

## **complaint**

Mr and Mrs C complained because Folgate Insurance Company Ltd proposed repairing their property without underpinning it.

## **background**

Mr and Mrs C claimed for damage to their property. Folgate's loss adjuster inspected the damage and concluded that it was caused by subsidence as a result of clay shrinkage. Upon the loss adjuster's recommendation, in order to address the cause of the subsidence Mr and Mrs C removed some trees that were implicated. Vegetation in the neighbouring property was also considered to be contributing to the damage and the neighbour removed a plum tree and pruned a hedge.

The property was monitored to establish whether or not it had stabilised. Once it was considered stable the damage was repaired.

Roughly two years after the main repairs had been completed (there were some snagging issues that took longer to complete) Mr and Mrs C noted further damage to the property. Folgate agreed to deal with the matter as a continuation of the original claim. Clay shrinkage was still considered to be the cause of the subsidence and it was initially thought that the neighbour's damson tree was implicated. However, further investigations did not show that the tree was the cause of damage and the neighbour refused to remove it.

The loss adjuster therefore felt that the affected part of the property needed to be underpinned. This was on the basis that on-going damage was occurring and was likely to re-occur at regular intervals. However, another loss adjuster carried out a further review and considered that underpinning was not necessary. This was due to the degree of damage and the general stability of the structure.

Mr and Mrs C were unhappy with this as they felt the cause of the subsidence had not been removed. They felt the property should be underpinned.

Folgate then offered to settle the matter by:

- implementing the underpinning scheme that was originally felt necessary;
- making fresh attempts with the neighbour to remove the damson tree (which the loss adjuster felt was contributing to the subsidence); or
- paying Mr and Mrs C a cash amount in lieu of the repairs.

Mr and Mrs C rejected the offer and proposed that a jointly appointed structural engineer be appointed to provide an opinion on the matter. Folgate agreed with this proposal.

The expert reported that further subsidence might occur in the future due to the effect of other vegetation and seasonal movement. However, he concluded it likely that the building was currently stable and that no work was needed other than cosmetic redecoration in the affected areas.

Mr and Mrs C disputed the quality of the report due to a lack of investigation and inconsistencies. They remained of the view that the property required underpinning and

lodged a complaint with Folgate. Although Folgate also wanted certain points clarifying, it felt the expert's report supported the position that underpinning was not required.

Our adjudicator concluded that the complaint should not be upheld. In summary, he felt the weight of evidence showed that the property was stable and that repairing the damage without underpinning the property was adequate and reasonable. He felt any stabilisation work would be a preventative measure to prevent future damage, which the policy did not cover.

Mr and Mrs C disputed our adjudicator's findings as the engineer said that movement and cracking was likely to occur from time to time. Our adjudicator remained of the view that the cause of the subsidence at the centre of the claim had been removed and, therefore, that damage is unlikely to re-occur as a result of the same cause.

### **my findings**

I have considered all the available evidence and arguments to decide what is fair and reasonable in the circumstances of this complaint.

Folgate's liability under the terms of the policy was to pay the cost of repairing, replacing or reinstating damage caused by subsidence. Its liability did *not* extend to the cost of putting measures in place to prevent future subsidence damage occurring (eg underpinning).

In this case Folgate elected to repair the damage. It must therefore ensure that the repair is effective. In subsidence claims the repair can only be effective if the building is stable. If the damage is repaired before the building is stable the repair will not be effective because the damage will simply re-appear due to the on-going movement. And if the building cannot be stabilised unless it is underpinned, that will become part of Folgate's liability. Whilst that might seem contradictory to my above paragraph because underpinning is a preventative measure, it becomes part of Folgate's liability because it is a necessary cost in order to carry out an effective repair.

Accordingly, the issue for me to decide is whether Folgate's view that underpinning is unnecessary in order to carry out an effective repair was fair and reasonable. In cases such as this I consider the expert evidence most persuasive.

Before discussing that I will address one of the issues Mr and Mrs C raised. They argued that Folgate's decision in 2007 and 2010 to not underpin the property was unfair and unreasonable based on the information available to it at those times. I may have agreed with that argument *if* that was the issue I am considering – because at that stage one of the suspected causes of the subsidence (the neighbour's damson tree) had not been removed. But that is not the issue I am considering.

The issue I am considering is whether Folgate's decision in 2012 (when Mr and Mrs C brought their complaint to the Financial Ombudsman Service) to not underpin the property was fair and reasonable based on the evidence available then. In any event, as outlined above, one of the offers Folgate put to Mr and Mrs C in 2010 was to underpin the property. But Mr and Mrs C chose to reject that offer in favour of appointing the engineer.

I turn now to the expert evidence available.

Two experts have inspected the damage and provided an opinion – the loss adjuster and the engineer.

The loss adjuster's opinion can be simply summarised as underpinning being unnecessary. This is based on his opinion that the cause of the subsidence has been removed and the property has now stabilised.

Obviously at one point the loss adjuster was of a different opinion; ie that underpinning was the only option. However, it seems reasonably clear to me that this opinion was based on his belief that the neighbour's damson tree was causing the problem and the neighbour's refusal to remove the tree. As the tree has since been removed, I consider the loss adjuster's original opinion on this basis to be redundant.

The engineer inspected the property six years after Mr and Mrs C noted further damage to the property. He considered it likely at that time that the property was stable. He did not categorically state whether or not the property needed to be underpinned. However, he did clearly state that no work was needed other than cosmetic repairs. I think it is reasonable to infer from this that the engineer was satisfied that no underpinning was needed.

Accordingly, the two experts were both of the opinion that the property was stable and that underpinning was not required as part of the repairs. Folgate were entitled to rely on these opinions when deciding what should be done to repair the subsidence damage. And given the opinions, I conclude that Folgate's decision to not underpin the property was neither unfair nor unreasonable.

I do acknowledge the arguments Mr and Mrs C have made about other comments the engineer made; eg that cracking has occurred due to minor seasonal foundation movement (although he also said it could have been caused by normal building shrinkage, thermal movement or defects in the plaster); that further movement and cracking will likely re-occur due to these reasons; and that nearby vegetation may contribute or continue to cause subsidence.

I consider these to be more generic comments. And I do not consider them to outweigh the more specific comments about the property being stable and cosmetic repairs only being required.

Mr and Mrs C also mentioned the fact that there was not "conclusive proof" or the expert not being able to form a "definite opinion". Although I also acknowledge these points, they do not make a difference to the conclusion I have reached. This is because my consideration of the complaint and my decision is based on the balance of probabilities; ie what I consider most likely given all the circumstances. I do not therefore need conclusive or definite proof of something or a conclusive or definite opinion in order for me to reach a decision.

Finally, last week we received further information from Mr and Mrs C about a recent subsidence claim being declined by their current insurer. In summary, the loss adjuster for that claim felt the subsidence was due to clay shrinkage due to nearby vegetation. The insurer declined the claim on the basis that the subsidence was not a new issue but a continuation of the claim at the centre of this dispute.

Irrespective of whether or not I consider this evidence persuasive, the problem insofar as this complaint is concerned is that it was not something Folgate could have considered by the time Mr and Mrs C brought their complaint to the Financial Ombudsman Service.

Accordingly, it does not change my opinion that Folgate's decision was fair and reasonable *based on the evidence it had available at the time*.

If they have not already done so, Mr and Mrs C are entitled to pass the latest information to Folgate (or we can do it on their behalf). Folgate would be obliged to consider the new evidence as part of the claim and make a fresh decision as to whether or not underpinning is required. If Mr and Mrs C are unhappy with any decision Folgate makes they will be entitled to lodge a new complaint with Folgate. And they will be entitled to bring a new complaint to the Financial Ombudsman Service if Folgate does not resolve that complaint to their satisfaction.

It could of course be that the decision made by Mr and Mrs C's current insurer was unreasonable. If Mr and Mrs C are of this opinion they are also entitled to complain to their current insurer about its decision.

### **my final decision**

For the reasons outlined above, my final decision is that I do not uphold this complaint. I make no award against Folgate Insurance Company Ltd.

Paul Daniel  
**ombudsman**