal with this, I asked the executors to provide a letter on the point from the estate agents that handled the marketing/sale of the property.

Zurich had offered to pay £250 as a gesture of goodwill in the light of damage to contents that its contractors were alleged to have caused. In the light of delays it had agreed to waive a contribution to the cost of repairs as a result of underinsurance and it said this represented/was in lieu of compensation for losses and distress/inconvenience.

I considered Zurich was responsible for the consequences of its agents' actions. When an insurer chooses to settle a claim by undertaking and/or arranging the necessary repairs, but fails to achieve that efficiently, effectively and expeditiously, it is my view that it should compensate the policyholder for adverse consequences suffered as a result.

Such compensation was not a payment due under the policy. Instead, it was for the poor handling of the claim.

On balance, I thought I should, when considering an award of compensation, fairly take into account Zurich's waiver of the contribution to the cost of repairs as a result of underinsurance.

I was minded to make an award of the difference between the sum for which it is likely the house would have sold if marketed around spring 2006 and the sum for which it eventually did sell, the savings in the costs of running and maintaining the house that would have been made following its earlier sale, the additional interest paid/incurred on any outstanding loan secured on the house, and Capital Gains Tax paid if and to the extent that it would not have

been payable upon the earlier sale. The contribution to the cost of repairs that should have been paid by the executors could be deducted from the resulting sum.

To enable this to be done I considered the executors and Zurich should jointly choose and instruct a property surveyor or estate agent to determine when it is likely the house would have sold if marketed in spring 2006 and, if it would have sold before December 2009, the sum that equates to any negative difference between the sum for which the house is likely to have sold and the sum for which it was sold.

developments

The executors' response included:

- Zurich should take responsibility for the underinsurance as the late Mr D was over 80 at the time;
- a marketing document issued by Zurich says buildings are covered for £500,000;
- the work done/amount paid or payable in respect of the claim was limited by the underinsurance, so a separate contribution should not have been required;
- floor tiles were replaced with replicas on the basis that like-for-like tiles could not be obtained (it is implied that the executors believe this was influenced by the underinsurance issue), but it has been discovered that they are available;
- the estate agents' sale document said the kitchen and bathroom had been remodelled;
- no new evidence that the claim was made before December 2002, but reference was again made to statements made by Zurich mentioning earlier dates;
- the loan was taken because the late Mr and Mrs D could not sell the property due to the dispute with Zurich;
- they incurred expense raising money for their own purposes when they would not have needed to do so if the house had been sold earlier;
- we should maintain an involvement in the selection of the property surveyor or estate agent who determines the sum for which the property is likely to have sold if marketed in spring 2006.

Zurich's response included:

- subject to the following points it accepts my provisional decision despite disagreeing with the compensation suggested;
- it was first notified of the loss/damage on 10 December 2002;
- it is not persuaded the executors tried to sell the property following the death of the late Mr D;
- it continues to believe the need for modernisation would have affected the prospects of a sale;
- it questions why the property took so long to sell and whether any offers were rejected;
- it believes evidence should be obtained from the estate agent that marketed the property;
- the executors said it was intended that relatives would move into the property – it considers this indicates there was no wish to sell the property and it asks what caused the executors to change their minds;
- it is not fair that it should have to pay utilities' costs when whoever was resident in the property would have incurred these costs anyway if they had been residing elsewhere.

my findings

I have considered all the available evidence and arguments to decide what is fair and reasonable in the circumstances of this complaint. In particular, I have considered everything the parties have said in response to the provisional decision. Having done so, I stand by the findings in the provisional decision. I will comment here on the core points arising from the responses.

The executors did not provide Zurich's marketing document that they mentioned but as it seems it dated from six years after the claim was made, I do not believe it is relevant.

I do not believe the sums paid by/work carried out for Zurich were limited by the sum insured. I acknowledge such a limitation was mentioned in a letter from the loss adjusters, but I believe this was erroneous. As Zurich should already be aware, where it undertakes to carry out or arrange repair work in settlement of a claim my ombudsmen colleagues and I consider the sum insured cannot fairly be used to curtail that undertaking. In any event, the loss adjusters' letter suggests the payments that were made came to less than the sum insured.

However, if the executors have evidence that work that was required to repair the insured damage was not paid for by Zurich because of the sum insured, they should submit it to Zurich for consideration. If, having done so and having completed its complaint procedure on the point, they remain dissatisfied with its response, they could submit a separate complaint to us.

Even if like-for-like replacement floor tiles could/should have been used, it seems unlikely that not doing so impacted on the price for which the house was sold.

I asked the executors to obtain a letter from the estate agents about whether the house was in need of modernisation. They did not do this. Instead, they supplied an extract from the estate agents' sale document mentioning the kitchen/diner and bathroom having been remodelled and another estate agents' document referring to the house as "*well presented*".

Especially bearing in mind the purpose of such literature, I do not think it resolves the point made by Zurich. Nevertheless, it seems to me it does undermine that point in relation to two rooms that I believe are often considered as significant features of a home likely to influence some potential buyers.

I am not satisfied Zurich has shown that the property was outmoded or that any need for modernisation is likely to have affected the sale significantly. Consequently, I am not persuaded the outcome I suggested should be amended in this respect.

Zurich says the claim was made in December 2002. That is consistent with the view I formed from examining the evidence. The executors maintain that it was made years before then but, despite my request, they did not provide additional evidence. Instead, they provided copies of two emails from/to Zurich (neither addressed to the late Mr D or the executors). One (dated 2006) mentioned "*a date of commencement*" that was stated as derived from loss adjusters' reports, and the other (dated 2003) mentioned "*the claim in 1998*".

I was already aware of these documents. As I stated in the provisional decision, I believe the remarks were erroneous.

No evidence was submitted of expenses incurred by the executors in order to raise money for their own purposes. The comment in this respect appears to relate more to the expectations of beneficiaries of the will rather than the role of executors of the estate. I am not persuaded to make an additional award in this regard.

I agree it is not clear the executors tried to sell the property following the death of the late Mr D. I dealt with this point in the provisional decision. The late Mr D died in September 2005, but no steps to repair the property had been taken by then, and Zurich is responsible for that and its consequences. Also, it seems to me the damage (and the existence of an outstanding, and longstanding, claim) is likely to have made it difficult to sell the property.

I do not know why it took more than a year to sell the house, or whether any offers were rejected. I think this could have been due to the difficult property market conditions and the recent history of significant subsidence damage/repairs, and Zurich's delays are relevant here. As I stated in the provisional decision, I am not satisfied the executors caused any delay in the process.

I have considered the executors' letter referred to by Zurich in its response (it gave an incorrect date for the letter), but I do not think it is unfair to include the costs of utilities in my award. It seems to me some costs would have been necessary even if the property had been left unoccupied – for example, electricity and gas to heat the property so as to reduce the risk of pipes freezing. As mentioned in the provisional decision, the executors had referred to the property being occupied because of insurance requirements.

It will not be possible for the Financial Ombudsman Service to be involved in the selection of the property surveyor or estate agent. The parties will need to cooperate in implementing my final decision. The executors suggest the estate agent through which the property was sold would be a suitable choice, and Zurich's response indicates it might agree this would be useful.

Having carefully considered everything the parties have said, I remain of the view that the remedy proposed in the provisional decision is fair.

my final decision

Where I uphold a complaint, I can make a money award requiring a financial business to pay compensation of up to £100,000, plus any interest and/or costs that I consider appropriate. If I consider that fair compensation exceeds £100,000, I may recommend the business to pay the balance.

determination and award: I uphold the complaint. My decision is that Zurich Insurance PLC should:

1) (jointly with the executors, and at its expense) choose and instruct a property surveyor or estate agent to determine when it is likely the house would have sold if marketed in spring 2006 and, if it would have sold before December 2009, the sum that equates to any difference between the sum for which it is likely to have sold then and the sum for which it was sold (provided the former sum is greater than the latter);

2) compensate the estate by paying the sum that equates to any difference (as above);

3) subject to the surveyor judging that it is likely the house would have sold before December 2009, compensate the estate for:

- the loss of savings in the costs of running/maintaining the house between the date he judges it likely it would have sold and December 2009, on the basis of evidence to be supplied by the executors as to the costs that were incurred, plus interest calculated at 8% pa simple (less tax if properly deductible) from the dates the relevant costs were incurred to the date of payment;
- additional interest paid/incurred on any outstanding loan secured on the house (subject to evidence that it was repaid upon the sale of the property), plus interest on the sum due calculated at 8% pa simple (less tax if properly deductible), from the dates the relevant interest was paid to the date of payment;
- Capital Gains Tax paid if and to the extent that it would not have been payable upon the earlier sale

up to a maximum payment of £100,000 (including the cost of the surveyor's report) plus the interest at 8% that is payable.

recommendation: If the amount payable as above exceeds £100,000 plus interest at 8%, I recommend that Zurich Insurance PLC pays the estate the balance. This recommendation is not part of my determination or award. It does not bind Zurich Insurance PLC. Whether the executors can accept my decision and go to court to ask for the balance is uncertain. They may want to consider getting independent legal advice before deciding whether to accept this decision.

S Lilley
ombudsman