

The complaint

Mr and Mrs C complain that esure Insurance Limited (Esure) declined a subsidence damage claim made under their home insurance policy.

What happened

Mr and Mrs C have a home insurance policy underwritten by Esure. Mr and Mrs C discovered their conservatory was pulling away from their house, so they made a claim to Esure.

Following investigations into the movement and construction of the conservatory, Esure declined the claim. They said the foundations of the conservatory were poorly constructed and should have been around five times the depth.

When declining the claim, Esure relied on exclusions under the policy. And they also referred to foundation guidance written by one of the major providers of new home warranties.

As Mr and Mrs C remained unhappy with Esure's position, they approached the Financial Ombudsman Service.

One of our investigators looked into things and upheld the complaint. In summary, he initially said:

- Esure hadn't shown the foundations were inadequate and didn't meet building regulations at the time
- The builder had a duty to build a reasonable structure, likely to stand the test of time
- The relevant standards at the time recommended a minimum foundation depth of 900mm, but the actual depth was 300mm, so it could be said the foundations were inadequate
- However, Esure's reliance on the new home warranty providers guidelines – that the foundations should have been 1,550mm was unfair – as the structure wasn't built by a builder registered with the new home warranty provider, or with an intention of providing one of their warranties on completion
- A foundation depth of 900mm would have been adequate, but it's likely the subsidence would still have occurred in any event as roots and dry soil was found at a depth of 1,300mm

So based on this, the investigator recommended Esure should reconsider the claim without relying on the inadequate foundation's exclusion, review the costs Mr and Mrs C had incurred in completing some repairs, and pay them £300 compensation.

Esure provided a response and disagreed. This included referring to a wider policy exclusion for defective design and workmanship, and they referred to the new home warranty provider guidelines being in the relevant standards.

The investigator re-reviewed matters. Overall, his conclusions and recommendations remained the same. In summary, he said:

- Reference to the new home warranty provider guidelines in the standards didn't make it effectively good industry practice
- The guidelines of the new home warranty provider were in reference to avoiding indirect damage by trees to structures, rather than as a requirement to follow
- Although the new home warranty providers guidelines may be recognised by the industry, they aren't regulations, and the builder wasn't required to follow them – and it isn't fair for Esure to hold the builder to these when they didn't strictly apply
- The structure stood for 18 years, so the foundations couldn't have been seriously defective in any event. But even accepting they were inadequate in terms of depth, if the foundations were 900mm or slightly more, which was consistent with standards at the time, then the subsidence damage would still have occurred anyway
- He also didn't think it was fair to use a wider faulty workmanship exclusion, where there was already an exclusion for inadequate foundations as this would render it meaningless

So, overall, the investigator's recommendations remained the same.

Esure didn't agree and asked for a final decision from an ombudsman.

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.

Having done so, I've reached the same overall outcome as our investigator.

I don't intend on revisiting every argument made by Esure and/or addressed by our investigator. I don't mean this as a discourtesy, instead I'll focus on the key points in reaching my final decision. But when reaching my final decision, I've considered all the evidence and arguments presented.

Esure's final response to Mr and Mrs C went into very limited detail, and instead simply said the conservatory foundations were inadequate and should have been around five times the depth so they were declining the claim.

It seems there are two exclusions which Esure has taken into account. Although it appears from the correspondence between the investigator and Esure that it is the latter in which they ultimately relied on to decline the claim. But for completeness, I'll consider both.

Under the subsidence section of the policy, it says:

“What is not covered?”

We will not pay for loss of or damage to Your Buildings or Contents caused by or consisting of:

- *inadequate foundations which did not meet the building regulations which were in force, at the time the foundations were constructed”*

And under the wider general policy exclusions:

“We will not pay for loss, damage or any liability resulting from or consisting of:

- *faulty workmanship, design or materials”*

I understand that the conservatory was exempt from building regulations. So, there was no requirement under these for the builder to lay the foundations to depths which applied to other structures under regulations. So, I don't think the first exclusion above can be relied on in order to decline the claim as there was no requirement for the builder to follow building regulations.

Esure says the second exclusion applies because the foundation design was faulty. To rely on this exclusion to decline the claim, Esure must show the design was faulty *and* that caused the subsidence damage. The onus is on Esure to show it would be fair to rely on this exclusion in the particular circumstances of this claim.

The building standards from the time indicated a minimum foundation depth of 900mm in clay soils. So, I'd consider this good practice. But following investigations, the foundations of Mr and Mrs C's conservatory were found to be only 300mm, so significantly below this.

Esure has argued that the foundations should have actually been around 1,550mm as a minimum, rather than 900mm in any event. And when saying this, Esure has referred to guidelines from a major new home warranty provider, which are referenced in the standards.

However, the conservatory wasn't built by a builder registered with that warranty provider, and it wasn't built with the intention of providing a warranty from that provider either. So, the builder wasn't under an obligation to meet the warranty provider's standards on this basis alone when constructing the conservatory.

I've also considered the standards that Esure has referred to. And I do recognise there is reference to reviewing the new home warranty provider guidelines for guidance on preventing indirect damage by trees. But these aren't requirements under the standards, or regulations that have to be followed, instead consideration needs to be given to them. So, I don't think this made them standard industry practice. Instead, they are wider guidance for consideration of avoiding potential future indirect damage, and the builder was under no obligations to follow this.

Therefore, I don't think it is fair for Esure to strictly hold the builder to these guidelines or to conclude that failing to comply with these means they can automatically decline the claim based on a faulty design or workmanship exclusion.

However, I accept the foundation was significantly shallower than the relevant standards at the time, so on the face of it, the design was faulty.

Having said that though, even if they were at a depth beyond the minimum, on balance, I think some subsidence damage would still have occurred. This is because tree roots and dry soil was found to depths of 1,300mm. So even if the foundations were 900mm or slightly more, rather than 300mm, then I still think it's likely some subsidence damage would have occurred.

Therefore, whilst it could be said the foundation design was faulty, I'm not satisfied that was the cause of all of the subsidence damage. And so it wouldn't be fair for Esure to rely on the exclusion to decline the claim.

I also do need to take into account that the conservatory stood for a period of around 18 years before suffering issues, even with the foundations at only 300mm. So, whilst far short of 900mm, in practice the foundations adequately performed their function for a significant period of time, so I don't think the design can be said to be fundamentally faulty.

With this in mind, I'll be directing Esure to accept the claim. It can't rely on the inadequate foundations or faulty workmanship/design exclusions to decline the claim, but the remaining terms and conditions apply.

Mr and Mrs C have also incurred costs in repairing some of the damage in the interim. So, Esure will also need to review those costs that Mr and Mrs C have incurred.

And I also agree with our investigator that Mr and Mrs C should be compensated by Esure. I think the suggested amount of £300 is fair and reasonable for the distress and inconvenience Esure has caused Mr and Mrs C by unfairly declining the claim, and them subsequently needing to arrange some works in the interim.

My final decision

It's my final decision that I uphold this complaint and direct esure Insurance Limited to:

- Accept the claim subject to the remaining terms and conditions of the policy.
- Review the costs Mr and Mrs C have incurred when repairing some of the damage
- Pay Mr and Mrs C £300 compensation

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr C and Mrs C to accept or reject my decision before 7 March 2024.

Callum Milne
Ombudsman