

The complaint

M complains about China Taiping Insurance (UK) Co Ltd's decision to decline a claim under its commercial property insurance policy.

Any reference to China Taiping includes the comments and actions of its agents.

What happened

The circumstances of this complaint are well known to both parties, so I've summarised events.

M has a commercial property policy which is underwritten by China Taiping. At the rear of the property is a private residential garden which is owned by a neighbour. In December 2022, a sinkhole appeared in the neighbour's garden and extended under M's business premises.

The local water authority concluded the sinkhole had been caused by an escape of water from M's water supply – the notes from its visit say: *“Leak on private supply caused sink hole. Please contact insurer to organise repair. Water isolated.”*

M made a claim, and in January 2023, China Taiping's loss adjuster attended. The adjuster said there was “no damage at all” to M's premises though accepted there was a very large hole under it, saying:

“There is also no damage to any paths/pavings etc belonging to [the] insured. We could not gain access to the hole itself for safety reasons but would estimate it to be about 3m long. It extends around 2m into the neighbour's garden and probably extends at least 2m under [M's] building.”

The adjuster said there was no evidence of damage to the foundations either saying the type of foundations - namely, raft foundations - had been able to cantilever over the hole. The adjuster also said there was no evidence of subsidence to the building, saying:

“It has been alleged that there are distortions to the floors and roof as a result of the sinkhole. This cannot possibly be the case without obvious recent movement to the walls themselves. We have thus still seen no evidence of subsidence to the building itself.”

With regards to the cause of the sinkhole - which the local authority said had been caused by the water leak - the adjuster said: “it would be impossible for a previously undetected leak from a water supply pipe to be the sole cause of a sinkhole of this size. The void must have already existed as such large volumes of soil cannot have vanished.” In other words, the adjuster said the escape of water simply highlighted an existing underground void.

M complained about China Taiping's decision to not cover the buildings claim. In its final response letter dated March 2023, it maintained its position, saying:

- Whilst the policy provides cover for subsidence, there is no subsidence damage to

M's building, and so, there can be no claim under this section of the policy.

- There is no evidence of any damage to the building or contents. And so, there is no claim for it to consider in respect of these aspects. The definition of “buildings” doesn't include land or soil under the building.
- There is cover for an escape of water, but the void wasn't caused by this, and so, there isn't an insured peril.
- It would be willing to meet the cost of repairing or rerouting the water main pipe which is presumably damaged.
- Whilst there is now obvious potential for future movement/collapse of M's property, the policy requires M to “take all reasonable precautions to prevent loss or destruction of or damage to property and injury to persons [...]”
- It would accept a claim under the “additional” cover section of the policy for loss of income as a result of “damage to property in the vicinity of the premises which prevents or hinders the use of or prevents access to the premises [...]”

Unhappy, M brought a complaint to this Service. An investigator considered it and upheld it.

In summary, he said he was satisfied there'd been downwards movement of the ground on which the building stood and so, there had been a form of subsidence. He was satisfied M's inability to open its business and carry out normal business activities did amount to a “loss” - a form of damage - under the policy terms.

The Investigator said that had there been even minor cracking to M's premises, China Taiping would have accepted the claim as there'd be visible damage – and so, to not cover the claim at all, was unfair, as the policy was designed to protect M against sudden and unforeseen loss, damage, or destruction by an insured event, like subsidence. So, he said China Taiping's decision to decline part of the claim on the basis of there not being any “loss, destruction or damage to the property” to be unfair.

He said China Taiping therefore, needed to reconsider the claim and pay M £350 compensation for delays caused by it unfairly declining the claim.

The Investigator wasn't satisfied that M's inability to sell its business could reasonably be attributed to China Taiping's handling of the claim – he said it was instead due to the subsidence - something China Taiping wasn't responsible for.

China Taiping disagreed. Whilst it accepted the sinkhole constituted an insured peril – namely, subsidence – it said cover under this peril would only be triggered if M had suffered “loss, destruction or damage” to the insured property – which M hadn't shown.

It said there had been no damage to the actual building which required restoring, repairing, or rebuilding. It added the Investigator had wrongly characterised the loss as being a “loss of function” in the same way as a blocked drainpipe and that M's claim is different because:

- There's been no alteration to the physical state of the insured property.
- The damage requiring remediation is to the soil and substrate, which is separate and distinct from the insured property; and does not form part of the definition of buildings (or foundations) under Section 1 of the policy.

In response, the Investigator said he was persuaded there had been a change in the physical state of the property. It was previously a functioning business but due to the void had to be closed and could no longer carry out its business activities.

He reiterated that even if there'd been a small amount of damage – even a minute crack – China Taiping would have accepted the claim and been expected to carry out a lasting and effective repair, which he was persuaded would likely involve filling the void underneath the insured property.

So, he considered it unfair for China Taiping to decline the claim on the basis the property had not suffered some minute amount of physical damage. He said such a narrow interpretation of the policy was unfair in the particular circumstances.

Because China Taiping disagreed, the complaint was passed to me for an Ombudsman's decision. Having considered it, I issued a provisional decision, in which I said:

“What I've provisionally 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've also kept in mind the relevant law and China Taiping's responsibilities as an insurer to handle claims promptly, fairly and to not unreasonably decline a claim. I've done this while having consideration for what is fair and reasonable in the circumstances. Having done so, I agree with the outcome our Investigator. However, because the way in which I think China Taiping needs to put things right differ, I've explained my findings in a provisional decision.

China Taiping accepts the opening of the sinkhole under M's premises is subsidence – that is to say downwards movement beneath M's property – which is on its face an insured peril under the policy. But China Taiping says in order for M to invoke cover under the subsidence peril, M has to show the property suffered “loss, destruction or damage” – which is how “damage” is defined under “Section 1 – Property Damage” of the policy.

So, I need to determine if China Taiping's position - that M's property hasn't been damaged - is both in line with the policy terms, and fair and reasonable in the particular circumstances. China Taiping has said there needs to be “physical damage” to M's property. But looking at the terms I've outlined above, I'm not persuaded that's reflected in the policy terms as the definition of “damage” includes loss, destruction, and damage. The inclusion of “loss” as a type of damage doesn't support that “damage” defined under the policy could only be met if physical damage had occurred.

Here, M's property has suffered a “loss” because following the condemnation of the premises by the council, the building couldn't be used and therefore, lost its core function as a property. In other words, the property's state had altered having been deemed “unsafe” to use. And so, similarly to the drainpipe analogy our Investigator used that explained this Service's long-standing approach to loss of function – whilst the property's physical state may have not changed, it had suffered a “loss of function” because it simply couldn't be used. In the same way a drainpipe would suffer a loss of function if it was blocked while the drainpipe physically remained undamaged itself.

So, whilst “loss of function” may not present as “physical damage”, I'm satisfied in these particular circumstances it can reasonably be considered “damage”, and so, the policy term has been satisfied.

With regards to “physical damage” and the loss adjuster’s finding that there was “no damage at all”, I’d add that it seems that had M pointed to any physical damage, regardless of how minute it was, the claim would most likely have needed to have been accepted. I say this as China Taiping has said if physical damage had been present it would’ve accepted the claim – and to put things right and complete a lasting and effective repair – it would’ve needed to address the issues under the property in putting things right.

Here, the loss adjuster has said the lack of physical damage is the result of M’s property and foundations having been well-constructed. This meant the foundations were able to “cantilever over the hole”. Whilst this is an advantage, it seemingly leads to an unfair situation where M is effectively penalised for having well-built foundations. Had that not been the case, and the property had suffered physical damage, it seems China Taiping would have accepted the claim and likely filled the void as part of completing a lasting and effective repair.

China Taiping’s position is that it is now for M to “take all reasonable precautions to prevent loss or destruction of or damage to property and injury to persons [...]” having acknowledged there is “now an obvious potential for future movement/collapse”.

As I’ve outlined above, I’m satisfied that an insured peril has taken place here as the loss of function amounts to damage under this policy, and therefore, China Taiping should cover the loss. But even if I were persuaded that physical damage needed to occur in line with the policy terms, I wouldn’t consider this fair or reasonable in these particular circumstances in light of the considerations outlined above about M’s foundations and the potential minute level of damage leading to the claim being accepted. So, I don’t accept that it would be fair or reasonable for China Taiping to absolve itself of any responsibility in these unusual circumstances, nor put the onus on M to put things right to avoid the future movement or collapse.

So, in light of the above, I consider M to have demonstrated that the property suffered “damage” and that China Taiping, therefore, needs to accept the claim.

Soil and substrate

China Taiping has said that even if the property had suffered damage, the claim wouldn’t be covered because the soil and substrate under the building is separate and distinct from M’s premises as it does not form part of the definition of “buildings” or “foundations”.

The policy defines “buildings” as:

“the buildings and outbuildings [...] constructed as stated in accordance with details lodged with the company, and their foundations, extensions, annexes, gangways, conveniences, outbuildings and sub-stations; walls, fences, gates, fixed signage and street furniture, piping, ducting, cable wires and associated control gear and accessories; fuel tanks, telephone, gas, water and electric meters, fibre optic or integrated services, digital network lines on the premises or in the buildings [...] yards; car-parks, pavements, pathways and roadways.”

On its face, I agree the soil and substrate doesn’t form part of the “building”. But to be clear – my direction here is not for China Taiping to accept a claim to cover the soil and substrate issues. My direction is about the loss to M’s property.

And if, in order to restore the building to its pre-loss state in carrying out a lasting and effective repair, China Taiping needs to carry out works to the substrate and soil then this is what I’d expect it to do. How China Taiping goes about returning the building to its pre-loss

state is up to it, but from what I've seen it seems highly likely this would involve filling the void.

Contents

China Taiping's position is that there hasn't been damage to the contents of M's premises. If M can provide evidence of the contents having been damaged, then I would expect China Taiping to reconsider this as part of the claim. But as things stand, there's not enough information for me to make a finding on this particular issue.

Neighbouring property

I note China Taiping has said there is no contractual basis upon which it should be required to repair the neighbouring property under Section 1 of the policy. Even if that's the case, I'm not persuaded this means it can absolve itself of reinstating M's property to its pre-loss state. Ultimately, I'm satisfied China Taiping needs to accept the claim and provide a lasting and effective repair. Based on the evidence I have, it's highly likely this could only be achieved by filling the hole. Any dispute over whether China Taiping or the third-party's insurer should bear the cost of repairing works is a dispute between the insurers - providing an effective and lasting repair is carried out for M – so this falls to China Taiping to discuss and resolve.

Other professional fees

The policy provides cover for architects', surveyors', consulting engineers', legal and other fees necessarily and reasonably incurred in the reinstatement of the property following loss, destruction or damage caused by any peril insured.

M has incurred costs by instructing a chartered engineer who provided advice on what reinstatement works would be required – it seems to me this is material evidence that will help the claim progress and was necessary given China Taiping's position on not covering the claim, and so, I consider it reasonable for China Taiping to cover the cost of obtaining this report (subject to proof of payment).

Inability to sell business

M has said it wasn't able to sell its business as intended. Whilst I appreciate M's frustration with this, and the financial implications this had, I'm not persuaded China Taiping can reasonably be held responsible for these difficulties. I'm more persuaded the difficulties are attributable to the sinkhole appearing and this leading to the premises being condemned as unsafe – which isn't something I can reasonably hold China Taiping responsible for. So, I won't be directing it to do anything else in respect of this aspect of M's complaint.

Compensation

I'm satisfied China Taiping's decision to unfairly decline part of the claim has caused avoidable delays – which has unnecessarily elongated the matter for M. And so, I consider £350 compensation to be fair and reasonable in the particular circumstances.

My provisional decision

My provisional decision is I intend to uphold this complaint and direct China Taiping Insurance (UK) Co Ltd to:

- *Accept the claim.*

- *Pay M £350 compensation.*
- *Cover the cost of M's expert report upon proof of payment."*

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.

As neither party responded to my provisional decision, there's no further evidence for me to consider, and so, my final decision is the same as that set out in my provisional findings.

My final decision

My final decision is I uphold this complaint and direct China Taiping Insurance (UK) Co Ltd to:

- Accept the claim.
- Pay M £350 compensation.
- Cover the cost of M's expert report upon proof of payment.

Under the rules of the Financial Ombudsman Service, I'm required to ask M to accept or reject my decision before 20 June 2024.

Nicola Beakhust
Ombudsman