

The complaint

Mr and Mrs G are unhappy that esure Insurance Limited (esure) has declined a claim they made for subsidence under their home insurance policy.

Mrs G has dealt with the claim and complaint throughout, so I'll refer to her in this decision.

What happened

Mrs G made a claim to esure after she noticed cracking to her conservatory and extension. esure's surveyor (S) inspected the cracking and arranged for site investigations to be carried out to look at the subsoil and foundation depth near the damaged areas.

S accepted the damage to the conservatory and extension had been caused by subsidence. But it said this was the result of defective design because the foundations hadn't been built to the correct depth. It said there were guidelines for the appropriate depth of foundations when building near trees and these hadn't been met. S said the claim was declined because esure's policy didn't cover damage caused by defective design.

Mrs G complained to esure. She said that when she bought the property, she had been given a certificate from the local authority to confirm the extension had been built satisfactorily the previous year. esure agreed with S that the cause of subsidence was shallow foundations, and this wasn't covered by the policy. Mrs G remained unhappy and brought her complaint to this service.

Our investigator upheld the complaint. He said esure had acted unfairly when declining the claim. He said there was no requirement for the foundation to comply with the guidelines S had relied on. He was satisfied the local authority had confirmed the extension had been built according to building regulations. He asked esure to deal with the claim.

Mrs G accepted what our investigator said but esure didn't. It said the information S had mentioned were guidelines to the building industry which recommended minimum foundation depths when building in clay soils near trees. It said those guidelines hadn't been met when the conservatory and extensions were built – and if they had been the damage wouldn't have occurred. esure went on to say that this service had set precedents before which supported its approach. And finally, it said it didn't matter that the local authority had signed off the extension because the foundation was inadequate.

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 agree with our investigator that esure was unfair to decline the claim, so I'll be upholding this complaint.

esure has accepted the conservatory and extension are suffering from subsidence as a result of clay shrinkage caused by a nearby tree. It's declined the claim because of a policy term which says:

"we will not pay for loss or damage to your buildings caused by ... inadequate foundations which did not meet the building regulations which were in force, at the time the foundations were constructed"

esure has shown through the site investigations that the foundation for the extension is 1,000mm deep and tree roots were found below that. Similarly, esure has shown that the foundation for the conservatory is 600mm deep and tree roots were found below that too. esure says that if the foundations had been built according to certain guidelines, they would have been deeper than the tree roots and there wouldn't be a subsidence problem. So I'm satisfied the policy term relating to the adequacy of the foundation is relevant to this claim.

The policy term is specific that the standard by which the adequacy of a foundation is to be judged is building regulations – and those that applied at the time the foundations were laid.

esure told Mrs G her claim was declined because the foundations didn't meet guidelines for building in clay soil near trees. But the guidelines esure is relying upon and referring to aren't building regulations – and these guidelines, it refers to, aren't mentioned in the policy term conditions. So, I don't think it's fair and reasonable to use these guidelines as the standard by which the foundation adequacy is judged.

The guidelines esure is referring to are applied by builders of certain new homes. Neither Mrs G's conservatory nor her extension were built as part of a new home. So the builder had no obligation to take those guidelines into account.

For these reasons I don't think it would be fair to take these extra guidelines esure refer to into account when considering whether the policy term applies to Mrs G's claim.

According to esure's policy term, a foundation is only inadequate if it failed to meet the building regulations in force at the time of construction. I've considered whether the conservatory and/or the extension failed to do that.

I think the crucial point is the extension was approved by Mrs G's local authority building control after several inspections during various stages of construction, including laying the foundation. Mrs G has a certificate which says the extension met building regulations. esure says sign off by the local authority doesn't matter. So I understand what esure is saying and if the policy wording said the same thing, I could see the standards esure wished to apply and so would the policyholder.

But that's clearly the case here. esure's own policy terms specifically rely on compliance with building regulations – which can be shown by local authority building control sign off. I'm satisfied the evidence shows the extension met building regulations and therefore it wouldn't be fair to decline the claim for the extension based on the policy term.

Building regulations have an exemption for conservatories. As the policy term relies specifically on building regulations to decide whether a foundation is inadequate, I don't think it would be fair for esure to rely on the policy term to decline the claim for the conservatory. I don't think the policy specifically treats conservatories any differently.

In its response to our investigator, esure said this service had set precedents which supported its approach. But this service considers cases on their individual merits and taking into account the particular facts of each case, the circumstances and the policy wordings.

I don't think it would be fair for esure to rely on the policy term to decline the claim. To put things right, it should now deal with the claim.

Putting things right

Deal with the subsidence claim for the conservatory and the extension, both subject to the remaining terms and conditions of the policy.

My final decision

I uphold this complaint.

I require esure Insurance Limited to deal with the subsidence claim for the conservatory and the extension, both subject to the remaining terms and conditions of the policy.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr and Mrs G to accept or reject my decision before 10 July 2020.

John Quinlan
Ombudsman